**FIRST-TIER TRIBUNAL**
**PROPERTY CHAMBER**
**(RESIDENTIAL PROPERTY)**

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| **Case Reference** | **:** | **BIR/00CN/ERO/2024/0613** |
| **Property** | **:** | **Castlemaine House, Culvert Road, Battersea, London, SW11 5BG** |
| **Claimants (Operator)** | **:** | **(1) EE Limited and (2) Hutchison 3G UK Limited** |
| **Representative** | **:** | **Mr James Tipler, instructed by Winckworth Sherwood LLP** |
| **Respondent (Site Provider)** | **:** | **The Mayor and Burgesses of the London Borough of Wandsworth** |
| **Representative** | **:** | **Mr Jon Wills, instructed by Freeths LLP** |
| **Application** | **:** | **Electronic Communications Code** |
| **Date and Venue of Hearing** | **:** | **4 – 5 August 2025 Centre City Tower, Birmingham** |
| **Tribunal Members** | **:** | **Judge M K Gandham Mr R P Cammidge FRICS** |
| **Date of Decision** | **:** | **18 September 2025** |

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**DECISION – Preliminary Issues**

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1. This reference relates to the Claimants' application for the imposition of a new code agreement, pursuant to paragraph 20 of the Electronic Communications Code, as set out in Schedule 3A of the Communications Act 2003 ('the Code').

2. Following a case management hearing before Judge Jackson on 14 January 2025, the parties agreed directions in respect of preliminary issues that required determination to establish whether or not the tribunal had jurisdiction to impose a new agreement under paragraph 20 of the Code.

3. The Preliminary Issues were as follows:

***Preliminary Issues***

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

(i) as tenants under a tenancy at will;
(ii) as periodic tenants without security of tenure under the provisions of Part II of the Landlord and Tenant Act 1954;
(iii) as periodic tenants with security of tenure under the provisions of Part II of the Landlord and Tenant Act 1954; or, alternatively
(iv) as licensees under a periodic licence?

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

(c) Whether the Claimants are entitled to seek a new agreement in both their names pursuant to paragraph 20 of the Code where each Claimant has given a separate paragraph 20 notice in its own name seeking a new agreement in their joint names.

(d) Whether the Claimants' paragraph 20 notices are invalid pursuant to paragraph 88(3) of the Code on the basis they are not in the form prescribed by OFCOM (as required by paragraph 88(2) of the Code) in the manner alleged by the Respondent.

4. A hearing in respect of the Preliminary Issues took place by way of a hybrid hearing over two days, commencing on 4 August 2025, with the Tribunal sitting in person at the tribunal's hearing room at Centre City Tower in Birmingham and the parties attending remotely. The Claimants were represented by Mr James Tipler, instructed by Winckworth Sherwood LLP. Mr Jon Wills, instructed by Freeths LLP, represented the Respondent.

5. Although witnesses for both parties – Mr Philip Harrison for the Claimants and Ms Tunde Ogbe for the Respondent – had provided witness statements and were made available for the hearing, the parties agreed, prior to the hearing, that cross-examination of the witnesses was not necessary, and they were not required to provide any further evidence at the hearing.

6. The morning of the hearing, the Tribunal was provided with a Statement of Agreed Facts. Mr Tipler also confirmed that the Claimants were no longer pursuing point (a)(iv) – that the Claimants occupied as licensees under a periodic licence.

7. In making this decision the Tribunal, in addition to the submissions made at the hearing, has considered the Hearing Bundle, the Joint Authorities Bundle, the Supplementary Authorities Bundle, and skeleton arguments received from both Mr Tipler and Mr Wills.

**Brief Summary of Agreed Facts and Correspondence**

8. The Respondent is the freehold owner, under title number SGL394930, of land known as 14 to 32 (even) and 38 to 48 (even) Culvert Road, 1 to 22 Roydon Close and 1 to 114 Castlemaine, London ('the Land'), also known as Castlemaine House. The Land principally comprises a residential apartment block ('the Building') on the roof of which is installed electronic communications apparatus (ECA) operated by the Claimants, together with a car park and ancillary land.

9. Each of the Claimants is an operator for the purposes of the Code and had been such at all material times.

10. On 27 May 2004, a lease was entered into between the Respondent and the First Claimant (then known as T-Mobile (UK) Limited) ('the Lease'). The term under the Lease was 10 years from and including 18 February 2003, and it was an agreement for the purposes of paragraph 2 of the old code, which demised a defined site (comprising an equipment cabin) on the roof of the Building. The provisions of sections 24 to 28 of the Landlord and Tenant Act 1954 ('the 1954 Act') were excluded (i.e. the Lease was 'contracted out').

11. By a Deed of Assignment dated 23 June 2010, the Lease was assigned to the First and Second Claimants. Consent was given for that assignment by a Licence to Assign, also dated 23 June 2010, to which the parties were the Claimants and the Respondent.

12. On 17 February 2013, the contractual term of the Lease expired. The Lease was not continued statutorily by section 24 of the 1954 Act because it had been contracted out. The parties agreed that the Lease had at no time been a 'subsisting agreement' within the meaning of that expression at paragraph 1(4) of the Transitional Provisions under Schedule 2 to the Digital Economy Act 2017.

13. By a letter dated 9 September 2016, the Claimants (through their agent WHP Telecoms Ltd) informed the Respondent of their "*wish to upgrade their existing installation*" at Castlemaine House. The letter included the following text:

> *"I refer to the Lease dated 27th May 2004 which requires that Landlord consent is required (such consent is not to be unreasonably withheld or delayed) for the proposed works.*
>
> *I would be most grateful if you could confirm your consent to the proposed works by signing the letter attached and returning it to the Warrington address listed above."*

14. Following the Code coming into force on 28 December 2017, the Claimants' agent (Sunny Dhillon) sent an email to the Respondent dated 26 November 2018, which stated as follows:

*"We act on behalf of Everything Everywhere Limited and Hutchinson 3G UK Limited who have an expired lease with yourself at the above address.*

*Our client proposes to carry out upgrade works to facilitate changes in technology, coverage and capacity and fulfil government aims to connect communities and deliver high quality service. Therefore, included within this e-mail is the new Electronic Communications Code introduction letter for the site above (Castlemaine House), in relation to the apparatus currently residing on the rooftop.*

*Please review, I would welcome any comments going forward."*

15. On 10 December 2018, the Claimants sent a further letter (through their agent WHP Telecoms Ltd) informing the Respondent of their wish to carry out further works on their existing installation. The letter included the same text as set out in paragraph 13 above.

16. By an email to the Respondent, dated 11 December 2018, the Claimants' agent (Sunny Dhillon) chased the Respondent for a response to their previous email, once again referring to having an expired lease at the address, and including a new code offer letter.

17. In a further email, dated 4 January 2019, Mr Dhillon chased the Respondent, asking if they had reviewed the offer letter. A similar request was made by Mr Dhillon on 23 January 2019.

18. Mrs Pat Battista, on behalf of the Respondent, replied on 23 January 2019, that the letter was likely being looked at by the Respondent's legal department and asked for a reference so it could be sent to the appropriate department.

19. By a letter dated 15 December 2021, the Respondent referred to contact between the parties' agents and gave consent to proposed works at Castlemaine House, stating that the same "*are within the rights granted to the Operator by the Lease*", and setting out provisos and conditions for the conduct of those works. (Although this letter referred, in the subject title, to the lease between the parties having been dated 1 June 2018, both parties confirmed at the hearing that they believed this to be erroneous, there being no evidence of any other lease having been entered into between the parties.)

20. By a letter of 14 May 2024, in similar form, the Respondent again referred to a lease between the parties at Castlemaine House and gave consent to the carrying out of further works, again on provisos and conditions set out therein. (Again, this letter erroneously referred to the lease being dated 1 June 2018).

21. Details of the planning history for the telecoms site were set out in the Statement of Agreed Facts.

22. A statutory notice was served on the Respondent, under paragraphs 20 and 27 of the Code, by the Claimants under cover of a letter dated 4 March 2024 and, on 6 November 2024, a reference seeking rights under paragraph 20 of the Code was received by the tribunal from the Claimant.

23. Both parties agreed that the Claimants had continued to pay rent on a quarterly basis since the contractual expiry of the Lease.

**Issue (a) – Legal Basis of Occupation**

24. Both parties agreed that the law on this point was "*well-established*", as described by Judge Cooke in *Arqiva Services Ltd v AP Wireless II (UK) Ltd* [2020] UKUT 195 (LC) ('*Arqiva*'). That there is no "*presumption of a periodic tenancy*", and the intention of the parties must be ascertained by objectively considering the conduct of the parties.

25. In *Arqiva*, Judge Cooke referred to the law as having been summed up as follows by Patten LJ in *Barclays Wealth Trustees (Jersey) Ltd v Erimus Housing Ltd* [2014] 2 P&CR 4, CA ('*Erimus*'):

> *"23. When a party holds over after the end of the term of a lease he does so, without more, as a tenant on sufferance until his possession is consented to by the landlord. With such consent he becomes at the very least a tenant at will and his continued payment of the rent is not inconsistent with his remaining a tenant at will even though the rent reserved by the former lease was an annual rent. The payment of rent gives rise to no presumption of a periodic tenancy. Rather, the parties' contractual intentions fall to be determined by looking objectively at all relevant circumstances. The most obvious and most significant circumstance in the present case, as in Javad v Aqil, was the fact that the parties were in negotiation for the grant of a new formal lease. In these circumstances, as in any other subject to contract negotiations, the obvious and almost overwhelming inference will be that the parties did not intend to enter into any intermediate contractual arrangement inconsistent with remaining parties to ongoing negotiations. In the landlord and tenant context that will in most cases lead to the conclusion that the occupier remained a tenant at will pending the execution of the new lease. The inference is likely to be even stronger when any periodic tenancy would carry with it statutory protection under the 1954 Act which could be terminated by the tenant agreeing to surrender or terminating the tenancy by notice to quit: see Cardiothoracic Institute v Shrewdcrest Ltd [1986] 1 WLR 368. This point is given additional force in the present case by the fact that the intended new lease, like the old lease, was to be contracted out."*

26. In *Javad v Aqil* [1991] 1 W.L.R. 1007 ('*Javad*'), Nicholls LJ described the relevant principles as follows at page 1012:

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

*tenant relationships. Where there is more than the simple situation, the inference sensibly and reasonably to be drawn will depend upon a fair consideration of all the circumstances, of which the payment of rent on a periodical basis is only one, albeit a very important one. This is so however large or small may be the amount of the payment."*

27. More recently, in *Smoke Club Ltd (In administration) v Network Rail Infrastructure Ltd* [2022] L & TR 11 ('*Smoke Club*') at paragraph 111, the Upper Tribunal summarised the law as follows:

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

28. In relation to the facts of this matter, these did not appear to be in dispute between the parties. The timeline of events and dates and details of correspondence are as detailed above. Neither Mr Harrison (a Chartered Surveyor employed by Mobile Broadband Network Ltd (MBNL)) nor Ms Ogbe (the Respondent's Assistant Director of Valuation and Asset Management Services) were aware that any renewal negotiations in respect of the site had been carried out by the parties prior to 2018.

29. Neither party had any information as to how or when the rent was increased from the initial annual rent set out in the Lease (£32,500), but both parties also accepted that quarterly rent of £9,250.00 had been paid, in line with the position prior to the expiry of the Lease, up until 24 March 2021, with the witness statement from Mr Harrison providing a printout of the rental payments made between 13 September 2012 to 4 November 2020 for the quarterly periods from 29 September 2012 to 24 March 2021.

30. In relation to invoices for the rent from the Respondent to the Claimants, the hearing bundle contained copies of the same from 15 May 2019 to 23 June 2025. Ms Ogbe confirmed that the Respondent had switched managing agents from Lambert Smith Hampton to Avison Young in February 2018 and that the Respondent did not hold copies of any invoices issued prior to this period.

31. The invoices from 15 May 2019 to 18 November 2020 contained the following words in the section of the invoice described as 'Rent':

THE ABOVE SUMS ARE DEMANDED WITHOUT PREJUDICE - LEASE EXPIRED, HOLDING OVER

32. From 9 March 2021 until 2025, the invoices contained the following words beneath the box detailing payment of Rent:

> **THE ABOVE SUMS ARE DEMANDED WITHOUT PREJUDICE LEASE OUTSTANDING RENT REVIEW**
> **THE ABOVE SUMS ARE DEMANDED WITHOUT PREJUDICE LEASE EXPIRED**

33. In his witness statement, Mr Harrison confirmed that the default position of MBNL was that, on expiry of a lease or agreement within the Claimants' permanent sites, rent would continue to be paid post expiry of the contractual term.

34. As to what the intention of the parties were by objectively considering those facts, Mr Wills, on behalf of the Respondent, and Mr Tipler, on behalf of the Claimants, suggested that the Tribunal should come to different conclusions, briefly summarised as follows.

35. Mr Wills submitted that this case was a classic "*failing more*" case as referred to in *Javad*. He pointed to the fact that there was no evidence of any negotiations between the parties for several years and that rent had been paid, by quarterly payments, and accepted following the expiry of the term. He stated that, unlike in *Smoke Club*, there were no other factors to negate a periodic tenancy being inferred, especially as rent continued to be paid for "*half a decade*" prior to any letter regarding the possibility of a new agreement being sent.

36. Mr Wills noted that the first communication, other than demands and payment of rent, came in 2016, when the Claimants requested an upgrade to their equipment. He referred to the wording of such request as being important, with it referring to the Respondent as being the landlord, that the landlord's consent was required to carry out the works and that this was derived from the terms of the Lease. In addition, Mr Wills suggested that it was unlikely that the Claimants would have considered such an upgrade had they considered that they had a tenancy at will rather than periodic tenancy, due to this being a more "*precarious*" interest.

37. In relation to whether such a periodic tenancy would have had protection under the 1954 Act, Mr Wills submitted that the premises were clearly occupied as business premises, so the protection would apply. Mr Wills stated that there was no evidence that the Respondent had any concerns regarding the fact that statutory protection might arise under the 1954 Act and that, in contrast to the Code which provides for an expired code agreement to continue once the contractual term of the Lease had expired, the old code did not continue it. As such, he stated that, objectively the Claimants would clearly have preferred the protections offered by a periodic tenancy.

38. Mr Wills contended that the objective test meant that there was no presumption either for a periodic tenancy or a tenancy at will, and that the suggestion in *Javad* to a situation leading to a periodic tenancy now being unlikely to arise did not discount the fact that it could arise based on the facts of a case.

39. In relation to when such a periodic tenancy arose, Mr Wills suggested that this began at the outset of the expiry of the Lease and that the substantial period of time that had passed since that date with rent being paid was an important factor.

40. In relation to the wording detailed on the invoices, Mr Wills stated that there was no evidence to suggest that such wording was included in any invoices that were issued between 2013 and 2018, especially since different agents had been instructed at that time, and that, in any event, Judge Cooke in *Arqiva* had made it clear that the simple inclusion of such wording on correspondence was not indicative of anything significant.

41. Mr Wills stated that there was no evidence to suggest operators had been waiting between 2013 and 2017 to see what the new regime had to offer and that the Code had not been introduced until several years after the expiry of the Lease.

42. Mr Tipler stated that it was for the Respondent to show that a periodic tenancy existed at the end of the expiry of the existing Lease. He referred to the fact that there were several reasons why the facts suggested that the Claimants occupied under a tenancy at will.

43. Mr Tipler referred to this matter as not being a typical landlord and tenant scenario in relation to business premises. He stated that the Claimants' occupation of the site was almost entirely passive and that the Claimants enjoyed statutory protection against removal under the old code and, after 28 December 2017, under Part 6 of the Code.

44. Mr Tipler submitted that, as the Lease was contracted out, entering into a periodic tenancy with protection under the 1954 Act would clearly have been objectively inconsistent with the intentions and interests of the respective parties. He stated that, although reported cases focussed on negotiations for a new tenancy, this was not a requirement in law and noted that the Respondent had previously not pleaded any specific time at which a periodic tenancy came into existence which had been criticised by the Court of Appeal in *Erimus*.

45. Mr Tipler submitted that the limited contemporaneous documentary evidence that was available before the Tribunal supported the Claimants' position, such as the wording on the invoices. Mr Tipler contended that these undermined the Respondent's assertions, as they were carefully caveated by including the words "*LEASE EXPIRED, HOLDING OVER*" and "*WITHOUT PREJUDICE LEASE EXPIRED*" to avoid any implication of a periodic tenancy.

46. As to the payment of rent, Mr Tipler referred to Mr Harrison's statement and that payment of rent was the default position of MBNA, rather than any site-specific election. He stated that this was wholly consistent with the industry at the time being aware that the old code was being examined and operators wishing to maintain good relationships with landlords in the meantime. Mr Tipler suggested that the issuing of the letters relating to the new code in 2018 supported this view.

47. Mr Tipler submitted that none of the background to the case was inconsistent with the Claimants enjoying a tenancy at will, safe in the knowledge that the ECA could not be removed until the section 21 procedure under the old code was invoked, and that no greater security of tenure was required by them.

48. Mr Tipler went on to refer to considerations against implication of a periodic tenancy post 28 December 2017. He stated that any such tenancy could not fall within the protections given by the 1954 Act, as its primary purpose would have been to grant code rights. He respectfully referred to the decision of the First-tier Tribunal in *EE Ltd & H3G Ltd v AP Wireless II (UK) Ltd* (LC-2024-000563) as being wrong to hold otherwise, as he stated

that the purpose of section 43(4) of the 1954 Act was to ensure that code rights could not enjoy dual protection under the 1954 Act and the Code. Mr Tipler also referred to the passing rent of £37,000 as being substantially above market rent which, he submitted, could not now be achieved without taking a fine or premium. As such, he stated that any new tenancy at that rate could only take effect as a tenancy will, under section 54(1) of the 1954 Act.

49. The Tribunal, having considered all of the evidence briefly summarised above, notes that neither party could produce any evidence of any negotiations in respect of a new tenancy following the expiry of the Lease on 17 February 2013. The first correspondence from the Claimants referencing the same was following the introduction of the Code in the email from the Claimants' agent on 26 November 2018. The Tribunal was not convinced that the passive nature of occupation was a significant factor in this – the nature of the occupation being fairly standard for many sites housing ECA.

50. Both parties accepted that, by November 2018, rent had been demanded and paid during the intervening period on a quarterly basis, on the usual quarter days, as per the provisions under the Fifth Schedule of the Lease for over five years.

51. With regard to the wording on the invoices, neither party was able to produce any invoices prior to May 2019, and as the managing agents had changed in the intervening period, there was no evidence as to what may have been detailed on such invoices. The Tribunal found the inclusion of the words "*LEASE EXPIRED, HOLDING OVER*" and/or "*WITHOUT PREJUDICE LEASE OUTSTANDING RENT REVIEW*" and "*WITHOUT PREJUDICE LEASE EXPIRED*", on invoices issued after 26 November 2018 to be of little assistance in knowing what wording may have been detailed in the previous invoices.

52. In addition, the Tribunal found the inclusion of such wording, which followed the Claimants' email of 26 November 2018 and which did not mention what the Respondent considered the Claimants' present position to be, could have been used without thinking, as referred to by Judge Cooke in *Arqiva*. There was no evidence before the Tribunal that such wording had been used after careful consideration of the current position between the parties.

53. In relation to the correspondence regarding the upgrade of the Claimants' equipment sent on 9 September 2016 and 10 December 2018, which referred to requiring the landlord's consent under the provisions of the Lease without any reference to any ongoing negotiations with regard to a new tenancy, the Tribunal agrees with Mr Wills' submissions. Read objectively, the letters indicated that the Claimants considered themselves as already occupying the site on a reasonably long-term basis and was suggestive of them still having a lease and the Respondent as being their landlord.

54. In relation to the previous tenancy having been contracted out of the protections under the 1954 Act and it being unlikely that the parties would have intended to change this position after the expiry of the Lease, as Mr Wills stated, there is no evidence to suggest that this was something the Respondent was averse to. There was no evidence of any negotiations for a new lease until the 2018 email and, if the Respondent had been concerned about this situation arising, the receipt of the letter in 2016 might have prompted it to consider its position. There is no evidence that it did.

55. Although the Tribunal accepts that the payment of rent on its own is not presumptive of a periodic tenancy existing, in this case there is no evidence suggesting that this was not the parties' intentions on the expiry of the Lease.

56. Taken altogether, the Tribunal finds that, on the evidence, this is one of those situations which Nicholls LJ stated was "*unlikely to arise often*" in *Javad*. There were no circumstances or conduct to "*negate any intention to enter into a periodic tenancy agreement*", as referred to in *Smoke Club* and, looking objectively at the facts, it is a case where rent having been demanded and paid for over five years "*failing more*" the inference "*sensibly and reasonably*" to be drawn (as per *Javad*) is that the parties intended that at expiration of the Lease, a quarterly periodic tenancy arose.

57. Having found that a quarterly periodic tenancy arose at the expiry of the Lease, the Tribunal accepts that it would have had protection under Part II of the 1954 Act, and the site was being occupied by the Claimants for the purposes of business. As the periodic tenancy commenced prior to the Code coming into force, section 43(4) of the 1954 Act did not apply.

**Issue (b) – Entitlement under Part 4 of the Code**

58. Having found that the tenancy is a periodic tenancy with security of tenure under Part II of the 1954 Act, the Tribunal is bound by the decisions of the Upper Tribunal in *Arqiva* and *Gravesham Borough Council v On Tower UK Ltd* [2024] UKUT 151 (LC) ('*Gravesham*').

59. Judge Cooke in *Arqiva* stated that Part 4 of the Code would not be available to a claimant who had a periodic tenancy with protection under Part II of the 1954 Act. This position, as stated by Mr Wills, has recently been reinforced by the decision of the Upper Tribunal in *Gravesham*, in which the Deputy Chamber President, Martin Rodger KC held that, even where an operator had failed to renew their tenancy under the 1954 Act, they could not then apply under paragraph 20 of the Code.

60. Although Mr Tipler tried to distinguish the current case with the decision of the Supreme Court in *Cornerstone Telecommunications Infrastructure Limited v Ashloch Ltd* and Another ('*Ashloch*') (heard with the *Compton Beachamp* appeal [2022] UKSC 18), based largely on the Claimants inability to renew their rights and susceptibility to the removal of its apparatus, the Tribunal finds that such a distinction does not sit well with the main reasoning set out in the *Ashloch* decision.

61. In that decision, Lady Rose, at paragraphs 167 to 168 stated as follows:

> *"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.*

*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 paragraph 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 paragraph 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."*

62. The Tribunal considers that the reference to the right to renew made by Lady Rose, based on the facts of the *Ashloch* case, does not deflect from the main point put forward – that a party with protection under the 1954 Act should not have the benefit of being able to choose which regime it can use and should not get the "*substantial benefit of the no-scheme valuation of rights*".

63. Although the Claimants may not have an automatic right to renew, their apparatus is on site and cannot be removed without the Respondent seeking to terminate under paragraph 25, at which point the tenant can apply for a new tenancy. As Judge Jackson stated in *On Tower UK Ltd & On Tower UK 2 Ltd v AP Wireless II (UK) Ltd* (LC-2023-000852 et al) at paragraph 27:

*"… 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."*

64. This appears to be in keeping with intention of the Code in relation the response published by the Government— DCMS, A New Electronic Communications Code, 17 May 2016 – following the Law Commissions Report in 2013 and consultation and wider engagement with stakeholders. This confirmed that the Code would make "*major reforms to the rights that communications providers have to access land - moving to a "no scheme" basis of valuation regime*". (page 4). The incentive was to "*invest in new sites*" and that "*savings on existing sites would be achieved over a much longer time period*" (page 21).

65. As the Tribunal has found that the Claimants occupy the site as periodic tenants with security of tenure under the provisions of Part II of the 1954 Act and, accordingly, are not entitled to seek the imposition of a new agreement under Part 4 of the Code, **the application by the Claimants must be struck out under rule 9(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.**

**Issues (c) and (d) – Validity of Notices**

66. Although the Tribunal has found that it does not have jurisdiction to deal with this matter, it has briefly set out below its observations with regard to the arguments put before it by the parties with regard to the validity of the notices.

67. With regard to the form of the notice, Issue (d), the Tribunal finds that as the paragraph 20 notices did not comply with the form of notice prescribed by OFCOM, they were not valid notices under paragraph 88(3) of the Code.

68. The parties accepted that each of the notices omitted two sentences in paragraphs 1 and 6 of the "*SUPPLEMENTARY INFORMATION FOR THE RECIPIENT OF THIS NOTICE*" section of the notices, relating to alternative dispute resolution. Mr Tipler noted that the same information detailed in the missing wording was set out no fewer than four times in the prescribed notice, so could not be said to have had a prejudicial effect on the Respondent and also relied upon the principle of construction against absurdity.

69. Both parties referred to the *Newbold v Coal Authority* [2014] 1 WLR 1288, in which the Court of Appeal stated at paragraph 70:

> "*In all cases, one must first construe the statutory or contractual requirement in question. It may require strict compliance with a requirement as a condition of its validity. In the Mannai case [1997] AC 749, 776B Lord Hoffmann gave the example of the Expired Lease requiring notice to be given on blue paper: a notice given on pink paper would be ineffective. Against that, on its true construction a statutory requirement may be satisfied by what is referred to as adequate compliance. Finally, it may be that even non-compliance with a requirement is not fatal. In all such cases, it is necessary to consider the words of the statute or contract, in the light of its subject matter, the background, the purpose of the requirement, if that is known or determined, and the actual or possible effect of non-compliance on the parties. We assume that Parliament in the case of legislation, and the parties in the case of a contractual requirement, would have intended a sensible, and in the case of a contract, commercial result*."

70. The wording of paragraph 88(2) of the Code states as follows:

> *"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."*

The Tribunal finds that the wording of paragraph 88(2) clearly requires strict compliance. There is no provision that a notice may be given in a form substantially similar to the form prescribed by OFCOM, nor is there anything in the template notice prescribed by OFCOM that suggests that some of the wording set out in that form is less important than others and need not be included.

71. Paragraph 88(3) of the Code states:

> "*A notice which does not comply with this paragraph is not a valid notice for the purposes of this code."*

72. As such, the Code clearly sets out the requirements for a valid notice and the consequence of non-compliance. The lack of any prejudice to the Respondent is not a relevant consideration. In addition, there is no absurdity in requiring operators to complete a readily available template notice correctly.

73. With regard to the notices not being in joint names, the Tribunal returns to the decision of the Supreme Court and the words of Lady Rose in *Compton Beachamp* at paragraph 140:

> *"… The proper implementation of the Code does not require that all occupation of any operator with ECA installed on the site falls to be disregarded. The interpretation of para 9 set out above means only that it is the occupation (if any) of the operator who seeks to have a new code right conferred on it which is ignored when considering how to identify the "occupier of the land" (as that term is used in para 9, according to the definition in para 105). If, having allowed for this, it can be seen that another person who happens to be an operator is "the occupier of the land for the time being" (para 105(1)), then the operator seeking to have the new code right has to approach that person (and any person who would also need to be bound) to seek their agreement."*

74. In this case, although the two notices served by each of the operators may have been enclosed in a joint letter, they were individual notices. One was issued by EE Limited on the Respondent and the other by Hutchinson 3G UK Limited on the Respondent.

75. As such, when considering the occupier of the land on each of the notices, it was only *that* operator whose rights were to be ignored. As the other operator also had rights and was an occupier under a periodic tenancy, then there is a valid argument, based on the decision in *Compton Beachamp*, that if a joint notice had not been given, the notice should have been served on the other operator who was the occupier of the land for the time being.

76. In any event, regardless of the validity of the notice, as the Tribunal has already found that it does not have jurisdiction to deal with this matter, the references are dismissed.

M K Gandham
Judge of the First-tier Tribunal

## Rights of Appeal

A 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 this written Decision to the party seeking permission.