FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LC – 2023 – 000852, 854, 856 and 857** **LC – 2024 – 000008 and 9**
Properties	**:**	**Patricroft (852), Dalkeith (854),** **Compton Mills (856), Sandy Lodge (857)** **Hornsby (008) and Thackley FC (009)**
Claimant	**:**	**On Tower UK Limited (1)** **On Tower UK 2 Limited (2)**
Representative	**:**	**Justin Kitson and Imogen Dodds** **instructed by Pinsent Masons LLP**
Respondent	**:**	**AP Wireless II (UK) Limited**
Representatives	**:**	**Toby Watkin KC and Wayne Clark** **instructed by Freeths LLP**
Application	**:**	**Electronic Communications Code**
Hearing	**:**	**13th – 15th August 2024** **Centre City Tower, Birmingham**
Tribunal	**:**	**Judge D Jackson**
Date of Decision	**:**	**2nd September 2024**

Decision – Preliminary Issues

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1. On 4th April 2024 I directed trial of the following Preliminary Issues:

   (i) On the assumption that the Claimants occupy the sites pursuant to periodic tenancies protected by Part II of the Landlord and Tenant Act 1954 ("the 1954 Act"):
      (a) Are the Claimants entitled to seek Code rights pursuant to Part 4 of the Code?
      (b) If entitled to do so, were they, prior to serving a para 20 notice and/or making the Reference pursuant to Part 4, first required to terminate any such periodic tenancy by serving a notice to quit at common law and by virtue of such notice having expired? If so, has such notice been served and/expired prior to the making of the Reference?
      (c) In so far as the Claimants would otherwise be entitled to seek such Code rights in accordance with Part 4 of the Code, is it the case that service by the Respondent of a notice pursuant to s.25 of the 1954 Act in respect of any such periodic tenancy in accordance with the 1954 Act (whether or not proposing the grant of a renewal tenancy) at any material time nevertheless precludes any entitlement on the part of the Claimants which may have otherwise existed to seek such Code rights in accordance with Part 4 of the Code?

   (ii) On the assumption that the Claimants occupied each of the sites pursuant to a periodic licence, was the Claimant, prior to making the Reference, first required to terminate any such periodic licence by first serving a notice at common law and by virtue of such notice having expired? If so, has such notice been served and/expired prior to the making of the Reference?

   (iii) On the assumption that the Claimants occupied each of the sites following the expiry of a licence, and there was no periodic licence, are the Claimants entitled to seek Code rights pursuant to Part 4 of the Code?

   (iv) In relation to Patricroft (852) and Dalkeith (854), were those agreements, if leases, effectively contracted out of the 1954 Act?

   (v) If and in so far as the Claimants are entitled to seek code rights under Part 4 of the Code on any of the References, can the Claimants rely on any of the paragraph 20 notices served on the Respondent?

   At the hearing both counsel agreed that Preliminary Issue (iii) serves no practical purpose and I am no longer asked to make a determination on that issue.

   References in this Decision are to the Trial Bundle (Preliminary Issues) [HB] which runs to 979 pages.

The Factual Assumptions – Periodic Tenancy or Periodic Licence

2. The Claimant's case is that it does not occupy any of the sites pursuant to business tenancies continued by section 24 of the 1954 Act. It is the Claimant's case that, the existing contractual agreements having expired and pending negotiations for new

Code agreements, it occupies either under tenancies-at-will or bare licences. At Dalkeith (854), Sandy Lodge (857) and Thackley FC (009) the Claimant is holding over following the expiry of a 1954 Act contracted out lease as a tenant-at-will. At Patricroft (852), Compton Mills (856) and Hornsby (008) the Claimant is holding over following the expiry of fixed term licences and pending negotiation is a tenant-at-will.

3. The Respondent's position is set out in Single Joint Statement of Case of the Respondent [HB434-437]. Patricroft (852), Compton Mills (856) and Hornsby (008) are leases not contracted out of the security provisions of the 1954 Act. In the alternative, if the agreements are in fact licences, since the expiry of the original term the Claimant has become a periodic tenant. Sandy Lodge (857) and Thackley FC (009) are leases that have been contracted out of the security of tenure provisions. Following expiry of the contractual term the Claimant is a periodic tenant. Dalkeith (854) is a lease that has not been effectively contracted out or in the alternative a periodic tenancy has arisen. The Respondent's fall-back position, in respect of all sites, is that the Claimant is a periodic licensee.

4. Accordingly the Claimant says that it has a either tenancies-at-will or bare licences. The Respondent's case is that the Claimant occupies the sites either under 1954 Act continuation tenancies or in the alternative under periodic tenancies or periodic licences.

5. The wording of the Preliminary Issues has been drafted with care. I am invited to proceed on the **assumption** that the Claimant occupies under either a periodic tenancy or a periodic licence. I am not at this stage invited to make findings of fact as to lease/licence or whether the agreements are tenancies-at-will or periodic tenancies (depending on whether or not it was the intention of the parties that occupation was with an intention to enter into a formal written agreement). I have been invited to deal with Preliminary Issue in that way because it is said by the Claimant, even if the Respondent is right and either periodic tenancies or periodic licences have arisen, Part 4 of the Code is still available to it. The Claimant says that the status of the legal relationship between the parties is not of any consequence at any of the sites because Part 4 is available whatever the Claimant's status. Under those circumstances I do not need to make findings of fact as to tenancies-at-will/bare licences or periodic tenancies/periodic licences. However one caveat remains. I will at some future date have to make findings of fact and determine the lease/licence issue as it is agreed that if the existing leases at any of the sites are leases which have not been effectively contracted out of 1954 Act protection, then the only route available to the Claimant is in the County Court. Such a finding of fact will be required for Compton Mills (856) and Hornsby (008) and may be required at Patricroft (852) and Dalkeith (854) if the leases were not effectively contracted out of 1954 Act protection.

6. I am also asked to determine as whether before serving Paragraph 20 Notices the Claimant is required to terminate the periodic tenancy/periodic licence underlying the assumption.

7. Unencumbered by those assumptions I am asked to determine whether there has been effective contracting out of 1954 Act protection in respect of Patricroft (852) and Dalkeith (854) and whether the Paragraph 20 Notices that have been served are valid

including in the case of Thackley FC (009) whether the Claimant can rely on a "stale" Notice issued over 4 years ago.

8. Finally on 7th May 2024, just over a month after the CMH, the Respondent served Notices under section 25 of the 1954 Act for all sites (except Dalkeith (854) specifying 6th May 2025 as the date of termination. The section Notices for Sandy Lodge (857) and Hornsby (008) do not oppose renewal. The section 25 Notices for Patricroft (852), Compton Mills (856) and Thackley FC (009) oppose renewal on various grounds under section 30(1). I am asked to determine the effect of those section 25 Notices in respect of the ongoing proceedings under the Code.

Issue i(a) –Periodic Tenancy or Periodic Licence

9. Mr Kitson relies on **Arqiva Services v AP Wireless II (UK) Limited** [2020] UKUT 0195 ("**Queen's Oak**"). Arqiva had a twenty year lease that expired in October 2016. The lease was contracted out of the protection of the 1954 Act. Arqiva "*remained in occupation and made payment of rent and other sums*" [7]. Negotiations for a new lease were not successful. The Code came into force on 28th December 2017. In 2019 Arqiva gave Paragraph 20 and 27 Notices and made reference to the Upper Tribunal in August of that year.

10. The facts of **Queen's Oak** are very similar to the situation in the references before me as indeed are the parties' submissions. This is not surprising as both Mr Kitson (for Arqiva which, of course, subsequently became On Tower) and Mr Clark (for APW) appeared in that case.

11. Upper Tribunal Judge Cooke determined four preliminary issues. On the first question she determined that Arqiva had a tenancy-at-will rather than a periodic tenancy or contractual licence as argued for by APW. The third question concerned a change of status which Judge Cooke rejected. The second question is directly relevant to the reference before me: "**Was there a "subsisting agreement" when the Code came into force?**".

12. Transitional Provisions define a "subsisting agreement" in paragraph 1(4), as:

    "*(a) an agreement for the purposes of paragraph 2 or 3 of the existing code, or*

    (b) an order under paragraph 5 of the existing code."

    Judge Cooke found that paragraph 1(4)(b) was not relevant "*as no order was made under the old Code*" [71]. Paragraph 3 is not relevant because it is concerned with agreements which grant rights to interfere with other land.

    Paragraph 2(1) of the Old Code provides:

    "(1) The agreement in writing of the occupier for the time being of any land shall be required for conferring on the operator a right for the statutory purposes—

    (a) to execute any works on that land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus; or

(b) to keep electronic communications apparatus installed on, under or over that land;

or (c) to enter that land to inspect any apparatus kept installed (whether on, under or over that land or elsewhere) for the purposes of the operator's network."

13. Judge Cooke's inevitable conclusion at [72] is that:

"*Accordingly the tenancy at will could only be a subsisting agreement if the claimant had the respondent's written agreement to its keeping apparatus on the land (and the other Code rights conferred by the tenancy)"*

14. The effect of subsisting agreement is set out at paragraph 2 of the Transitional Provisions:

"2(1)A subsisting agreement has effect after the new code comes into force as an agreement under Part 2 of the new code between the same parties, subject to the modifications made by this Schedule."

Part 5 of the Code (Termination and Modification of Agreements) applies to an agreement under Part 2. As an "unwritten agreement" cannot be a subsisting agreement it follows that Part 5 is not available. It further follows that any application for code rights must be for new or fresh code rights under Part 4.

15. Judge Cooke also considered the position had she found that Arqiva had a periodic tenancy rather than a tenancy-at-will. In her footnote to [67] Judge Cooke makes no further mention of APW's fall-back position of a contractual licence. Before considering Judge Cooke decision further it will be helpful to set out paragraph 6(1) of the Transitional Provisions:

6(1) This paragraph applies in relation to a subsisting agreement, in place of paragraph 29(2) to (4) of the new code.

(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.

(3) Part 5 of the new code does not apply to a subsisting agreement that is a lease of land in England and Wales, if — (a) the primary purpose of the lease is not to grant code rights (the rights referred to in paragraph 3 of this Schedule), and (b) there is an agreement under section 38A of the 1954 Act in relation to the tenancy."

Paragraph 6(1) is important because a lease protected under the 1954 Act must be renewed in the County Court as Part 5 of the Code is not available in such circumstances (and, of course, following **Compton Beauchamp** it is not possible to bypass the restriction on the use of Part 5 by utilising Part 4 instead).However Paragraph 6(1) only applies to "a subsisting agreement" .

It is said by Mr Kitson that in the absence of "*agreement in writing of the occupier*" the periodic tenancy I am required to assume exists for the purposes of the Preliminary issues cannot be a subsisting agreement. However that submission seems to miss the crucial point – what matters is does the Claimant have an agreement protected by Part 2 of the 1954 Act?

16. I return now to what Judge Cooke said in **Queen's Oak** had she found that Arqiva had a periodic tenancy [67-68]:

67….I have found that the claimant had a tenancy at will; the arguments made by the parties on the second question are the same whichever form of tenancy the claimant had at that point, although the consequences of a finding that there is a subsisting agreement differ depending upon the form of the tenancy.1 That is because the form of the tenancy determines whether it is protected by Part 2 of the 1954 Act.

68. Had I found that the claimant had a periodic tenancy, it would have been protected by Part 2 of the 1954 Act, and the consequence of the decision in Ashloch would be that neither Part 4 nor Part 5 of the Code would be available to it. As it is, I have found that there was a tenancy at will. If it is a subsisting agreement then the Tribunal would have jurisdiction to make an order under Part 5 of the Code.

Judge Cooke's conclusions on this issue are at [84]:

"I find that the tenancy at will did not confer rights under the old Code and was not a subsisting agreement. If I am wrong about the tenancy at will, then the same is true of a periodic tenancy."

Let me be clear in what I understand Judge Cooke to be saying. An operator with an unwritten tenancy at will or unwritten periodic tenancy does not have a subsisting agreement. Accordingly in neither case is Part 5 available. However there is still an important difference – where there is a periodic tenancy such a tenancy is protected by the 1954 Act.

17. The fourth issue before Judge Cooke was "**Does the Tribunal have jurisdiction to impose an agreement on the parties under paragraph 20 of the Code**?" However to find the answer to the question I must turn to the Supreme Court and the appeal in **Queen's Oak**, better known as **Compton Beauchamp**.

18. Before doing so **Queen's Oak** deals with a number of submissions made by Mr Watkin and Mr Clarke. The process of payment and acceptance of rent will necessarily include demands and receipts for rent. Do such demands amount to "*agreement in writing of the occupier*"? The facts of **Queen's Oak** were that Arqiva made payments of rent [7]. I may safely assume that there would have been the usual rent demands and receipts issued as is common practice. However there is nothing in **Queen's Oak** which suggest that such receipts can be equated with the agreement required for conferring the rights referred to at paragraph 2(1) of the Old Code. I am not therefore persuaded a rent demands and receipts, without more, are sufficient to amount to "*agreement in writing of the occupier*". Judge Cooke was also unpersuaded by the submission of Mr Clark, who also appeared in **Queen's Oak**, that the "*original lease provided the permission*" [75]. At [155] Judge Cooke rejects non-retrospectivity

arguments*: "Be that as it may, where I part company with Mr Clark is that I see no reference in the policy statements about retrospectivity to operators without Code rights and I do not believe that the policy on retrospectivity is relevant to such operators".* In the following paragraph [156] Judge Cooke deals with the Law Commission's report*: "It is not possible to discern from the Law Commission's report, or from any Government statement, an intention that any such operator would be excluded 32 from paragraph 20 in relation to a particular site, and I can think of no reason why that would have been Parliament's intention".* Far from saying that "the Code "trumps" the 1954 Act" as suggested by Mr Watkin and Mr Clark at paragraph 18 their Submissions of 31st May 2024 Judge Cooke observes at [163]: "*There is nothing in the Code about punishing operators for allowing rights to lapse.*"

19. In **Compton Beauchamp** in the Court of Appeal Lewison LJ observed that the finding that the transitional provisions did not apply because there was no written agreement signifying the landowner's consent was "*not altogether surprising*". This lead to the comments of Lady Rose in the Supreme Court at [93] which are relied upon by Mr Watkin:

    "It is not clear whether this point has been common ground between the parties from the start, but there has been no appeal from the Upper Tribunal's decision on this point. This seems to me a surprising conclusion. A "subsisting agreement" is defined by para 1(4) of the transitional provisions as "an agreement for the purposes of" para 2 of the old code rather than an agreement "falling within" para 2, and the purposes set out in para 2 are the statutory purposes of executing works, keeping apparatus installed and entering onto the land to inspect that apparatus and so forth. The operator who was on site holding over under an unwritten continuation of an agreement did have rights under the old code in the sense that, at least if it was vulnerable to a request for removal of its equipment, it could apply for fresh rights under para 5 of the old code: see para 43 above. It also seems to create a distinction between those operators who managed to arrive at an agreement with their landowner under the old code and those who had to bring court proceedings and had rights pursuant to a court order. All court orders made under para 5 of the old code are included in the definition of "subsisting agreement" in the transitional provisions no matter how long ago they were made whereas it appears that an operator who entered onto the premises under a written agreement will have dropped out of the transitional provisions if the initial contractual term of the agreement has expired and there is no written tenancy continuing."

    That passage is clearly obiter as there was no appeal on this point. Lady Rose appears to suggest that Judge Cooke may have been wrong to find paragraph 1(4)(b) of the Transitional provisions not to be relevant and the operator in the "last chance saloon" could still access the Code and apply for fresh rights.

20. When addressing "The Outcome of the Appeals" Lady Rose entirely adopts Judge Cooke's reasoning when allowing On Tower's appeal at [165]:

    "*On Tower's appeal should, by contrast, be allowed. On Tower's ECA is present on the site pursuant to an initial lease which fell within Part 2 of the 1954 Act but which had been contracted out of the protection of tenure provided by that Act. If its current rights had been contained in a "subsisting agreement" within the meaning of the*

transitional provisions, it would have been entitled to use Part 5 of the new Code. This is because para 6 of the transitional provisions applies Part 5 to subsisting agreements and On Tower's agreement would not be in the category of excluded agreements. The Upper Tribunal held, however, that On Tower's rights were no longer embodied in a "subsisting agreement" because they were in an unwritten tenancy at will. On Tower could not rely on the transitional provisions because they only applied Part 5 to subsisting agreements. The Upper Tribunal's conclusion that On Tower was also prevented from using para 20 of the new Code was based solely on the judgments in Compton Beauchamp and Ashloch which had ruled that an operator with ECA on site such as On Tower was the occupier of the site for the purposes of para 9 and therefore unable to apply under para 20. As explained above, I consider that no such bar is created by the new Code and that the Upper Tribunal has jurisdiction to determine On Tower's application."

However Lady Rose concludes by reaffirming her observations at [93]:

"*I reiterate the point I made in para 93 above, that this conclusion does not improve the position of On Tower over the position it was in under the old code as the Upper Tribunal and the Court of Appeal have suggested. There was nothing in the old code which precluded an operator vulnerable to an application to remove his apparatus from applying for fresh rights to be imposed by order of the court under para 5 of the old code.*"

21. I therefore hold **Queen's Oak** to be good law and that tenancies-at-will, absent landowners' written agreement, are not subsisting agreements and do not confer Code rights. Following **Compton Beauchamp** there is therefore no impediment to an application for rights under Paragraph 20 of the Code.

22. The Respondent's fall-back position that if it is incorrect about periodic tenancies then in the alternative it relies on periodic licences. Those periodic licences will also be "unwritten" and cannot be subsisting agreements. For the same reasons given for tenancies-at-will there is no bar to the Claimant applying for fresh rights under Part 4.

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.

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

Issues i(b) and 2 – notice of termination.

30. The Respondent seeks limitation on the ability of a periodic tenant or periodic licensee to access Part 4 by requiring termination of its existing contractual entitlement. The Respondent suggests the following precondition: prior to serving a Paragraph 20 Notice and/or making a Part 4 reference the Claimant is first required to terminate any such periodic tenancy/ licence by first serving a notice at common law and by virtue of such notice having expired. The Respondent submits that this can be achieved by a purposive interpretation of the Code.

31. In light of my decision that periodic tenants with 1954 Act protection are not able to access Part 4 it is not strictly necessary for me to consider the position further in respect of such tenants. However in **Gravesham** 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.

32. As far as periodic licences are concerned, I find that no notice as proposed by the Respondent is required. The submission seems to me to confuse an application for code rights under Part 4 and the provisions of Part 5 which address how a person may

bring a code agreement to an end and how a party to a code agreement may require a change to the terms of an agreement which has expired. There are no termination requirements under Paragraph 20 and I am not persuaded that there is any need for such requirements to be implied. The requirement to serve a Notice under Paragraph 20(2) and thereafter make application to the court/tribunal under subparagraph (3) provide a sufficient statutory framework.

33. In any event as pointed out by Mr Kitson the imposition of an agreement under Paragraph 20 operates as a surrender and re-grant. The existing agreement will be terminated by operation of law. The position was confirmed by the Deputy Chamber President in **Compton Beauchamp** [2019] UKUT 107 at [82]:

"*We agree with Mr Seitler that rights may be conferred on an operator who is already in occupation, and that in such a case the person who confers the rights (voluntarily or by compulsion) may not have been in occupation when the notice was given to them under paragraph 20(2)….The effect of the same parties entering into a new agreement on different terms will be that the previous agreement will be terminated by operation of law.*"

34. Mr Watkin relies on Peter Gibson J in **Tarjomani v Panther Securities Ltd** (1983) 46 P & CR 32 at [41]:

"*In my judgment, it is indeed estoppel that forms the foundation of the doctrine. The doctrine operates when the tenant is a party to a transaction that is inconsistent with the continuation of his tenancy, but in my judgment the conduct of the tenant must unequivocally amount to an acceptance that the tenancy has been terminated. There must be either relinquishment of possession and its acceptance by the landlord or other conduct consistent only with the cesser of the tenancy, and the circumstances must be such as to render it inequitable for the tenant to dispute that the tenancy has ceased.*"

35. I prefer the analysis of the Deputy Chamber President and find that where an agreement is imposed by Order of the Tribunal an estoppel still arises. The landlord has no option but to comply with the Order and therefore cannot act inconsistently with having accepted the surrender. To the extent that it is necessary to do so I would also hold that termination by operation of law must of necessity occur where the Tribunal imposes an agreement on the parties and in such circumstances consideration of the nicety of estoppel does not arise.

Issue i (c) – Section 25 Notice

36. I am asked to determine the consequences of the Section 25 Notices served by the Respondent on 7th May 2024.

37. The service of a section 25 Notice triggers renewal at Sandy Lodge (857) and Hornsby (008) and termination under section 30(1) grounds for Patricroft (852), Compton Mills (856) and Thackley FC (009). No notice has been served in respect of Dalkeith (854).

38. I understand that the Respondent took the decision to serve section 25 Notices to counter the Claimant's arguments that 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 and that, a fortiori, the Claimant must be able to access Part 4. I have rejected those arguments and accordingly the service of the section 25 Notices no longer serves any useful purpose in connection with these present proceedings. No jurisdictional issues are engaged. The Claimant has properly applied to the Upper Tribunal under Part 4 of the Code on the basis that it has either a tenancy-at-will or a bare licence. Whether that is correct or not will depend on the Tribunal's future findings of fact on lease/licence. The mere service of a section 25 Notice does not oust the jurisdiction of the Tribunal.

Issue iv – contracting out.

39. This arises in respect of two references Patricroft (852) and Dalkeith (854). Mr Kitson helpfully concedes that the Claimant has not satisfied the requirements of the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 in relation to Patricroft (852). However that is not sufficient to strike out the reference. The Claimant's case is that it occupies the site pursuant to a licence and not a lease. Accordingly the Tribunal will have to make findings of fact as to lease/licence at a later date.

40. The Lease for Dalkeith(854) [HB746] is dated 12th March 2002 and made between Listers (Sussex) Limited (1) and One 2 One Personal Communications Limited (2) . Clause 3.1 provides that the lease was granted for a term of 15 years from and including the commencement date of 3rd January 2002. It is not disputed that the lease was effectively contracted out of the security of tenure provisions of the 1954 Act by Order of Huntingdon County Court made on 3rd January 2002 (see clause 16.1 of the Lease).

41. Licence to Assign and Vary [HB766] dated 3rd July 2004 was made between Listers (Sussex) Limited (1) EE Limited and Hutchison 3G UK Limited(2) and Arqiva Limited(3)

    The following provisions are relevant:

    RECITALS

    (E) The parties have agreed to vary the terms of the Lease as set out in this Licence

    AGREED TERMS

    1 DEFINITIONS AND INTERPRETATION
    1.1 The definitions and rules of interpretation set out in this clause apply to this Licence and unless the context otherwise requires the following expressions shall have the following meanings:

    "Term" means the term of years created by and if appropriate as defined in the Lease and where applicable shall include the period of any continuation or extension or of any holding over whether by Statute common law or otherwise

4 VARIATIONS
4.1 If the assignment to the Assignee is completed the Landlord and the Assignee agree and declare that with effect from the Assignment Date the Lease shall be read and interpreted as if it incorporates the provisions set out in the Schedule, whether or not such provisions form part of the terms of the Lease, and in the case of any inconsistency between the terms of the Lease and the provisions of the Schedule, the provisions of the Schedule shall prevail.
4.2 The Lease shall remain fully effective as varied by this Deed and the terms of the Lease shall have effect as though the provisions contained in this Deed had been contained in the Lease from the Assignment Date.

THE SCHEDULE
VARIATIONS TO THE AGREEMENT

1.1 In this clause the following expressions shall have the following meanings: ....
1.2 Arqiva shall be entitled to: ....

1.3 The Landlord acknowledges and agrees that the Apparatus on the Land now or at any time during the Term may belong to third parties (including EE and/or H3G) and/or to Arqiva. The Landlord agrees that all the provisions of the Lease will apply in relation to the Apparatus, including the exercise of the Rights, regardless of whether the Apparatus is owned by Arqiva or a third party.

42. The provision of the Licence to Assign and Vary relied upon by Mr Watkin is at clause 1.1:

"Term" means the term of years created by and if appropriate as defined in the Lease and where applicable shall include the period of any continuation or extension or of any holding over whether by Statute common law or otherwise"

In **Newham LBC v Thomas-Van Staden** [2009] L&CR 5 the Court of Appeal held that where the definition of a contractual term is expressed to include any period of holding over the term granted is not a "term of years certain". The contracting out provisions of section 38A of the 1954 Act only apply to lease granted for a "term of years certain". Mr Watkin submits that the Dalkeith (854) Lease as varied by the Licence cannot be contracted out because the term, as varied, includes "any holding over" and is not therefore for a term of years certain. Under those circumstances the Claimant has a continuation tenancy under section 24 of the 1954 Act and I have no jurisdiction as any renewal must take place under the 1954 Act.

43. The definition of Term at 1.1 is expressed to apply only "*to this Licence*". It is not expressed to apply to the Lease. Clause 4 sets out that the variations to the Lease are those set out in the Schedule. The Schedule does not contain a definition of the term at paragraph 1.1. The rest of the Schedule is concerned with sharing and ownership of apparatus. The variations to the Lease as set out in the Schedule do not concern "the Term" except for a reference at 1.3 which is an acknowledgement and acceptance that the Apparatus belongs to Arqiva or third parties during the Term. I do not accept that

an acknowledgement as to ownership of Apparatus is sufficient to amount to a variation of the Term. My finding is that the definition of "the Term" relied upon by Mr Watkin applies only to the Licence. Accordingly the term granted by the Lease has not been varied and remains a term certain. The contracting out by Order of Huntingdon County Court remains effective.

Issue v – validity of Notices

44. The Respondent raises 4 issues of invalidity:

- The Notice in Thackley (009) is stale
- The Notices seek terms which are different to those set out in the draft Agreement annexed to the Claimant's Statement of Case
- All Notices, other than Thackley (009), are defective because of failure to correctly complete paragraph 16 of the OFCOM prescribed form.
- The Notices in Patricroft (852) and Dalkeith (854) fail to refer to ADR in accordance with section 69 PSTI 2022

Thackley FC (009)

45. The Notice in Thackley FC (009) is dated 9th March 2020. The reference was received by the Upper Tribunal very nearly 4 years later on 8th January 2024 [HB679]. I am invited by Mr Watkin to interpret the Code as requiring a reference to be served within a reasonable time. I am not persuaded that it is necessary to do so. Any prejudice to the Respondent can be addressed through arguments as to abuse of process.

46. In the context of Paragraph 20(3) which requires a Claimant to wait for only 28 days after service before making a reference and the 6 month time limit for determination of any such reference under Regulation 3(2), Electronic Communications and Wireless Telegraphy Regulations 2011 (albeit disapplied where an operator is on site – see **EE Ltd & Hutchison 3G UK Limited v London Borough of Islington** [2018] UKUT 0361 (LC)) the delay of nearly 4 years is unconscionable. There is much force in Mr Watkin's submission that such a delay is oppressive, the site owner's land being under threat of expropriation. Prejudice can readily be inferred from such substantial delay. In any event the Claimant could easily, and without any significant delay beyond 28 days, have served a fresh notice.

47. I have considered the Witness Statement of Sarah Burrows made on 2nd August 2024 [HB847-851]. Ms Burrows is a Chartered Surveyor employed by the Claimant. As I am not conducting a fact finding hearing Ms Burrows was not cross examined and her Statement was submitted as written evidence in the Hearing Bundle. At paragraph 12 she explains that discussions between both parties (On Tower and APW) had been ongoing for several years. There were discussions as to a framework agreement covering renewal of all sites in "*the wider APW estate*". There was a pause in those negotiations following the decision in **Queen's Oak**, entirely understandably in view if the uncertainty of the law at that time. Ms Burrows exhibits correspondence between On Tower and APW dated 12th October 2022 which refers to "*regroup on negotiations and look to agree a timetable*" and further correspondence dated 22nd October 2023 where On Tower were "*keen to progress discussions*". There is also further correspondence dated 20th December 2022 [HB954] and 22nd March 2023 [HB956]

48. Having read that correspondence I am not persuaded that it can properly be said that the Claimant has been put to its election either to abandon the Notices or issue a reference. Such a conclusion is not available to me in the context of the ongoing discussions between the parties as to renewals generally.

49. I would wish to make it clear that a delay of nearly 4 years in issuing a reference would, absent special circumstances, inexorably lead to a strike out in the basis of abuse of process. However, having regard to the special relationship between the parties before me I am not satisfied that abuse of process arises in the context of lengthy, difficult and ongoing commercial negotiations across a large number of sites between business competitors.

50. The Thackley FC (009) Notice is therefore, in these exceptional circumstances, valid.

Terms

51. In relation to Thackley FC (009) the Respondent sets out the differences between HOTS annexed to the Paragraph 20 Notice and the draft Agreement annexed to Claimant's Statement of Case at paragraph 39(4) of the Respondent's Submissions [HB634]:

    - Tenant break – originally on expiry of 3rd year; subsequently any time after first year
    - Provision for charging site without landlord's consent abandoned
    - No sharing rights sought in HOTS
    - Rent increased from £500 p.a. to £1000 p.a
    - No provision for forfeiture in HOTS
    - No reference to landlords covenants in HOTS

    I do not find any of those differences to be in any way material except for the failure to seek sharing rights. In my judgement that omission does not make the Notice invalid but certainly opens the door to **Keast** arguments at trial.

52. Differences in relation to all other sites are at paragraph 44 of Respondent's Submissions [HB636]:

    - Rent reduced from £2100p.a. (£750 for Sandy Lodge and Hornsby) to £1000p.a.
    - Right of first refusal no longer sought
    - No reference to landlord's covenants in HOTS
    - Break clause originally 6 months' notice, increased to 12 months' notice
    - Assignment to group company no longer sought
    - Insurance increased from £5m to £10m
    - Third party liability limit increased from £5m to £10m
    - Rewording of wording for standby generator
    - Arboreal works no longer sought
    - Interest rate increased form 3% above base to £4% above base

I do not find any of those differences to be in any way material. None of the changes relate to code rights except for standby generator and arboreal words. Again this is a matter for **Keast** arguments at trial.

53. Any inconsistency between HOTS annexed to the Notices and the draft Agreement annexed to the Claimant's Statement of Case is not a jurisdictional issue. It is a matter for trial when considering terms to be imposed. The Respondent's position is protected following the decision in **Cornerstone Telecommunications Infrastructure Limited v Keast** [2019] UKUT 116 (LC) at [29]:

"*Obviously the Tribunal cannot impose upon the occupier of land any Code right that has not been sought in the paragraph 20 notice: that is perfectly clear from the terms of paragraph 20.*"

54. Inconsistency between HOTS annexed to the Notices and the draft Agreement annexed to the Claimant's Statement of Case does not invalidate any of the Notices.

Defective Notices

55. The Respondent's complaint in respect of all Paragraph 20 Notices served by the Claimant (except Thackley FC (009) at [HB291]) is that the Claimant has failed to delete, at paragraph 16, one of the following options "*agree to confer the Code Rights on us/ to be bound by the Code Rights*" [see HB62, 119, 175, 233 and 348]. The template OFCOM Notice provides for deletion/strike through of the two options either to confer a code right or be otherwise bound by a code right. The defect complained about is that strike through/deletion has been incorrectly carried at paragraph 16. This has been done in at least two different ways (see Compton Mills (856) at [HB119] and Dalkeith (854) at [HB62]). The result Mr Watkin submits is that the Notices are not in the form prescribed by OFCOM. The error is compounded by the fact that rather than an agreement being attached there are only HOTS (see for example Dalkeith(854) at [HB66 -73])

56. Ms Dodds explained that this issue has been raised with OFCOM and relies on the following extract from the OFCOM website (see paragraph 105 of Skeleton Argument on Behalf of the Claimant's):

"*Ofcom has received a stakeholder request for clarification concerning the Template Notice it has prescribed under paragraphs 20(2) and 27(1) of the Code. The request identified a drafting error and also raised a point of more general application.*

The point of more general application relates to the alternative forms of wording that are provided in the Template Notice and how these should be selected without invalidating it under paragraph 88(3) of the Code. The alternative forms of wording in the Template Notice allow it to be used, with appropriate modification, both under paragraph 20(2) and under paragraph 27(1). Paragraph 20(2) provides for a notice to be given where an operator requires a person to agree to confer a code right or to be otherwise bound by a code right. Paragraph 27(1) provides for the same notice to additionally require agreement on a temporary basis where a right is to be

exercisable in relation to apparatus which is already installed and the landowner/occupier has the right to require the operator to remove the apparatus but the operator is not for the time being required to do so.

Deleting the appropriate text will not invalidate the notice. However, deletion is best effected by striking through the non-relevant text or paragraph rather than removing it altogether. This should ensure it is clear where alternative text has been selected or deleted and where optional wording is not used. It should also ensure that internal paragraph numbering and cross-references remain intact, as some Notices may provide for a whole paragraph to be deleted rather than for an alternative version to be selected. Ofcom suggests this approach is adopted wherever a prescribed Template Notice includes text which is marked for potential use or deletion."

Miss Dodds submits that the reasonable recipient test in **Mannai** should be applied and further submits that the error would have been clear to the reasonable recipient who would have been in no doubt as to how the notice was intended to operate.

57. Paragraph 88 of the Code provides:

(1) A notice given under this code by an operator must—

(a) explain the effect of the notice,
(b) explain which provisions of this code are relevant to the notice, and
(c) explain the steps that may be taken by the recipient in respect of the notice.

(2) If OFCOM have prescribed the form of a notice which may or must be given by an operator under a provision of this code, a notice given by an operator under that provision must be in that form.

(3) A notice which does not comply with this paragraph is not a valid notice for the purposes of this code.

58. I find that the notices are in the form prescribed by OFCOM for the purposes of Paragraph 88(2). The defect complained about relates to strike through rather than deletion. The defective strike through (in various permutations) does not in my judgement lead to the consequence that the form is not that prescribed by OFCOM.

59. I turn now to consider the requirement of Paragraph 88(1) of the Code taking the Notice at Dalkeith (854) by way of example [HB57- 63]. The Notice was served on the Respondent under cover of letter dated 13th October 2023 sent by the Claimant's solicitors. The Respondent is advised to "consider the Notice carefully and seek immediate legal advice in view of the timescales set out therein". Paragraphs 1 and 2 of the Notice explain that it is a statutory notice under Paragraph 20(2) and that it has been issued because the Claimant would like to enter into a new agreement to retain ECA on land occupied by the Respondent recipient. Paragraph 7 sets out that the Claimant is seeking the Respondent's agreement "*to confer on us*" certain code rights. Paragraphs 10 and 11 explain that in default of agreement the Claimant will be entitled to apply to the Court for an Order under Paragraph 20(4). Paragraph 14 sets out the

options available to the Respondent "*(a) agree to confer the Code rights on us; (b) give notice to us that you do not agree to confer the Code Rights; or (c) do nothing*."

60. I therefore consider the defective strike through at paragraph 16 in the context of the preceding paragraphs. The effect of the Notice (Paragraph 88(1)(a)) is clearly explained. It is a statutory notice and the Claimant is seeking the conferral of Code Rights. The relevant provisions of the Code under Paragraph 20(2) and (4) are set out and explained (Paragraph 88(1)(b)). The steps that may be taken (Paragraph 88(1)(c)) are set out in terms of the three options at paragraph 14 of the Notice.

61. I find that the Notices comply with Paragraph 88 (1) (a)-(c). The Notice is in the prescribed form albeit incorrectly struck through at paragraph 16. I therefore find that all Notices are valid for the purposes of Paragraph 88(3).

Alternative Dispute Resolution

62. Section 69 of the Product Security and Telecommunications Infrastructure Act 2002 provides:

69Use 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."

(5)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."**

63. Those amendments to Paragraph 20 came into effect on 7th November 2023. The Notices in Patricroft (852) and Dalkeith (854) were served on 13th October 2023 in each case. However the references were not issued until 28th December 2023. The position is the same in Thackley FC (009) where the Notice is dated 9th March 2020 and the reference issued on 8th January 2024.

64. The first point to make is that none of the 3 Notices are invalid. All were served prior to 7th November 2023. The Notices complied with the OFCOM prescribed form as at the date of service and are therefore valid notices for the purposes of paragraph 88 of the Code. However the fact that references pursuant to those notices were not made until after 7th November 2023 makes compliance with Paragraph 20(5) particularly significant. As the notices do not contain information about ADR it is all the more important that: "*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.*"

65. The case advanced by Mr Watkin at the hearing, as predicated by Preliminary issue (v), is whether the Claimant can rely on those Notices. Mr Watkin submits that, absent any transitional provisions in the 2022 Act, the Notices were no longer valid as at the date that the references were made. Mr Watkin submits that the Claimant has "sidestepped" the rights of the Respondent to have any dispute resolved by ADR. The Claimant could and should have served a fresh Notice containing information about ADR and the consequences of refusing to engage. The delay from the perspective of the Claimant would have been only the requirement to wait for the period of 28 days to elapse before a reference could be made.

66. I do not accept Mr Watkin's submission. 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.

67. I am not persuaded that the high threshold of abuse of process has been crossed. No issue of abuse of process could possibly arise. I am satisfied that to the extent that the Respondent has suffered any prejudice by reason of any alleged failure by the Claimant to comply with Paragraph 20(5) or in circumstances where either party has failed unreasonably to engage in ADR, the appropriate remedy will be reflected in costs under Paragraph 96.

68. FTT Rule 4 provides:

Alternative dispute resolution and arbitration
4.—*(1) The Tribunal should seek, where appropriate— (a) to bring to the attention of the parties the availability of any appropriate alternative procedure for the resolution of the dispute; and*
(b) if the parties wish, and provided that it is compatible with the overriding objective, to facilitate the use of the procedure.

69. I therefore encourage the parties to engage in alternative dispute resolution to seek to reach agreement.

Decision

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

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

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

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

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

75. The Claimant concedes that the agreement for Patricroft (852), if a lease, was not effectively contracted out of the 1954 Act.[(iv)]

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

77. The Paragraph 20 Notices served by the Claimants for all sites are valid Notices given by operators for the purposes of Paragraph 88 of the Code. [(v)]

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.