FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00CN/ECR/2025/0645 – 0652** **BIR/00CN/ECR/2025/0661 and 0662**
Properties (Abbreviated Site Name)	**:**	**Birmingham Eathorpe Close, Birmingham Richard Street, Bolton Kirkebrok Road, Bradford Great Horton Road, Bury St Edmunds Cornhill, Chessington Cox Lane, Hounslow Staines Road, Liverpool County Road Birmingham Old Walsall Road and Portsmouth Highland Road**
Claimant	**:**	**On Tower UK Limited**
Representative	**:**	**Kester Lees KC and Taylor Briggs instructed by Gowling WLG (UK) LLP**
Respondent	**:**	**AP Wireless II (UK) Limited**
Representative	**:**	**Toby Watkin KC and Fern Schofield instructed by Eversheds Sutherland (International) LLP**
Application	**:**	**Electronic Communications Code Paragraph 34 (renewal)**
Tribunal	**:**	**Judge D Jackson**
Hearing	**:**	**17th – 19th November 2025** **Centre City Tower, Birmingham**
Date of Decision	**:**	**12th December 2025**

DECISION

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1. This is my decision on 7 Preliminary Issues in respect of 10 rooftop telecommunications sites.

2. The Claimant seeks renewal of its Existing Agreements under Part 5 of the Code. In order to determine whether or not the Tribunal has jurisdiction to order the parties to enter into new agreements under Part 5, the parties are agreed that the Tribunal shall determine the following as Preliminary Issues:

No.	**Preliminary Issue**	**Abbreviated Site Name**	**Reference**
1.	Lease Issue *Is the agreement a lease or a licence and, consequently, does the Tribunal have jurisdiction under Part 5 of the Code?*	Bolton Kirkebrok Road	0647
2.	Statutory Purposes Issue *Is the Claimant exercising the rights conferred by the Agreements for the 'statutory purposes'?*	All	All
3.	Ineffective Assignment Issue *Was consent necessary/obtained for the assignments to the*	Birmingham Richard Street Bolton Kirkebrok Road Bradford Great Horton Road Chessington Cox Lane Hounslow Staines Road Birmingham Old Walsall Road	0646 0647 0648 0650 0651 0661

	Claimant?	Portsmouth Highland Road	0662
4.	Ineffective Deed of Covenant Issue *Were the deeds of covenant effective to render the Claimant subject to the burdens of the relevant Agreements?*	Birmingham Richard Street Bolton Kirkebrok Road Bradford Great Horton Road Chessington Cox Lane Hounslow Staines Road Birmingham Old Walsall Road Portsmouth Highland Road Liverpool County Road	0646 0647 0648 0650 0651 0661 0662
5.	ADR Notice Issue *Do the paragraph 33 notices satisfy the requirements of paragraph 33, in circumstances where they do not refer to ADR?*	Birmingham Richard Street Liverpool County Road Birmingham Old Walsall Road Portsmouth Highland Road	0646 0652 0661 0662
6.	HOTs Notice Issue *Do the paragraph 33 notices satisfy the requirements of paragraph 33, in circumstances where they annex HOTs or HOTs and a sample agreement?*	All	All
7.	Stale Notice Issue	Birmingham Richard Street Birmingham Old Walsall Road	0646 0661

	Is issuing the References in reliance on these notices an abuse of process?	Portsmouth Highland Road	0662

3. The Preliminary Issues were heard in Birmingham on 17th-19th November 2025. I received oral evidence from Andrew Fricker (Senior Commercial Manager at Cellnex [B290-307]), Matthew Smith (Country Head of Service Assurance at On Tower [B508-515]) and Paddy Jackson (Contract Manager at MBNL [B1545-1550]) on behalf of the Claimant. I also received oral evidence from Nicholas Ward (Regional director of Asset Management at AP Wireless [B1554-1608]) on behalf of the Respondent.

4. The Claimant was represented by Kester Lees KC and Taylor Briggs (Skeleton Argument dated 10th November 2025). The Respondent was represented by Toby Watkin KC and Fern Schofield (Skeleton Argument dated 12th November 2025).

5. In reaching my decision I have considered Bundles of documents [A+B 1-4265, C-F 1-2699 and SB 1-482]. I have also considered Schedule of Agreed and Assumed Facts [AF 1-11]

Conventions

- **MNOs** – broadband mobile operators (EE, H3G, VF and O2)
- **EE** – EE Limited
- **T Mobile** – T Mobile (UK) Limited was a former name of EE. T Mobile changed its name to Everything Everywhere Limited on 1 July 2010 and, subsequently, to EE Limited on 2 September 2013.
- **H3G** – Hutchison 3G UK Limited
- **MBNL** – Mobile Broadband Network Limited (agents for EE and H3G)
- **VF** – Vodafone Limited (merged with H3G to form VF3 in 2025)
- **O2** – Telefonica UK Limited trading as O2UK

- **WIP** – wholesale infrastructure provider
- **CTIL** – Cornerstone Telecommunications Infrastructure Limited. WIP acting as agent for VF and O2
- **Cellnex** – parent company of the Claimant
- **Arqiva Services Limited** – a former name of the Claimant. Arqiva Services Limited became "On Tower UK Limited" on 16 July 2020. This change occurred following the acquisition, by Cellnex, of the telecoms business of Arqiva on 8 July 2020.
- **ECA** – electronic communications apparatus

Lease Issue

6. On 4th November 2025 the Respondent notified the Tribunal that it was no longer pursuing the Lease Issue.

Statutory Purposes Issue

7. I have previously considered this issue in **Lupton Road** (On Tower UK Limited v AP Wireless II (UK) Limited BIR/OOCN/ECR/2024/0602 and others). In **Lupton Road** I set out my conclusions at paragraphs 97-105:

"97. As a matter of law, there is a jurisdictional requirement that an operator must be exercising a Code right(s) for the "statutory purposes" (as defined in paragraph 4 of the Code) in order to apply for an order under paragraph 34.

98. There is a single "one time" conferral of code rights as at the date of entering into the agreement. Accordingly, an operator need only show that it is exercising a code right for the statutory purposes at the date of entry into the relevant agreement.

99. I find as fact that ownership of passive infrastructure passed to the Claimant on 1st January 2020 in respect of 7 of the sites and on 1st April 2020 in respect of the site at Hopes Hill. Passive Infrastructure at Lupton Road passed to Arqiva on 1st January 2020

and from Arqiva to the Claimant on 8th July 2020.

100.The Claimant is not required to prove ownership of passive infrastructure at the sites. "The statutory purposes" means providing an infrastructure system. Provision of an infrastructure system includes establishing or maintaining such a system.

101."Maintaining" means "the performance of an activity, such as effecting a repair" and also "to secure the continuation of the system that has been established".

102.In respect of active maintenance, I find as fact that all sites were held under the various Master Site Services Agreements which were service agreements. Under those agreements the Claimant provided services which included installation of equipment and responsibility for ensuring that the tower was maintained and was safe to climb.

103.Lupton Road, Burchett's Green and South Cave are sites where agreements have been assigned to the Claimant. As the agreements were made with NMO's code rights were being exercised for the statutory purposes at the date of entry into those agreements.

104.In respect of the direct grant cases where the grant was made directly to the Claimant (Vulcan Arms, Plunders Price Papers, Roman Garage and Ardsley House) or to Arqiva Limited and subsequently assigned to the Claimant (Cromer Hyde Farm and Hopes Hill) there was in all cases an Earlier Agreement made with an MNO operator. I find that the Existing Agreements made on dates between 2016 and 2019 were entered into "to secure the continuation of the system that has been established" by the Earlier Agreements with MNO operators in respect of ECA that had been installed many years previously and continued to remain on site.

105.The occupation of a site by an MNO or other third party is irrelevant."

8. Before me Mr Watkin accepts that there is single "one time" conferral of code rights as at the date of entering into the Existing Agreements. The Respondent no longer argues that the Code is "ambulatory" in the sense that an agreement may drop in and out of Code protection.

9. The Claimant occupies each site under the terms of the Existing Agreements made on various dates between 2002 and 2007 [AF3]. The exception is the site at Bury St. Edmunds which is occupied under the terms of a surrender and regrant by reference to an earlier agreement made in 2005 [AF5]. All Existing Agreements, with the exception of Bury St Edmunds were entered were into by MNOs, either H3G or T Mobile. Accordingly, Mr Watkin accepts that the statutory purposes test is satisfied as at the date of entry into the Existing Agreements at all sites with the exception of Bury St Edmunds.

10. However, Mr Watkins advances the further proposition that the statutory purposes test must also be satisfied as at the date of imposition of the new agreement. This date is also variously described as the date of the hearing or the date of trial. The Claimant seeks an Order under Paragraph 34(6) of the Code which provides:

The court may order the termination of the code agreement relating to the existing code right and order the operator and the site provider to enter into a new agreement which—

(a) confers a code right on the operator, or
(b) provides for a code right to bind the site provider.

Mr Watkin is therefore entirely correct. As at the date the parties enter into the new agreement the statutory purposes test must be satisfied because the new agreement confers code rights. I will refer to this as the Paragraph 34(6) test.

Paragraph 34(6) test

11. In **Lupton Road** I found, at paragraph 99, that:

"I find as fact that ownership of passive infrastructure passed to the Claimant on 1st January 2020 in respect of 7 of the sites and on 1st April 2020 in respect of the site at Hopes Hill. Passive Infrastructure at Lupton Road passed to Arqiva on 1st January 2020 and from Arqiva to the Claimant on 8th July 2020."

The reason for the different dates is that as at 1st January 2020 some sites were owned by

Arqiva Limited and some sites owned by Arqiva Services Limited (the former name of the Claimant). At sites owned by the Claimant ownership of passive infrastructure passed from EE/H3G to the Claimant on 1st January 2020. At sites owned by Arqiva Limited on 1st January 2020 ownership of passive infrastructure passed initially from EE/H3G to Arqiva Limited and then, on 8th July 2025 from Arqiva Limited to the Claimant.

The position in the present references is the same. Ownership of passive infrastructure passed from EE/H3G to the Claimant on 1st January 2020 at all sites with the exception of Birmingham Richard Street and Liverpool County Road at which ownership of passive infrastructure passed from to the Claimant from Arqiva Limited on 8th July 2025.

12. I am able to make my findings of fact based on the evidence of Andrew Fricker (Witness Statement [B290-307]. Mr Fricker is Senior Commercial Manager at Cellnex. The Claimant is a property holding company within the Cellnex group and provides access to its sites and infrastructure as well as providing site share services to its customers. Mr Fricker manages the commercial relationship between Cellnex and MBNL, EE and H3G. Mr Fricker helpfully explained the commercial agreements that underly the contractual relationship between Cellnex, MBNL, EE, H3G and the Arqiva Providers (various companies within the Arqiva Group). Those commercial agreements are

    - "Godiva": 2008 Framework Agreement [F1385-1436] and 2008 Master Site Services Agreement("MSSA") [F1695-1792]
    - Side letter 2013 [F1793-1807]
    - "Brunel": 2019 Termination Agreement effective 1st January 2020 [F1857-1907] and 2019 MSSA [F1908-2659]
    - Business Transfer Agreement from Arqiva Limited to Arqiva Services Limited following acquisition by Cellnex of Arqiva's telecoms business with effect from 8th July 2020 [F1808-1856].

Those commercial agreements are commercially sensitive. I have only been supplied with heavily redacted copies. The Respondent has not sought specific disclosure of unredacted copies of those agreements. The Respondent does not put forward a positive case. Instead, the Claimant is put to proof.

13. MBNL was established under the Godiva agreements by EE and H3G to act as their agents and to manage their telecoms sites. MBNL entered into the 2008 Framework Agreement with the Arqiva Providers. Under the Framework Agreement Arqiva Providers could call for the transfer of sites from the MBNL pool. Over time Existing Agreements were transferred to Arqiva Limited. However legal title to passive infrastructure did not pass as at the date of transfer of the Existing Agreement. Legal title was to pass on expiry of the 2008 Framework Agreement.

14. Pending transfer of legal title to the passive infrastructure Godiva provided for the Arqiva Provider to be granted an "irrevocable royalty free licence" to use the passive infrastructure for the purposes of its business, to allow site sharers to use passive infrastructure and to replace, modify and extend the passive infrastructure.

15. Godiva was supplemented by the 2013 Side Letter which confirmed the position under the 2008 Framework Agreement but provided that the "irrevocable royalty free licence" was not to be documented in any of the transfers of the Existing Agreements. In his evidence Mr Jackson was asked if the intention was that someone looking from the outside would get the impression that the passive infrastructure was owned by Arqiva. Mr Jackson replied that the situation was that Arqiva "*may as well have owned it*".

16. The Existing Agreements and the "irrevocable royalty free licence" (undocumented in accordance with the 2013 Side Letter) were transferred (by way of surrender and regrant in case of Bury St Edmunds) to the Claimant prior to 2020 with the exception of the sites at Birmingham Richard Street and Liverpool County Road.

17. The 2008 Framework Agreement terminated with effect from 1st January 2020 in accordance with the 2019 Termination Agreement. Legal title to the passive infrastructure passed to the Claimant as at that date at all sites except Birmingham Richard Street and Liverpool County Road. In respect of Birmingham Richard Street and Liverpool County Road title to passive infrastructure passed, on 1st January 2020, to Arqiva Limited. Title to passive infrastructure at those two sites passed to the Claimant, from Arqiva Limited, under the terms of the 2019 Business Transfer Agreement on 8th July 2020.

18. If there were any doubts about Mr Fricker's evidence, he is corroborated by the evidence of Paddy Jackson (Contract Manager at MBNL) who at [B1552-1553] produces a letter from Winckworth Sherwood LLP, solicitors for MBNL for and on behalf of EE and H3G,

dated 28th October 2025 confirming:

" In respect of (1) Bradford Great Houghton Road, (2) Chessington Cox Lane, (3) Hounslow Staines Road, (4) Birmingham Eathorpe Close, (5) Birmingham Old Walsall Road, (6) Bolton Kirkebrok Road, (7) Portsmouth Highland Road and (8) Bury St Edmunds Cornhill, EE and/or H3G transferred the primary passive infrastructure at the Sites to On Tower with effect from 1 January 2020 and no longer have any interest in them; and

H3G and/or EE use the infrastructure system provided by On Tower at each of the Sites for the purposes of their electronic communications networks, with MBNL acting as their managing agent. On Tower is responsible for maintaining its passive infrastructure that H3G and EE use at the Sites to provide network services to their customers. This is a commercial arrangement between EE/H3G and On Tower to occupy the Sites (and other sites) provided by On Tower."

Mr Jackson confirms at paragraph 12 of his Witness Statement [B1545-1550] that the contents of Winckworth Sherwood's letter "*aligns with my practical understanding of the ownership and responsibility for the sites*". Further at paragraph 16 Mr Jackson confirms that "*MBNL no longer owns and/or manages and/or maintains the Passive Infrastructure at the Sites*".

19. Mr Fricker, at paragraph 57 of his Witness Statement refers to a letter to the Tribunal dated 10th October 2025 from Jill Paul, Property Solicitor for an on behalf of Arqiva Limited [B507] headed "(1) Birmingham Richard Street and (2) Liverpool County Road" which confirms:

"Arqiva is aware of the References, as On Tower has sought permission from Arqiva to disclose certain provisions in the contractual documents to which they are party. This was to allow On Tower to show that it owns the primary passive infrastructure (including all the supporting steelwork and plinths) at the Sites.

We confirm that the transfer of the primary passive infrastructure (including all the supporting steelwork and plinths) from Arqiva to On Tower took effect on 8 July 2020

and we no longer have any interest in it."

20. I find as fact that ownership of passive infrastructure passed to the Claimant on 1st January 2020 in respect of all sites except Birmingham Richard Street and Liverpool County Road in respect of which ownership of passive infrastructure passed to Arqiva Limited on 1st January 2020 and from Arqiva Limited to the Claimant on 8th July 2020.

21. In light of my findings of fact both in this reference and in **Lupton Road** I do not consider that further consideration of the Paragraph 34(6) test is necessary. The Claimant has proved (twice) that by 2020 it owned both the sites and the passive infrastructure. In circumstances where the Respondent does not advance a positive case, I can see no compelling reason why the Claimant should be required to prove, yet again, that it satisfies the statutory purposes test.

22. FTT Rule 9(3)(c) provides that the Tribunal may strike out the whole or part of proceedings (or bar the Respondent from taking further part in the proceedings or part of them) if:

> *"the proceedings or case are between the same parties and arise out of facts which are similar or substantially the same as those contained in a proceedings or case which has been decided by the Tribunal"*

23. In light of my findings in this case and in **Lupton Road**, absent the Respondent advancing a positive case, any future Tribunal will not need to decide the statutory purposes issue on similar or substantially the same facts.

Establishing or Maintaining – Bury St Edmunds

24. The Respondent accepts that the statutory purposes test is satisfied as at the date of entry into the Existing Agreements at all sites with the exception of Bury St Edmunds. At that site the Claimant seeks renewal of an agreement dated 29th October 2018 between (1) the Respondent and (2) Arqiva Limited [AF3e]. That Existing Agreement was preceded by an agreement dated 14th February 2005 between (1) Cornhill Property Investors Limited and

(2) H3G [AF4]. In **Lupton Road** such cases were described as "direct grant cases". I held that:

100.The Claimant is not required to prove ownership of passive infrastructure at the sites. "The statutory purposes" means providing an infrastructure system. Provision of an infrastructure system includes establishing or maintaining such a system.

101."Maintaining" means "the performance of an activity, such as effecting a repair" and also "to secure the continuation of the system that has been established".

25. On that basis I further held:

"104.In respect of the direct grant cases where the grant was made directly to the Claimant (Vulcan Arms, Plunders Price Papers, Roman Garage and Ardsley House) or to Arqiva Limited and subsequently assigned to the Claimant (Cromer Hyde Farm and Hopes Hill) there was in all cases an Earlier Agreement made with an MNO operator. I find that the Existing Agreements made on dates between 2016 and 2019 were entered into "to secure the continuation of the system that has been established" by the Earlier Agreements with MNO operators in respect of ECA that had been installed many years previously and continued to remain on site."

26. My reasoning in **Lupton Road** is supported by Mr Fricker at paragraph 12 of his Witness Statement. Mr Fricker explains that it is "*common in telecoms industry for sites and infrastructure to be transferred between operators, often on multiple occasions. In particular, there has been a trend for sites and passive infrastructure to be transferred by MNOs to wholesale infrastructure providers. Such transfers can be of individual sites but, more often, involve portfolios of hundreds, or even thousands, of sites.".* That is the way that the Code works in practice. H3G and EE have secured the continuation of the established infrastructure system at sites previously owned by them by means of transfer to the Claimant WIP in accordance with complex commercial agreements. O2 and VF have done exactly the same through their WIP, Cornerstone Telecommunications Infrastructure Limited. It is not for this Tribunal let alone the Respondent to mandate to MNOs how they ought to structure their business affairs.

27. Mr Watkin makes three objections to my reasoning in **Lupton Road**. The first is that "maintaining" does not mean *"the performance of an activity, such as effecting a repair"*. I do not need to decide that issue here because the Claimant has not led any relevant evidence on "active maintenance". Mr Smith gives limited evidence as to maintenance activity at paragraph 11.1.3 (d) of his Witness Statement. He refers to maintenance at Bradford Great Horton Road, Hounslow Staines Road in 2024 and at Birmingham Eathorpe Close and Birmingham Old Walsall Road in 2025. As the Claimant has satisfied me as to ownership of passive infrastructure in 2020 at all sites it no longer needs to rely on "maintaining" after that date.

28. Mr Watkin's second objection relates to the use of the words "establish and maintain" on numerous occasions in the Communications Act 2003 (see ss1, 12, 52 and 108). I am not assisted by those submissions which miss the point that the expression in the 2003 Act is the conjunctive "establish **and** maintain" whereas Paragraph 7(2) of the Code uses the disjunctive "establishing **or** maintaining".

29. Mr Watkin's third objection relates to the wording of section 106 of the Communications Act 2003 which provides that the Code may be applied in a person's case for:

"the purposes of the provision by him of a system of infrastructure which he is making available, or proposing to make available, for use by providers of electronic communications networks for the purposes of the provision by them of their networks"

30. The answer to Mr Watkin's third objection is to be found in the wording of the "irrevocable royalty free licence" contained in the 2008 Framework Agreement at [F1516] which operated on assignment of an Existing Agreement or in the case of Bury St Edmunds on transfer by way of surrender and regrant:

"*10.11.5 shall incorporate an irrevocable royalty fee exclusive licence permitting the Arqiva Provider and its successors in title at all times in accordance with the terms of this Agreement:*
(a) (in common with the assigning party) to use the Fixed Assets for the purpose of its business;
(b) to allow New Site Sharers to use and enjoy the Fixed Assets;
(c) to replace, modify or extend the Fixed Assets."

31. At Bury St. Edmunds the Claimant seeks renewal of the agreement dated 29th October 2018 between (1) the Respondent and (2) Arqiva Limited. That agreement was assigned on 30th September 2019 as part of the bulk assignment of sites from Arqiva Limited to the Claimant (then known as Arqiva Services Limited) [B875-881]. The "irrevocable royalty free licence" was originally granted to Arqiva Limited on the surrender and regrant in 2018. The licence passed to the Claimant as successor in title to Arqiva Limited on 30th September 2019. Accordingly, under the terms of the "irrevocable royalty free licence" Arqiva Limited and subsequently the Claimant were providing a system of infrastructure which each of them was making available or proposing to make available to new site sharers.

32. There is a further reason why the Claimant is exercising the rights conferred by the 2018 agreement at Bury St Edmunds for the 'statutory purposes'. As I have already explained Paragraph 7(2) of the Code expands the definition of provision of an infrastructure system to include "establishing or maintaining". Arqiva Limited having acquired the site at Bury St Edmunds on 29th October 2018 set about establishing an infrastructure system. It did so initially reliant on the "irrevocable royalty free licence". At little under a year later, on 30th September 2019, the site was transferred to the Claimant which then began the process of establishing its own infrastructure system, again initially reliant on the "irrevocable royalty free licence" pending the transfer to it of the passive infrastructure at the site, which took place 3 months later, on 1st January 2020 under the terms of the 2019 Termination Agreement. In my judgement the acquisition of the site, transfer to another provider as part of the common practice of portfolio or block transfer and proposing to make the infrastructure at the site available to sharers under the "irrevocable royalty free licence" pending transfer of ownership of the infrastructure shortly thereafter amounts to establishing an infrastructure system.

A system of Infrastructure

33. Paragraph 7(1) of the Code provides:

In this code "infrastructure system" means a system of infrastructure provided so as to

be available for use by providers of electronic communications networks for the purposes of the provision by them of their networks.

34. Mr Watkin quite correctly submits that provision of a single or indeed multiple components does not amount to a system of infrastructure. Mr Watkins refers to the definition of a system contained in the Shorter Oxford English Dictionary (6th ed., 2007) as being "*a group or set of related or associated material or abstract things forming a unity or complex whole*".

35. I start my analysis with the observation that antenna and associated cabling must be supported. That support must be secured, in the case of a rooftop site, to the building. The way in which that is done is in accordance with design drawings. The system depends as much on the design as the component parts. Designing an infrastructure system in accordance with the Construction (Design and Management) Regulations 2015 is a highly skilled undertaking. To suggest, as the Respondent does in these references, that what has been provided at these sites as mere components is untenable. Designers ensure that antenna are positioned in such a way as to ensure that, from a radio planning perspective, coverage is provided to the intended area and that transmission links are effective. There is also the public safety aspect of the system. The antenna, exposed to the elements, must be secured so as to ensure that they do not fall from the rooftops causing injury. Antenna are dangerous because they emit ionising radiation. The design of the system must ensure that the antenna are positioned safety and securely to comply with ICNRP (the International Commission on Non-Ionizing Radiation Protection). The exclusion zones for each site inform the design of the infrastructure system.

36. The infrastructure system must be designed to ensure safe access and working conditions for engineers who carry out installation and maintenance. The mere provision of components is not enough. Infrastructure must be designed to ensure the safety of those working at height.

37. To suggest, as the Respondent does, that the component parts at each of these sites does not amount to a system is fanciful. The Respondent fails to recognise that the system of infrastructure at each site has been designed to ensure the safety and effectiveness of the active ECA in accordance with CDM design drawings.

Ownership of passive infrastructure

38. The Respondent does not advance a positive case but submits:

    (1) The passive infrastructure is owned by EE/H3G
    (2) The passive infrastructure is owned by the landlord
    (3) The passive infrastructure is owned by a third party.
    (4) There is no passive infrastructure at any of the sites

39. I start by discussing the concept of principal passive infrastructure. This is a term which litters the various witness statements. I am surprised that the Respondent should have such difficulty with this concept. I note that in **Lupton Road** it was an agreed fact (see paragraph 39):

    "It is agreed, for the purposes of these proceedings, the principal passive infrastructure at each of the Sites is as follows:

    a. Lupton Road: 17.5m 30H Lattice Tower;
    b. Burchett's Green: 27.5m Lattice Tower;
    c. Vulcan Arms: 22.5m Monopole;
    d. Cromer Hyde Farm: 30m Monopole;
    e. Plunder Price Papers: 15m Monopole;
    f. Roman Garage: 15m Monopole;
    g. South Cave: 15m Monopole;
    h. Hopes Hill: 18m imitation Scots Pine Tree-Mast; and
    i. Ardsley House: 22.5m Monopole." [AF20]

    "It is agreed, for the purposes of these proceedings, that the full details of the passive infrastructure at each site is as detailed at page 1 to Exhibit "TCH1" to the Witness Statement of Timothy Charles Holloway dated 6 May 2025 which can be found at page 1813 of the Preliminary Issues Hearing Bundle." [AF21]

    I find it difficult to understand why such a straightforward matter which was capable of

agreement in August 2025 should have proved so contentious just 3 months later.

40. The matter was put beyond doubt by Mr Jackson in his response to questioning by Mr Watkin. Mr Jackson explained that the principal passive infrastructure was not a day to day term or a "*differentiator*". The primary passive infrastructure is "*steelwork, feeder management and antennae pole mounts*". What is not "primary" are the other items "*bolts and brackets*".

41. There is a further issue of terminology. The 2008 Framework Agreement refers to the passive infrastructure as "Fixed Assets". It was the Fixed Assets that passed in accordance with the 2019 Termination Agreement on 1st January 2020. Fixed Assets are defined in the 2008 Framework Agreement [F1495]:

    Fixed Assets means the non-operator specific equipment on the relevant Godiva Transferred Sites including the tower and anything supporting the tower, cabin and excluded infrastructure, but for the avoidance of doubt excludes any cabinet, feeder or antenna and Operator Technical Equipment;

42. The contracting parties have no trouble in understanding what was meant by Fixed Assets. Mr Jackson from MNBL has given evidence on behalf of EE and H3G. Arqiva and EE/H3G have instructed solicitors to write to the Tribunal. I am not persuaded by the Respondent's attempts to sow disharmony between the MNOs and the Claimant. Fixed Assets means what was agreed as principal passive infrastructure by the parties in August 2025. It accords with the clear evidence of Mr Jackson. The Claimant now owns all non-operator specific equipment namely the tower (or in the case of rooftop sites the antenna pole mounts) and anything supporting the tower and cabin (i.e. the steelwork). The MNOs retained their active ECA i.e. antenna, feeder cable and cabinets.

43. I am not persuaded by Mr Watkin's submission that the passive infrastructure is owned by the landlord. Mr Smith gave very helpful evidence on this point. It is quite easy to differentiate between telecoms equipment and landlord's fixtures. For example, if a hooped ladder has been added that will be a "*telecoms install*". The Claimant has to be able to guarantee the safety of ladders used by engineers in accessing the site. If it is unable to do so the Claimant will impose a "temporary access restriction" on the site. All cable

trays and grillage are owned and earthed by the Claimant for electrical safety reasons. Other infrastructure has obviously been installed by the Claimant or its predecessors to ensure safety (for example climbing pegs and latchway cable). Such items are part of the system to ensure customers can safely access their equipment whilst climbing the Claimant's infrastructure. Steelwork is easily identifiable as being telecoms specific. Its location shows that it has been installed to allow operators to access their cabinets or antenna. Looking at the age, design and positioning of steelwork, it is apparent that it is a "*telecoms install*" being "*reminiscent*" of telecoms design or located next to the antenna pole.

44. I find that steelwork has been provided by the Claimant or its predecessors. It is clearly telecoms in terms of age and design. Its purpose is to comply with the Claimant's health and safety obligations. In view of what I have said above about the importance of safety I find that neither the Claimant nor its predecessors would rely on landlord's steelwork.

45. The burden is clearly on the Claimant to prove ownership. However, if any of the infrastructure were owned by the landlord that would be something within the knowledge of the Respondent as the Claimant's immediate landlord at all sites. Further having regard to the assiduity with which the Respondent has conducted these proceedings I have no doubt that if a landlord was providing a system of infrastructure the Respondent would lose no time in telling me that such was indeed the case.

46. At some sites there are also separate agreements with other MNOs. The Respondent therefore submits that steelwork could belong to another operator under a separate agreement. Mr Smith explained to me that antenna poles each have an inventory number. However, cable trays and grillage do not. Mr Smith explained to me that ownership would be provable from the original design drawings dating back to the early 2000's. The Respondent fell short of asking me to conduct an inventory of all items of infrastructure at all 10 sites. As a matter of case management, I would have declined to do so on grounds of proportionality. Nevertheless, the drawings attached to Mr Ward's witness statement together with his helpful explanations allow me to make findings of fact as to the presence and ownership of an infrastructure system at all sites.

Birmingham Eathorpe Close

47. Mr Ward deals with site specifics at paragraphs 78-90 of his Witness Statement [B1574-1576]. There are two separate parcels of land at this site. What is referred to by Mr Ward as the "Triangular Parcel" is occupied by Vodafone and the "Rectangular Parcel" by the Claimant. The site was originally let to H3G. However, the site was transferred to the Claimant on 15th November 2019. In accordance with my finding set out above, ownership of passive infrastructure passed to the Claimant on 1st January 2020.

48. Site inspection carried out in 2025 as detailed by Mr Ward at paragraph 86 of his witness statement clearly identifies two separate systems of infrastructure namely the H3G system now owned by the Claimant and a separate Vodafone system.

49. The planning documents at [B2860-2899] show a Vodafone/Telefonica application in 2013 [B2860] and an H3G application in 2015 [B2865]. The plan at [B2869] shows what is clearly the separate H3G system of infrastructure, ownership of which has transferred to the Claimant. In 2022 EE made an application in respect of its antenna [B2870]. It is important to note that the application by EE relates solely to active ECA which it operates. The 2022 application did not relate to the passive infrastructure which had by that time had passed to the Claimant. The application to install a 10m stub tower which was refused in 2022 [B2880] relates to the separate CTIL (O2 and VF) infrastructure system.

50. In conclusion there are clearly two distinct systems of infrastructure at this site. The H3G system is owned by the Claimant.

Birmingham Richard Street

51. Mr Ward explains at paragraphs 91- 103 of his witness statement [B1577-1579] that the site was originally owned by T Mobile. The site was assigned to the Claimant on 18th June 2020. As I have found above ownership of passive infrastructure passed to the Claimant on 8th July 2020. Site inspections in 2021 and 2025 (see paragraphs 98 and 99 of Mr Ward's witness statement) show that only EE was in occupation.

52. Planning documents at [B3025-3067] show that there is also a separate CTIL rooftop site on what is clearly a large roof top area (see for example photograph at [B3008]). Planning

history shows Orange in 2000 [B3025], T Mobile in 2002 [B3030], H3G in 2006 [B3034] and EE in 2015 [B3046]. It is the H3G/EE system of infrastructure which passed to the Claimant on 8th July 2020. EE and H3G made a further planning application in 2022 which related to antenna/active ECA only [B3058]. The further applications in 2013 [B3039] and 2022 [B3051] relate to the separate CTIL/Telefonica/O2/VF system.

53. There are two separate systems of infrastructure at this site. The EE/H3G passive infrastructure system is now owned by the Claimant.

Bolton Kirkebrok Road

54. Mr Ward deals with this site at paragraphs 104-124 of his witness statement [B1580-1584]. This has been an H3G site since 2002. The site was assigned to the Claimant on 26th September 2019. All passive infrastructure passed to the Claimant on 1st January 2020.

55. VF removed its installation between 2018 and 14th May 2019. O2 have also removed their installation. Accordingly, only the Claimant and its MNO customers are in occupation at this site. The position is confirmed by the inspections carried out in 2020 and 2025 (see paragraphs 116-118 of Mr Ward's witness statement) which show only H3G equipment at the site.

56. Mr Ward has not produced planning documents for this site but the plan at [B3191] shows the infrastructure system installed by H3G which is now in the ownership of the Claimants.

Bradford Great Horton Road

57. Mr Ward deals with site specifics at paragraphs 125- 137 of his witness statement [B1584-1587]. This was originally a T Mobile site. The Claimant acquired the site on 30th September 2019. Infrastructure passed to the Claimant on 1st January 2020.

58. There are 3 separate parcels of land on the rooftop. CTIL has a separate lease of its own rooftop space. At paragraph 133 Mr Ward describes three internal equipment rooms which appear to be in the occupation of O2, Telefonica and EE/H3G respectively.

59. Mr Ward produces a large number of technical drawings dated 8th June 2020 and 22nd February 2023 [B3323-3357]. Having considered those drawings I find that they are proposals by Cellnex (Claimant's parent company) to allow EE and H3G to upgrade their active ECA (antenna, feeder cable and cabinets) using the existing passive infrastructure system owned by the Claimant. These drawings as entirely consistent with ownership of the infrastructure system by the Claimant.

Bury St Edmunds Cornhill

60. Mr Ward deals with site specifics at paragraphs 138-151 of his witness statement [B1588-1590]. There are 3 separate parcels of land on the rooftop of the site. This was originally an H3G site which was assigned to the Claimant on 30th September 2019. As I have found above ownership of passive infrastructure passed to the Claimant on 1st January 2020.

61. Site inspection in 2025 shows that "shrouded flagpole" antenna were installed at this mid-20th Century Neo-Georgian commercial development. The Claimant's site houses cabinets and antenna owned by its customers EE and H3G. However, the Respondent's inspection fails to note the separate CTIL/O2/Telefonica site.

62. Planning history shows that EE/H3G replaced flagpole and cabinets in 2017 [B3549]. The other planning permissions relate to CTIL in 2015 [B3556] and 2021 [B3570].

63. I find that the Claimant now owns a system of infrastructure which is separate from that owned by CTIL. The Claimant's system is used by its customers EE and H3G who retain ownership of their "shrouded flagpole" antenna and cabinets which are supported by the Claimant's system of infrastructure.

Chessington Cox Lane

64. This site, also known as Chessington Business Centre, comprises 50 offices. The roof space is substantial. Mr Ward deals with site specifics at paragraphs 152-166 of his witness statement [B1590-1595] The Second Respondent has 6 separate parcels of land on the rooftop. There is a separate lease to CTIL. On inspection in 2024 separate EE/H3G and Telefonica sites were noted.

65. The Claimant acquired the site on 26th September 2019. Passive infrastructure was

transferred to the Claimant on 1st January 2020. The Claimant's system of infrastructure can be seen on the plan to the 2014 EE planning application [B3732].

66. This was originally a T Mobile site. There are planning applications for EE in 2014 [B3729] and a further MBNL/EE/H3G application in respect of active ECA (antenna) in 2019. There is a CTIL/Telefonica application in 2014 [B3735], CTIL/O2 in 2019 [B3749] and CTIL/Vodafone in 2020 [B3757].

67. The Claimant owns the passive infrastructure system at this site in succession to T Mobile and EE/H3G. It is an entirely separate system from that operated by CTIL/VF/Telefonica/O2.

Hounslow Staines Road

68. Mr Ward deals with site specifics at paragraphs 167-177 of his witness statement [B1595-1598]. The Claimant acquired its rooftop site on 26th September 2019. Passive infrastructure system was transferred to the Claimant on 1st January 2020.

69. Site inspection in 2024 shows EE active ECA (antenna etc.) on site. This was originally a T Mobile site. The infrastructure system can be seen on the plans to the EE planning application [B3835]. A further planning application was made by the Claimant's parent company, Cellnex, in 2022 to upgrade its customers active ECA.

70. The Claimant owns and operates the passive system of infrastructure at this site.

Liverpool County Road

71. Mr Ward deals with this site at paragraphs 178-195 of his witness statement [B1598-1601]. There are two parcels of land and a separate VF lease. Inspections in 2022 and 2025 showed the Claimant's site at the upper roof level and the VF site at the lower roof level. Clearly both sites are separate.

72. The Claimant acquired the site on 13th May 2020, and the passive infrastructure was transferred to it on 8th July 2020.

73. Mr Ward does not produce planning documents but merely an assortment of plans

[B3985-4008]. However, those plans clearly show the T Mobile system of infrastructure which is now owned by the Claimant and a separate VF/CTIL system.

Birmingham Old Walsall Road

74. Mr Ward deals with this site at paragraphs 196-201 of his witness statement [B1601-1604]. The Claimant acquired its rooftop site on 30th September 2019. Passive infrastructure was transferred to the Claimant on 1st January 2020.

75. Site inspections in 2015 and 2025 showed the presence of EE/H3G antenna and cabinets. Cellnex proposed an upgrade in 2020 [B4099-4101], but the works did not take place.

76. The Claimant owns the infrastructure system originally established by T Mobile. The active equipment at the site (antenna etc.) is operated by the Claimant's customers EE and H3G.

Portsmouth Highland Road

77. Mr Ward deals with this site at paragraphs 210-222 of his witness statement [B1604-1607]. The Claimant acquired its site on 26th September 2019 and passive infrastructure on 1st January 2020.

78. Site inspections in 2019 and 2022 showed EE/H3G antenna and cabinets. This was originally an H3G site. It appears that there was a lift and shift in 2019. The plans prepared at that time [B4260-4264] show the system of infrastructure subsequently acquired by the Claimant in 2020. EE/H3G continue to use the Claimant's infrastructure system for the purposes of their ECA.

Conclusions

79. I find as fact that there is a system of infrastructure at all sites. Ownership of that system of infrastructure passed to the Claimant on 1st January 2000 at all sites except for Birmingham Richard Street and Liverpool County Road where ownership transferred on

8th July 2020. Following those dates EE and H3G no longer own any of the passive infrastructure at the sites. None of the system of infrastructure is owned by the landlords at any of the sites. At sites where other operators (CTIL/O2/VF/Telefonica) have established their own systems of infrastructure those systems are entirely separate to the T Mobile/EE/H3G system of infrastructure now owned by the Claimant. EE/H3G continue to use all sites as the Claimant's customers. EE/H3G attach their active ECA (antenna etc.) to the Claimant's passive infrastructure system at all sites.

80. The Claimant is providing a system of infrastructure at all sites. The Claimant is exercising the rights conferred by the Existing Agreements for statutory purposes.

Ineffective Assignment Issue

81. Preliminary Issue 3 concerns 7 sites - Birmingham Richard Street, Bolton Kirkebrok Road, Bradford Great Horton Road, Chessington Cox Lane, Hounslow Staines Road, Birmingham Old Walsall Road and Portsmouth Highland Road. The Existing Agreements at all 7 sites are licences (AF5a-f and h).

82. The assignments which are said by the Respondent to be ineffective are assignments made between Arqiva Limited (1) and Arqiva Services (2) on the following dates:

- Birmingham Ricard Street - 18th June 2020 [E572-578]
- Bolton Kirkebrok Road – 26th September 2019 [E671-680]
- Bradford Great Horton Road – 30th September 2019 [E758-764]
- Chessington Cox Lane – 26th September 2019 [E967-976]
- Hounslow Staines Road – 26th September 2019 [E1063-1072]
- Birmingham Old Walsall Road – 30th September 2019 [E1263-1283]
- Portsmouth Highland Road – 26th September 2019 [E1352-1361]

83. The Respondent's case is that the assignments at all sites to which Preliminary Issue 3 applies were ineffective to vest the benefit of the agreements in the Claimant. Under those circumstances the Claimant is not a "party to the code agreement" and therefore the

Tribunal has no jurisdiction to order the parties to enter into a new agreement under Part 5 of the Code.

84. This is a particularly difficult issue to follow because the relevant wording is not consistent across all sites. I am therefore particularly grateful to Ms Scofield for her diligent work in preparing colour coded "Key Contractual Provisions". The Key Contractual Provisions are:

- Meaning of "the parties"
- Assignment provisions in the Existing Agreements
- Definition of "Group Company" in the Existing Agreements
- Additional assignment provisions in the Licence to Assign and Vary
- Definition of "Group Company" in the Licence to Assign and Vary

85. To further ease the task of the Tribunal Ms Schofield helpfully divides the sites into 3 Types:

- Type 1 – Birmingham Richard Street
- Type 2 – Bolton Kirkebrok Road and Portsmouth Highland Road
- Type 3 – Bradford Great Horton Road, Chessington Cox Lane, Hounslow Staines Road and Birmingham Old Walsall Road

Type 1 – Birmingham Richard Street

86. The Existing Agreement at Birmingham Richard Street Birmingham is an agreement dated 20 May 2004 between (1) CNC Waterlinks Limited and (2) T-Mobile (UK) Limited, as varied by a Licence to Assign and Vary dated 15 December 2015 between (1) Excell 3 Independent Schools Limited, (2) EE Limited and Hutchison 3G UK Limited, and (3) Arqiva Limited. [AF3b].

87. The particular issue at this site is that any assignment requires consent under clause 10:

10.2. T-Mobile may assign the benefit of this Agreement and any right conferred hereunder to any Group Company with consent from the Owner (such consent not to be unreasonably withheld or delayed).

10.3. T-Mobile may assign the benefit of this Agreement and any right conferred hereunder to any other person subject to obtaining the Owner's prior written consent (such consent not to be unreasonably withheld or delayed).

88. A "consent request" letter was sent by Arqiva Limited to its then landlord, Excell3 Independent Schools Ltd, on 21st February 2020 [E570-571]. No response was received and the Assignment to Arqiva Services Limited took place on 18th June 2020 [E572-578]. The Respondent says that the Assignment was ineffective as it was made without consent.

89. Section 1 of the Landlord and Tenant Act 1988 imposes a duty on a landlord to give consent within a reasonable time. A Ms Schofield rightly submits no such duty arises in the case of the Existing Agreement at Birmingham Richard Street as it is a licence and not a lease.

90. I am told there is no authority on the point. However, I have no difficulty in finding that the assignment was effective. A request was made of the landlord. No reply was received. The assignment took place over 5 years ago and no issue has been raised by Excell3 Independent Schools Ltd or any subsequent landlord. Rent has continued to be demanded, paid and accepted.

91. Consent has clearly been unreasonably withheld and delayed. Under those circumstances the Assignment is effective.

Type 2 – Bolton Kirkebrok Road and Portsmouth Highland Road

92. The discrete issue here is the wording of the definition of "the parties":

"References to the parties include their successors in title and those whose title is derived in any way from theirs."

93. Ms Schofield's submission is that "successors in title" is a term of art which applies to leases. It is an agreed fact that the Existing Agreements for Type 2 sites are licenses. The Respondent's case is that the assignments at Type 2 sites are ineffective because Arqiva Limited cannot, as licensee, be a successor in title.

94. The "General Rule" is that that whilst the benefit of a contractual licence can be assigned the burden cannot be assigned. In **Bexhill UK Limited v Razzaq** [2012] EWCA Civ 1376 at [44] Aikens LJ made it clear that an assignee is the beneficial owner of a chose in action and not a party to the agreement.

95. Both Type 2 sites contain provisions for assignment. Clearly the original contracting parties intended that the Existing Agreements were capable of assignment:

4.9 (Without prejudice to Clause 3.2) not assign let or otherwise part with possession of the whole or any part of the ability to exercise the Rights or share occupation of the whole or any part of the Apparatus except by way of an assignment of the ability to exercise the whole of the Rights to a person taking over H3G's undertaking or to a Group Company

96. I find that the expression "successors in title" in the context of a licence which is assignable must mean an assignee of the benefit of the contractual licence and beneficial owner of the chose in action in respect of the rights granted by the Existing Agreements. The assignments at Type 2 sites are effective.

Type 3 – Bradford Great Horton Road, Chessington Cox Lane, Hounslow Staines Road and Birmingham Old Walsall Road

97. All four Type 3 sites contain provisions in similar terms. Using Chessington Cox Lane as an example, the following Key Contractual Provisions are contained in a Rooftop Agreement between (1) The Accessory People Limited and (2) T Mobile (UK) Limited [E918-932]:

(1) By clause 1.1 the term "Group Company" is defined as: "*any company which is for the*

time being a subsidiary of T-Mobile or the holding company of T-Mobile or another subsidiary of the holding company of T-Mobile in each case within the meaning of section 736 of the Companies Act 1985 as amended by the companies Act 1989". [E920]

(2) By clause 1.3, "*References in this Agreement to "the Owner" and "T-Mobile" or any third party shall include where appropriate their respective employees, agents, independent contractors, successors and permitted assigns*". [E921]

(3) Clause 9.1 provides: "*T-Mobile may assign the benefit of this Agreement and any right conferred hereunder to any Group Company without any requirement to obtain consent from the Owner*". [E925]

(4) Clause 9.2 provides "*T-Mobile may assign the benefit of this Agreement and any right conferred hereunder to any other person to whom the code has been applied subject to obtaining the Owner's consent (such consent not to be unreasonably withheld or delayed)".* [E925]

98. The Claimant's case is that the definition of Group Company in clause 1.1 should not be limited to subsidiaries of T Mobile only but, in accordance with clause 1.3, include group companies of "*successors and permitted assigns*". A broad reading of clause 1.1. means that the assignments from Arqiva Limited to Arqiva Services Limited were effective without any requirement to obtain consent from the Owner under clause 9.1 because it is an Agreed Fact that between 6 April 2016 and 8 July 2020, Arqiva Limited and Arqiva Services were each subsidiaries of Arqiva Holdings Limited, within the meaning of section 736 of the Companies Act 1985 (as amended by the Companies Act 1989) and within the meaning of s.1159 Companies Act 2006 [AF11].

99. Ms Schofield submits that the definition of "Group Company" should be confined to T Mobile itself. On that narrow reading clause 9.1 should be construed so that only T Mobile that can assign to group companies. Under those circumstances the assignments from Arqiva Limited to Arqiva Services Limited were impermissible under clause 9.1 and ineffective under clause 9.2 in the absence of Owner's consent.

100. Clause 1.3 provides for the broader definition of "Group Company" to apply "*where appropriate*". Ms Schofield and Mr Watkin refer, in their Skeleton Argument to the decision of Millett J in **Johnsey Estate v Webb** [1990] 1 EGLR. I am not persuaded that authority, which considers "where the context so admits" is of assistance. The Court of Appeal in **Parkside Clubs (Nottingham) Ltd v Armgrade Ltd** [1995] EGLR 96 CA took a rather different approach when considering the expression "where appropriate". In that case Legatt LJ said:

"The lease stipulates at the outset that the appellants are to be called the "Tenant" and that the expression shall, where appropriate, include successors in title and assigns. For my part, I cannot see how, in default of rectification, the term can then be construed as meaning something else, at any rate unless in context it would be absurd to treat it as referring to the actual tenant."

The decision in Parkside Clubs is persuasive as it is authority in respect of the exact wording use at Type 3 sites – "*where appropriate*".

101. The difficulty with the Respondent's argument is that the Respondent seeks to apply clause 1.3 inconsistently. The Respondent argues that in respect of clause 9 assignment only the narrow meaning of "Group Company" should apply whilst accepting that in respect of the grant of rights under clause 2.1 the broader meaning of "Group Company" applies. I follow what was said by the Court of Appeal in **Parkside Clubs**. The term "Group Company" includes "successors and permitted assigns" and cannot be construed as meaning anything else unless in context it would be absurd to do so.

102. The commercial context supports the Claimant's broader reading of "Group Company" and explains why it is "appropriate" to extend that definition to include "successors and permitted assigns". At paragraph 12 of his Witness Statement Andrew Fricker explains:

"*For many years, it has been common in the telecoms industry for sites and their infrastructure to be transferred between operators, often on multiple occasions. In particular, there has been a trend for sites and passive infrastructure to be transferred by MNOs to wholesale infrastructure providers. Such transfers can be of individual sites but, more often, involve portfolios of hundreds, or even thousands, of sites. The Sites were all transferred as part of a "block" transfer programme.*" [B292]

In that context T Mobile would require considerable operational flexibility in respect of block transfers. From the landlord's point of view the commercial reality is that a landlord would not wish to be troubled by intra-group transfers.

103. I find that in respect of Type 3 Existing Agreements assignment is permitted by T Mobile and its successors and permitted assigns to any Group Company without any requirement to obtain consent. As all Type 3 assignments from Arqiva Limited to Arqiva Services Limited were completed prior to 8th July 2020 both parties were group companies at the relevant time. The Type 3 assignments are therefore effective.

Licence to Assign and Vary

104. At paragraphs 77 and 78 of his witness statement Andrew Fricker explains that under the 2008 Framework Agreement EE and H3G had the right to call for sites to be transferred back to them. This required every assignment to be accompanied by a Deed of Variation expressly adding a right to reassign to EE and H3G without consent:

77.Under the provisions of paragraph 10.20.1 of Schedule 4 to the 2008 Framework Agreement, EE and H3G had a right to call for the site to be transferred back to them if the Arqiva Provider was unable to agree to a renewal of a site with a Site Provider or if EE and H3G had to perform any of the grantee's, tenant's or licensee's covenants in the Site Provider Agreement. This provision gave EE and H3G the protection it needed for its network in the unlikely event that the Arqiva Provider decided not to continue providing the site to EE and H3G.

78. In order to ensure that there was no restriction or prohibition in the Occupational Agreement to effect this reassignment, EE and H3G required, and Arqiva agreed, that an additional clause would be inserted into every assigned Occupational Agreement granting the right to re-assign the Occupational Agreement without obtaining prior consent. The parties agreed that this would be the most effective way to operate a large-scale programme to assign 1,000s of sites, rather than undertaking due diligence on every single site to confirm whether the rights already existed in the relevant Occupational Agreement. Hence, regardless of the alienation provisions in the

Occupational Agreements, every assignment was to be accompanied by a deed of variation that expressly added the right to re-assign to EE and/or H3G without consent. Where such provisions were not included, this was where landlords who were party to the Occupational Agreement asked for the wording to be removed as it was clear from the existing wording in the Occupational Agreement that such rights already existed. Arqiva did not undertake such due diligence itself. I confirm that the variations were not intended to negate, override, or restrict the existing alienation provisions in the Occupational Agreements, but simply to confirm or add rights in the unlikely event that they were ever needed. [B306]

[Note: A Licence to Assign and Vary was entered into at all sites to which Preliminary Issue 3 applies except Birmingham Richard Street]

105. By way of example the Licence to Assign and Vary for Chessington Cox Lane was made on 18th December 2013 between Chessington Business Centre Limited ("the Owner") (1) EE and H3G ("the Assignor") (2) and Arqiva Limited ("the Assignee") (3) [E953-960] provides at clause 4 that:

"…with effect from the Assignment Date the Agreement shall be read and interpreted as if it incorporates the provisions set out in Schedule 1 whether or not such provisions form part of the terms of the Agreement and in the case of any inconsistency between the terms of the Agreement and the provisions of Schedule 1 the provisions of Schedule 1 shall prevail"

106. The two relevant provisions of Schedule 1 – Variations to the Agreement are:

1.1 "Group Company" means a company which is a member of the same group of companies as EE and/or H3G within the meaning of section 42 of the Landlord and Tenant Act 1954

1.2 Arqiva shall be entitled to:

1.2.2 reassign all its estate and interest in the Agreement to EE and/or H3G or any person or company or other legal entity who or which may from time to time be the

successor of EE and/or H3G in the establishment and running of the EE and/or H3G's wireless telecommunications networks or shall be a Group Company of EE or H3G

107. For the purposes of Preliminary Issue 3 the Licence to Assign and Vary is of limited relevance. The Claimant does not rely on the reassignment provisions in clause 1.2.2 of Schedule 2. However, reading clause 4 of the Licence together with clause 1.1 of Schedule 1, it seems to me that the relevant test for "Group Company" as at the date of the Assignments from Arqiva Limited (1) to Arqiva Services (2) Limited must be that contained in section 42 of the Landlord and Tenant Act 1954. AF 11 only deals with the meaning of subsidiaries within the meaning of section 736 of the Companies Act 1985. Under those circumstances, and at my request, the parties have, by email dated 9th December 2025, further agreed that:

"Arqiva Limited and Arqiva Services Limited were both subsidiaries of Arqiva Holdings Limited at the times of the relevant assignments and therefore come within section 42 of the 1954 Act"

[Note: as no Licence to Assign and Vary entered into at Birmingham Richard Steet the section 736 Companies Act definition of a group company still applies at that site.]

108. The variation in respect of "Group Company" only refers to EE and H3G. This gives rise to the same issue discussed under Type 3 above. Again, the problem is solved, from the Claimants point of view, by clause 1.3 of the Existing Agreements which remain unaffected by the Licence to Assign and Vary:

References in this Agreement to "the Owner" and "T-Mobile" or any third party shall include where appropriate their respective employees, agents, independent contractors, successors and permitted assigns

As Mr Lees was quick to point out T Mobile is in fact the previous name of EE. This, of course, rather supports Mr Lees submissions on interpretation. In any event the definition of Group Company in the Licence to Assign and Vary as meaning EE clearly cause no problems. The reference to H3G is covered by "any third party" and therefore includes the successors and permitted assigns of H3G for the reasons I have given in respect of Type 3

sites.

109. The assignments of the Existing Agreements at Birmingham Richard Street, Bolton Kirkebrok Road, Bradford Great Horton Road, Chessington Cox Lane, Hounslow Staines Road, Birmingham Old Walsall Road and Portsmouth Highland Road are effective.

Ineffective Deed of Covenant Issue

110. I am bound by the judgement of Fancourt J in **AP Wireless II (UK) Ltd v On Tower UK Ltd** [2024] UKUT 429. At [92], Fancourt J said:

'A better interpretation of who falls to be treated as a party to a code agreement is in my judgement that a lawful assignee who has assumed the primary responsibility for performing the obligations in the licence agreement will be the operator who is a party to the code agreement. That could be pursuant to a multi-partite deed by which the licensor permitted the assignment, or a unilateral deed of covenant with the site provider made by the assignee, or it could be a covenant or agreement made by the assignee with the assignor to perform the obligations in the licence agreement. Any of these have the effect of placing the burden of the obligations in the licence agreement on the assignee, so that, as between them, the assignee is standing in the shoes of the assignor'.

111. The Respondent seeks to preserve its position pending appeal against the decision of the decision of Fancourt J (CA-2025-000538) listed for hearing on 13 January 2026. However, Mr Watkin concedes that on the present state of the law, OTUK has done what is necessary to render itself a 'party to a code agreement'.

112. I find, as I am bound to do, that the Claimant has stepped into the shoes of the assignor and is to be treated as a party to the Existing Agreements at the 8 sites to which Preliminary Issue 4 applies.

ADR Notice Issue

113. I have previously considered this issue on three previous occasions: **Patricroft** - On Tower (UK) Limited and another v APW Wireless II (UK) Limited (LC – 2023 – 000852), **Equipoint** – EE Limited and Hutchison 3G UK Limited v APW Wireless II (UK) Limited (LC – 2024 – 000563) and **Crownland Hall Farm** – EE Limited and Hutchison 3G UK Limited v APW Wireless II (UK) Limited (BIR/00CN/ECR/2024/0623 and others).

114. The ADR Notice Issue was heard, on appeal, by the Chamber President on 2nd and 3rd December 2025 in **Equipoint** (LC-2025-000202). In light of the pending decision of the Upper Tribunal and despite Mr Watkins eloquent submissions I determine this issue on the same basis as in **Crownland Hall Farm**. My detailed determination on this issue is set out at paragraphs 45-60 of that decision. For present purposes, pending the determination of the Upper Tribunal a summary will suffice:

(1) Section 69 of the Product Security and Telecommunications Infrastructure Act 2022 ("the 2022 Act") came into force on 7th November 2023. OFCOM prescribed form of notice changed at that time to include information about ADR.

(2) The notices at Birmingham Richard Street, Liverpool County Road, Birmingham Old Walsall Road and Portsmouth Highland Road do not contain the prescribed information in respect of ADR that applied after 7th November 2023. 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 33 after 7th November 2023 reliant on valid Notices served prior to that date.

(3) The 2022 Act also introduced changes to Paragraph 33 and in particular Paragraph 33 (3A). Nowhere in the 2022 Act is it suggested that all pre-existing notices are invalid. Clear wording is required for a statute to have retrospective effect (see **Lipton and another v BA Cityflyer Ltd** [2024] UKSC 24). The 2022 Act does not alter the legal consequences of Code Notices served before it came into force. I therefore find that the Claimants are able to rely on Notices served prior to November 2023 when making application to the Tribunal after that date.

(4) Paragraph 33 is drafted without expressly spelling out the consequences of non-compliance. There is no bright line. **A1 Properties (Sunderland) Limited v**

Tudor Studios RTM Co. Limited [2024] UKSC 27 sets out the approach to be taken where there is no express statement of consequences of non-compliance

(5) Subparagraphs 33(6) and (7) of the Code are relevant. The requirement to consider ADR at the point of application and the option for the other party to serve a notice if it wishes to engage in ADR both point firmly to the conclusion that the consequence of a non-compliant Notice is not invalidity. The presence of safeguards within Paragraph 33 itself leads to the conclusion that failure to comply with Paragraph 33(3A) does not preclude application to the Tribunal under Paragraph 33 (5).

(6) The Respondent has not suffered any prejudice. Provisions concerning ADR are contained in in FTT Rule 4. The most recent version of the OFCOM Code of Practice specifically deals with resolving disputes and the role of ADR. The Respondent is well aware of ADR and the consequences of failing to engage.

(7) The suggestion that it would be easy for the Claimants to start again and serve new Notices, did not find favour with Supreme Court in **A1 Properties** and would simply lead to "*unwarranted opportunities for obstruction*".

115. The notices at Birmingham Richard Street, Liverpool County Road, Birmingham Old Walsall Road and Portsmouth Highland Road are all valid notices under Paragraph 33 of the Code.

HOTs Notice Issue

116. Paragraph 33 of the Code provides:

(2) The notice must—
[…]
(c) set out details of—
(i) the proposed modified terms,
(ii) the code right it is proposed should no longer be conferred by or otherwise bind the site provider,
(iii) the proposed additional code right, or
(iv) the proposed terms of the new agreement,
(as the case may be).

117. The Prescribed OFCOM Paragraph 33 Notice contains the following relevant clauses 5 and 6:

THE CHANGE WE ARE REQUESTING

5. We are asking you to agree, from the date set out in paragraph 6 below, that:
(a. – c. deleted)
d. the Agreement should be terminated and a new agreement should have effect between us on the terms set out in Annex 1.

6. The day from which we propose that:
(a. – c. deleted)
d. the Agreement should be terminated, and from which the new agreement set out in Annex 1 should have effect
is 7 November 2024

118. It is agreed that the Notices at all Sites have annexed Heads of Terms (HOTs) and a sample lease marked "for information only" except for Birmingham Richard Street which has only HOTs annexed. The Respondent's case is that HOTs are insufficient. What must be attached is "*an agreement which is capable of acceptance by the site provider or imposition by the Tribunal*" (See Respondent Skeleton Argument at paragraph 72).

119. By way of example the Paragraph 33 Notice at Birmingham Eathorpe Close is at [D47-54]. HOTs are at [D47-54]. It is entirely standard practice in all commercial sales and lettings for the parties' respective surveyors to agree HOTs which once agreed are sent to the lawyers for preparation of an engrossment of the lease for execution. HOTs attached to the Notice are detailed and run to 29 items over 7 pages. In many cases notices will be served upon site owners who are unrepresented. They will find HOTs to be, in Mr Lees' words, "more digestible" than the legalese of a formal lease. HOTs are standard commercial practice, and I can see no objection to them whatsoever.

120. The sample lease comes with a warning in red on the coversheet:

PLEASE NOTE THAT THIS A SAMPLE LEASE ONLY AND IS SHOWN FOR

INFORMATION ONLY TO DEMONSTRATE ON TOWER UK LIMITED'S STANDARD TERMS FOR A LEASE FOR ELECTRONIC COMMUNICATIONS PURSUANT TO THE ENACTMENT OF THE DIGITAL ECONOMY ACT 2017.

Note that this is amended to reflect the legal language in Scotland and for different types of sites (e.g. Rooftops, Greenfields or Pylons)

121. The sample lease can best be described as unhelpful and wholly inapplicable to these rooftop sites.

122. Paragraph 33 requires "*proposed terms of the new agreement*". That cannot sensibly be described as anything other than what any surveyor and commercial conveyancer would recognise at HOTs. The same wording is used at paragraph 5 of the OFCOM notice. However, Paragraph 6 of the OFCOM notice refers to "*the new agreement set out in Annex 1*". I can only conclude that paragraph 6 is simply wrong. It is inconsistent with the wording of the preceding paragraph 5 and with the statutory wording of Paragraph 33.

123. The paragraph 33 notices at all sites satisfy the requirements of paragraph 33. It is sufficient that HOTs are annexed for all sites.

Stale Notice Issue

124. Mr Watkin has helpfully indicated that the Respondent only pursues Preliminary Issue 7 in relation to Birmingham Richard Street. The Respondent no longer wishes to proceed with this issue in respect of Birmingham Old Walsall Road or Portsmouth Highland Road.

125. I have previously considered the Stale Notice Issue in respect of a site at **Burchett's Green** which formed part of the **Lupton Road** decision issued on 8th August 2025. Permission to appeal was refused by the Deputy Chamber President on 22nd October 2025 (LC-2025-000628).

126. My decision in Burchett's Green can be summarised as follows:

(1) **Icebird Ltd v Winegardner** [2009] UKPC 24 and the "warehousing claims" (**Asturion Foundation v Alibrahim** [2020] 1 WLR 1627) apply to striking out an action for want of prosecution and are applicable only once proceedings have been commenced.

(2) Stale Notice Claims fall under **Collin v Duke of Westminster** [1985] QB 581. Although **Collin** concerned the statutory contract arising under the Leasehold Reform Act 1967, **Collin** is authority for the proposition that to strike out a "stale" notice either the notice must have been abandoned, or the Claimant estopped from relying on the notice.

(3) The Tribunal's power to strike out proceedings as an abuse of process is contained in FTT Rule 9(3)(d)

(4) Abuse of process is fact sensitive. Each case must be confined to its own facts.

127. The site at Birmingham Richard Street is held under an agreement dated 20 May 2004 made between (1) CNC Waterlinks Limited and (2) T-Mobile (UK) Limited [E522-540], as varied by a Licence to Assign and Vary dated 15 December 2015 made between (1) Excell 3 Independent Schools Limited, (2) EE Limited and Hutchison 3G UK Limited, and (3) Arqiva Limited [E555-562] [AF3b]. The agreement was for a term of 15 years from 20th May 2004 and expired on 19th May 2019. On 17th October 2019 Arqiva Limited served a Notice under Paragraph 33 of the Code on Excell 3 Independent Schools Limited [D79-108].

128. Neither the Claimant nor the Respondent had any interest in the site as at the date of service of the Notice. The Claimant acquired its interest by way of assignment on 18th June 2020 [E572-578]. The Respondent acquired its leasehold interest of the main roof level by way of a lease dated 18th March 2021 [E584-615]. The Respondent's leasehold interest is registered under Tille Number MM154844 [E519-521].

129. From Tribunal records I am able to establish that the reference was received, along with others, on 25th April 2025. The period of time elapsing between issuing the Notice on 17th October 2019 and issuing the reference on 25th April 2025 was 5½ years.

130. The Claimant took no action in respect of the Notice until 18th October 2024 [B2653] when it issued a generic draft rooftop lease to the Respondent. This was an entirely generic email headed "Rooftop sites in England" [B2652]. On 31st October 2025 the Respondent asked

for site specific details and valuations [B2653]. The Claimant did not provide its valuation (£5,000 p.a.) until 26th February 2025 [B2654]. As indicated above the reference was issued on 25th April 2025. My finding is that the Claimant took no action in respect of the Notice for 5 years. I further find as fact that delay is wholly unexplained.

131. Mr Ward gave evidence that the Claimant has served code notices at 258 sites owned by the Respondent. Proceedings have only been issued at 92 sites (36%) (see paragraph 75 of Mr Ward's Witness Statement at [B1573]). Historically the Respondent undertook investigations on receipt of notices and in particular incurred the expense of instructing surveyors to assess valuation and alternative use. The present position is that the Respondent does not "allocate resources" unless it receives a letter before action ("LBA") or a reference is issued.

132. The Respondent's case is that, as the Notice was served on a predecessor in title, it was unaware of its existence. Following receipt of the Claimant's email of 18th October 2024, the Respondent replied on 23rd October 2024 "*We cannot find notices for the following sites that have been referenced in your recent LBA's*" [SB483]. I therefore find that although this is an historic matter the Respondent did not incur expenses of instructing an external surveyor. As the Respondent was unaware of the existence of the Notice until October 2024 it clearly cannot have suffered any prejudice either financial or otherwise.

133. Mr Ward was asked under cross examination by Mr Lees whether or not he thought the Notice had been abandoned. Mr Ward did not know. However, as a matter of law abandonment is an objective matter and not a matter of opinion for a witness.

134. Mr Ward was also asked about another matter which has been a recurrent theme in proceedings between these parties. The driver behind the Respondent's resistance to renewal under Paragraph 33 is financial. The Respondent derives substantial revenue from its income stream of rents from telecoms sites. Existing market rents are well in excess of the likely rent to be determined under the Code. Mr Ward conceded that during the delay of 5 ½ years the Respondent has received "*a higher rent for longer*". My finding is that not only has the Respondent not been prejudiced by the existence of a Notice of which it was unaware it has in fact benefited financially from the Claimant's delay.

135. The Code is a species of compulsory purchase. However, the Code provides two substantial safeguards for the Respondent. Firstly, at any time after expiry of the

agreement on 19th May 2019 the Respondent (or its predecessor in title) could have served a Notice under Paragraph 31 of the Code to bring the agreement to an end on the following grounds:

(a) that the code agreement ought to come to an end as a result of substantial breaches by the operator of its obligations under the agreement;
(b) that the code agreement ought to come to an end because of persistent delays by the operator in making payments to the site provider under the agreement;
(c) that the site provider intends to redevelop all or part of the land to which the code agreement relates, or any neighbouring land, and could not reasonably do so unless the code agreement comes to an end;
(d) that the operator is not entitled to the code agreement because the test under paragraph 21 for the imposition of the agreement on the site provider is not met.

Secondly the Respondent could itself have served a Notice under Paragraph 33 to require a change to the terms of an agreement which has expired. The Respondent could have served either a Paragraph 31 or 33 Notice entirely independently of the Claimant's Notice. It has chosen not to do so.

136. Mr Watkin raises a number of arguments which I will address in turn:

(1) The Respondent has been "bounced" into proceedings and been deprived of the 6 month period under Paragraph 33(4) and (5) to engage in negotiations
(2) As a species of compulsory purchase proceedings under the Code must be commenced within a reasonable time.
(3) Abandonment can be inferred from the Claimant's unexplained delay.
(4) The Tribunal's power to make an order under Paragraph 34 is discretionary. It would be unfair and inappropriate in all the circumstances to grant the Claimant the relief it seeks.
(5) Abuse of process

Respondent "bounced" into proceedings

137. I proceed on the assumption that the Respondent having requested a copy of the Notice on 23rd October 2025 a copy was supplied forthwith. Accordingly, when the Claimant

issued the reference on 25th April 2025 the Respondent had possession of a copy of the Notice for a period of 6 months. The Respondent rightly criticises the Claimant's failure to engage. However, the Respondent is equally complicit. The Respondent could "at any time" have served a notice under Paragraph 33(7) that it wished to engage in ADR. The Respondent has raised a raft of Preliminary Issues. It should have responded to the Notice and put the Claimant on notice of those jurisdictional hurdles. The Respondent should have engaged with the draft rooftop terms and proposed such site specific terms as it thought appropriate. The Respondent is best placed to know if there is any alternative use value for the site. It should actively put forward its position on consideration rather than waiting for the Claimant to make the first move.

138. Both parties are significant players in the telecoms market, they are sophisticated litigators and have deep pockets. I am not persuaded that the Respondent has been "bounced" into these proceedings.

Reasonable time

139. In **Grice and another v Dudley Corporation** [1957] Ch. 329 Upjohn J, as he then was, said at [339]:

"In my judgment, however, the authorities to which I shall shortly refer establish the following propositions: first, the promoter exercising statutory powers must proceed to enforce his notice in what, in all the circumstances of the case, is a reasonable period. If he sleeps on his rights he will be barred if his delay is not explained. If it is explained, he will be allowed to enforce the notice providing it is equitable that he should do so in all the circumstances of the case. However, the oppression upon the owner of land in respect of which a notice to treat has been given cannot be wholly disregarded, however sound the reason for not proceeding to enforce it. Secondly, the promoter may evince an intention to abandon his rights given to him by the notice to treat, in which case the owner is entitled to treat those rights as abandoned. Thirdly, this court has an inherent jurisdiction to control the exercise of statutory powers if, but only if, it can see that the powers are being exercised not in accordance with the purpose for which the powers were conferred"

140. Upjohn LJ, as he became, considered the matter again in **Simpsons Motor Sales (London) Ltd v Hendon Corporation** [1962] Ch. 57. At [82] Upjohn LJ repeated:

"First, when a notice to treat has been served, it is the duty of the acquiring authority to proceed to acquire the land within a reasonable time."

Further at [83]:

"Of course, the delay may be such that it is itself evidence of abandonment without more, but that is more conveniently dealt with under the heading of delay mentioned above.

On the other hand, delay is nearly always, though not necessarily, an element in a finding of abandonment: see for example Grice's case, where it was pointed out how these various heads of principle tend to merge in practice"

141. The code is a variety of compulsory purchase. However, that does not mean that concepts of compulsory purchase are to be imported slavishly into the Code. As was said, in the context of importing 1954 Act concepts into the Code, in **EE Limited and Hutchinson 3G UK Limited v Sir James Chichester and others as Trustees of the 1968 Combined Trust of Meyrick Estate Management** [2019] UKUT 164 (LC) at [38]:

"Clearly the Code, new as it is, must be looked at with a clean slate and as a fresh start. The principles applicable to … should be adopted where they are relevant, although we are mindful of the need to be aware of the different context in Code cases"

Simialrly in **Vodafone Limited v Icon Tower Infrastructure Limited (1) and AP Wireless II (UK) Limited** [2025] UKUT 00058 (LC) at [233] the Chamber President said:

Applying this approach, it seems to us that it is legitimate to consider authorities on … subject to keeping in mind that the principles … should only be adopted where they are relevant

142. I am not persuaded that the principles in **Grice's** case are relevant to the Stale Notice Issue. Upjohn LJ was concerned about the acquiring authority sitting on its rights and deferring enforcement to the financial detriment of the landowner. As he observed:

"*How much more unfair it is today in an age of rapidly increasing land values!*"

Of course, the reverse applies under the Code. As Mr Ward observed, delay by the Claimant means that the Respondent gets "*a higher rent for longer*".

143. In **Dalkeith Farm** and **Thackley Football Club** (LC-2025-360/3rd October 2025) the Deputy Chamber President refused permission to appeal against my decision not to imply a requirement to the effect that an application must be made within a reasonable time after the giving of notice under the slightly differently worded provisions of Paragraph 20.

144. The Code does not set out a time limit for an application to the Tribunal under Paragraph 33(5) save that an application cannot be made until *"after the end of the period of 6 months beginning with the day on which the notice is given*" as set out in Paragraph 33(4). Parliament did not consider it necessary to impose a "reasonable time" requirement and it is not necessary, for the proper working of the Code, for me to imply a term, or to interpret paragraph 33, to the effect that an application must be made within a reasonable time after the giving of notice.

Abandonment

145. **Simpsons Motor Sales** went on appeal to the House of Lords [1964] AC 1088. Upjohn LJ's analysis was adopted as is shown in the headnote at [1090]

(2) Though delay on the part of an acquiring authority might disentitle them to proceed upon a notice to treat, this authority, in the circumstances, were not guilty of such inanition or procrastination as would disentitle them from proceeding to enforce the notice (post, 1122).

(3) Though an intention to abandon a notice to treat might invalidate the notice, there was nothing here which could fairly amount to an abandonment by the authority of their rights under the compulsory purchase order

146. In the circumstances of the present reference abandonment is based solely on delay. There is no positive act by the Claimant which the Respondent says amounts to abandonment. The is nothing in the facts of the present reference which could fairly amount to abandonment of the Notice by the Claimant.

Discretion

147. In Re ***Edwardian Group Ltd*** [2018] EWHC 1715 (Ch) Fancourt J observed:

"If, in view of the delay and the reasons for the delay, it is unfair or inappropriate in all the circumstances for the Petitioners to obtain the relief that they seek, the Court will exercise its discretion to refuse it."

Mr Watkin argues that if no reasonable Tribunal, properly applying the law, would say that it is fair to grant relief then it is permissible to strike out the claim in advance of trial.

148. The present reference is very far removed from an unfair prejudice petition under the Companies Act. The Claimant is on site and paying rent. The Respondent has not served a Paragraph 31 notice to terminate the existing agreement. Subject to the Claimant surmounting the various jurisdictional hurdles put in its way renewal is not disputed. On the facts before me at the moment it is neither unfair nor inappropriate to grant the Claimant the Order it seeks under Paragraph 34 of the Code.

Abuse of Process

149. The doctrine of abuse of process exists "*to protect the process of the court from abuse and the defendant from oppression*" **Johnson v Gore Wood & Co. (a firm)** [2002] 2 AC 1. Mr Watkin also refers me to **Hunter v Chief Constable of the West Midlands** [1982] A.C. 529:

"...misuse of [the court's] procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people."

150. The complaint by the Respondent is delay. The Notice was neither served by, nor on, the parties to the reference, neither of whom had acquired their respective leasehold interests as at the date of the Notice. The delay is 5 years and 6 months. It is wholly unexplained. However, the Respondent has not suffered any prejudice. It was unaware of the Notice until 6 months prior to the issue of the Reference. The Respondent has benefited from "a *higher rent for longer*". The Respondent could have issued its own notices under paragraphs 31 and 33 but has chosen not to. Prior to issue of the reference the Respondent was supplied with draft rooftop lease and informed of the proposed rent of £5,000 p.a. The Respondent could have served a notice to engage in ADR under Paragraph 33(7) but has not done so. There has been no oppression of the Respondent. The Claimant has not acted in a way which amounts to an abuse of process of the Tribunal under FTT Rule 9(3)(d).

151. Issuing the reference in Birmingham Richard Street in reliance on the Notice dated 17th October 2019 is not an abuse of process.

Decision

152. The Claimant is exercising the rights conferred by the Existing Agreements for the 'statutory purposes'.

153. The assignments of the Existing Agreements at Birmingham Richard Street, Bolton Kirkebrok Road, Bradford Great Horton Road, Chessington Cox Lane, Hounslow Staines Road, Birmingham Old Walsall Road and Portsmouth Highland Road are effective.

154. The Claimant has stepped into the shoes of the assignor and is to be treated as a party to the Existing Agreements at the 8 sites to which Preliminary Issue 4 applies.

155. The notices at Birmingham Richard Street, Liverpool County Road, Birmingham Old Walsall Road and Portsmouth Highland Road are all valid notices under Paragraph 33 of the Code.

156. The paragraph 33 notices at all sites satisfy the requirements of paragraph 33. It is sufficient that HOTs are annexed for all sites.

157. Issuing the reference in Birmingham Richard Street in reliance on the Notice dated 17th October 2019 is not an abuse of process.

D Jackson
Judge of the First-tier Tribunal

Either party may appeal this Decision to the Upper Tribunal (Lands Chamber) but must first apply to the First-tier Tribunal for permission. Any application for permission must be in writing, stating grounds relied upon, and be received by the First-tier Tribunal no later than 28 days after the Tribunal sends its written reasons for the Decision to the party seeking permission.

Schedule of Sites

Birmingham Eathorpe Close – BIR/00CN/ECR/2025/0645
Eathorpe Close, Shard End, Birmingham, B34 7RN

Birmingham Richard Street – BIR/00CN/ECR/2025/0646
Waterlinks House, Richard Street, Birmingham B7 4AA

Bolton Kirkebrok Road – BIR/00CN/ECR/2025/0647
Stanley Wharf Mill, Kirkebrok Road, Bolton, BL3 4JE

Bradford Great Horton Road – BIR/00CN/ECR/2025/0648
Ali Baba Furniture, 586A Great Horton Road, Bradford BD7 3EU

Bury St Edmunds Cornhill – BIR/00CN/ECR/2025/0649
3 Cornhill, Cornhill, Bury St. Edmunds, IP33 1BE

Chessington Cox Lane – BIR/00CN/ECR/2025/0650

Accessory House, Cox Lane, Chessington, Surrey, KT9 1SD

Hounslow Staines Road – BIR/00CN/ECR/2025/0651
15-21 Staines Road, Hounslow, West London, TW3 3HR

Liverpool County Road – BIR/00CN/ECR/2025/0652
Graphical Paper & Media Union, 254-256 County Road, Walton,
Liverpool L4 5PW

Birmingham Old Walsall Road – BIR/00CN/ECR/2025/0661
G & G Manufacturing Limited, Hampstead Industrial Estate, Old Walsall Road,
Birmingham B42 1EA

Portsmouth Highland Road – BIR/00CN/ECR/2025/0662
West Court, Highland Road, Eastney, Portsmouth PO4 9SL