FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LC-2024-000475**
Property	**:**	**Cheam Leisure Centre/Malden Road Baths, Maldon Road, Sutton, London, SM3 8EP**
Claimants (Operators)	**:**	**(1) EE Limited (2) Hutchison 3G UK Limited**
Representative	**:**	**Winckworth Sherwood LLP**
Respondent (Site Provider)	**:**	**Mayor and Burgesses of the London Borough of Sutton**
Representative	**:**	**Freeths LLP**
Type of Application	**:**	**Electronic Communications Code**
Date of Decision	**:**	**5 February 2026**

DECISION ON PRELIMINARY ISSUE and DIRECTIONS

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1. A Case Management Hearing took place on 3 February 2026 to consider as a preliminary issue whether it has jurisdiction to determine the reference.

2. The Respondent's position is that it does not object in principle to the continued presence of the operators ECA on the roof of its building but cannot confer the code rights sought under the Proposed Code Agreement for two principal reasons.

3. First, it was not the occupier of all the land over which Code rights were purported to have been conferred by the Existing Code Agreement. Consequently, some of the rights granted were not code rights. The non-code rights are not therefore a subsisting agreement under the Transitional Provisions and cannot be varied under Part 5.

4. Secondly the Respondent is not the occupier of the land or at least significant parts of the land, over which code rights are sought under the Proposed Code Agreement.

5. There is also a subsidiary challenge to extended rights sought in the Proposed Code Agreement over those contained in the Existing Code Agreement. The Respondent argues they are too extensive to be considered under Part 5 and should have been sought as new rights under Part 4.

6. For these reasons the Respondent argues it cannot be compelled to enter into an agreement under Part 5 and the claim should be struck out.

7. To unpick the jurisdictional challenge, it is necessary to consider the history of the telecom's leases on this site, the Respondent's other dealings and the chronology of the proceedings.

<u>The telecoms leases</u>

8. The telecoms apparatus (ECA) situated on and above the roof of the Respondent's leisure centre building at Maldon Road Sutton has been there since 1992 pursuant to a succession of leases granted by the Respondent as follows:

    a. Lease 22 October 1992, for a term on 10 years, between (1) the Respondent and (2) Mercury Personal Communications Limited (and others) as varied by Deed dated 6 August 1999 to permit further installations shown on the drawings attached. ("the 1992 Lease")

    b. Lease 12 June 2003, for a term of 10 years from 22 Oct 2002, between (1) the Respondent and (2) T-Mobile (UK) Ltd. There is a supplemental licence agreement dated 3 April 2009. ("the 2003 Lease")

    c. Lease dated 29 December 2014, for a term commencing on 29 December 2014 and expiring on 21 October 2022, as varied by Deed dated 13 December 2019 ("the 2014 Lease")

<u>Proceedings</u>

9. On 26 July 2022 the Claimants' agent served a p33 notice on the Respondent with a proposed form of agreement ("the Proposed Code Agreement"). Over the next two years terms were broadly agreed subject to a few points. The Claimant issued these proceedings on 11 July 2024 while negotiations continued.

10. On 30 September 2024, the Respondent filed its statement of case which disclosed for the first time the existence of a lease of the entire leisure centre site granted by the Respondent on 4 April 2011 to Sports and Leisure Management Limited for a term expiring on 31 March 2026 (the "Leisure Centre Lease"). The jurisdictional issue, which the Respondent states is a consequence of granting this lease, is raised for the first time in the statement of case with the Respondent threatening in correspondence to seek an order striking out the claim.

11. The threat was not actioned. Instead, correspondence between the parties continued, securing a succession of agreed stays throughout 2025 while negotiations on the proposed agreement continued. The final request, made by the Respondent on 11 November 2025, was not supported by the Claimants who appeared from the correspondence frustrated by the continued delays. As the obstacle to progress appeared to be the jurisdictional challenge the Tribunal listed that issue for determination as a preliminary issue.

12. That brings us to the status and effect of the Leisure Centre Lease on the 2014 Lease and the Part 5 reference.

<u>The 2011 Leisure Centre Lease and status of the 2014 Lease</u>

13. Skirting any explanation of its failure to disclose the existence of the Leisure Centre Lease (which has never been registered) until September 2025, the Respondent simply argues that on its terms the Leisure Centre Lease demises the Building including the Roof (but not the air space above) and surrounding land to the tenant. Therefore, the Respondent was not the occupier of the roof or surrounding land over which code rights were purportedly granted in 2014. Consequently, the rights (other than those in the air space) were not code rights and could not have been a subsisting agreement under the Transitional Provisions. Therefore, the Tribunal has no jurisdiction under Part 5 to order the Respondent to enter into a new agreement in respect of those rights.

14. The Respondent accepts that the 2014 Lease is a subsisting agreement insofar as it grants code rights over the air space above the roof but contends that most of the rights were not of the air space and could not therefore be code rights because the Respondent did not occupy them when the 2014 lease was granted. Mr Wills conceded that if the roof was not demised under the Leisure Centre Lease, the entire 2014 lease would be a subsisting agreement.

15. The Claimants argue that (apart from the roof finish) the Leisure Centre Lease does not demise the roof to the tenant and that the Respondent was and in possession and control of the roof following the grant of the Leisure Centre Lease and remains so. The Respondent reserved sufficient rights out of the areas demised by the Leisure Centre Lease to control the use of the roof and other parts of the building used for ECA installations which the tenant agreed to be bound by. The Respondent has not provided any evidence that the Leisure Centre Lease tenant was in occupation of the relevant areas when the 2014 Lease was granted, or since. The Respondent was the person with management power and control of the roof and the occupier for time being capable of conferring code rights. The 2014 Lease was therefore a 'subsisting agreement' under the Transitional Provisions for the purposes of Part 5.

16. The 2003 Lease was in force when the Leisure Centre Lease was granted in 2011 and noted on the Landlord's freehold title.

17. The premises demised by the Leisure Centre Lease is described in the First Schedule. That and other relevant terms are as follows:

First Schedule

ALL those premises comprising the Building and the shared Car Parking Area and known as Cheam Leisure Centre, Malden Road, Cheam in the London Borough of Sutton and shown [edged red] on the Plan including without prejudice to the generality of the foregoing:-

1. ALL non structural walls and partitions within the Demised Premises [...] and up to and including the internal and external finishes (as hereinafter provided) of the structural walls bounding the Demised Premises and finishes of structural walls lying within the Demised Premises together with the whole of any doors windows and lights and their frames and fixings in all walls and partitions bounding and lying within the Demised Premises

2. The plaster or other surfaces of the ceilings of the Demised Premises and the whole of any suspended ceilings (and any void between such false ceiling and the non false ceiling) up to (but not including) the structural slab and/or joists lying immediately above such ceilings

3. The flooring of the Demised Premises down to (but not including) the structural slab and/or joists lying supporting the same

4. The decorative surfaces and plasterwork and finishes upon all internal and external surfaces of the Demised Premises

[...]

BUT EXCLUDING (for the avoidance of doubt) telecommunications apparatus situated on the roof of the Building and airspace above the Building AND Excepting and Reserving to the Corporation:-

7.1 [...] The free passage and running of [...] electricity and other services as now or hereafter within a period of eighty years from the date hereof to be used or enjoyed from or to other buildings and land of the Corporation through the mains [...] channels and cables in or under the Demised Premises together with the right to lay construct or maintain (or permit to be laid constructed or maintained) in or under the Demised Premises such further mains pipes sewers drains channels cables [...] and similar apparatus as may in the opinion of the Corporation be necessary either for the Demised Premises or for any other premises owned by the Corporation (whether adjoining or not) [...].

[...]

7.3 The right for the Corporation to retain all income from telecommunications apparatus situated on the roof of the Building and together with the exclusive right for the Corporation to negotiate terms with telecommunications operators for additional or replacement telecommunications apparatus on the roof of the Building or elsewhere and a right of access thereto for the

Corporation and telecommunications operators and all other rights and wayleaves incidental thereto.

8. There is also EXCEPTED AND RESERVED:

8.1 All easements rights and privileges benefiting third parties which are set out in the registers of title or as other public register or otherwise enforceable or in law or in equity.

18. Although the roof and foundations are not specifically named, paragraphs 2 and 3 expressly exclude any joist or slab above the ceilings and any the joist or slab below the flooring. In both paragraphs reference to joist and slabs is likely to include the load bearing joists and slabs that support the structural walls that are specifically excluded from the Demised Premises. This would almost certainly include the load bearing slabs that comprise the foundations under the ground level flooring and roof slab above the top floor ceilings. The drafting is consistent with the landlord's covenant in the lease to keep the roof, foundations and structural walls in repair.

19. The First Schedule appears to have been carefully drafted to ensure the Respondent retained all necessary rights over the roof for its maintenance, the retention of the ECA and the right to agree the terms and extent of any new or additional ECA, with ancillary rights of access.

20. It is unlikely that paragraph 4 of the First Schedule was intended to apply to the roof, but in any event the waterproofing layer (if that is a 'finish') would have already been covered by the ECA. It's unlikely that the parties intended the demise to include the waterproofing layer between the airspace above the roof and the roof slab beneath the ECA. Or that the tenant would have some right to effect repair and maintenance of that layer.

21. Under Clause 3.18 of the lease the tenant is prohibited from installing any additional ECA on the roof and from removing or doing or permitting anything to be done which interferes with the 'Telecoms Structures' referred to in the charges register of Respondents title, or any other Telecoms Apparatus replacing or additional to it. Entry 2 of the schedule of leases to the charges register refers to the 2003 Lease of 'Telecoms Structures'.

22. The drafting indicates care was taken to ensure the Respondent retained control of the roof slab below and airspace above the ECA. The lease is expressly granted subject to the 2003 Lease and not with the benefit, the Respondent reserving the income, and the right to negotiate any extension or renewal of it. The tenant is expressly prohibited from interfering with the ECA. Taken together this is consistent with the Respondent retaining control of management of the roof and inconsistent with the tenant being in control of or managing the roof on which the ECA is mounted.

23. Also consistent is the grant by the Respondent of the 2014 Lease. The Respondent did not doubt it had reserved power to renew the 2003 lease on the terms of the 2014 Lease.

24. The Respondents witness statement confirms Mr Gobel had only been involved with the property since 2022. He could not assist with construction of the First Schedule other than to confirm what advice he had received. Mr Gobel confirms the council had carried out repairs to the roof in line with its covenants and that the tenant had also accessed the roof to build over a spiral staircase to prevent water ingress. Mr Gobel states that the council were unaware of any limitation on its power to agree the current renewal terms until lawyers were instructed in September 2024 and had been negotiating in good faith.

25. There is no statement or other evidence confirming that the Leisure Centre tenant is, or believed it was, at any time in possession or control of the parts of the roof on which the ECA is mounted. There is nothing to suggest the tenant believes that it is not bound by the code rights granted in the 2014 Lease or that it would object to similar terms on any renewal.

26. To confer code rights under the 2014 Lease the Respondent had to be an occupier under Sched 2 p2 of the Old Code (corresponding provision in the new Code is paragraph 9). *CTIL v Compton Beauchamp Estates Ltd* [2019] UKUT 0107 (LC) at [71] makes clear that occupation is a question of fact not legal status. It means physical presence and control of the land. Where there is no person satisfying that description paragraph 105(6) identifies the person who for the time being exercises powers of management or control of the land, as the occupier.

27. At the date of the 2014 Lease the land was entirely occupied by the operators ECA where it had stood from before 2003. However, following *CTIL v Compton Beauchamp Estates Ltd* [2022] UKSC, the operator is not to be regarded as the occupier for the purposes of paragraph 9. Where there is no other person with physical presence and control of the land, under p105(6)(a) the occupier is the person (if any) who for the time being exercises powers of management or control over the land.

28. It follows from my findings in the preceding paragraphs that the Respondent was when the 2014 Lease was granted, the person exercising powers of management over the ECA land, not the tenant of the Leisure Centre Lease. It therefore had power to confer the 2014 Lease code rights.

29. Provided the Respondent was an occupier any issue concerning its legal estate or interest in the roof is not relevant to its ability to confer code rights, although they will only bind third parties listed in p10(2).

30. It follows that the 2014 Lease is a 'subsisting agreement' within the Transitional Provisions to which Part 5 of the Code applies and the Claimants reference under p33 is within the jurisdiction of the Tribunal to determine.

<u>The Proposed Code Agreement</u>

31. In relation to the Proposed Code Agreement, the Respondent has failed to establish that it was not in occupation when the 2014 Agreement was entered into and the 'subsisting agreement' argument therefore falls away. We are left with the Respondent's other points, that as it only has an interest in reversion and does not currently occupy the ECA areas it cannot be ordered to confer code rights other than

in relation to the air space. That there has been an enlargement of the rights sought which go beyond that contemplated by a renewal under Part 5.

32. The Respondent illustrated its points by reference to the 2014 Lease plan; the Leisure Centre Lease plan and the two plans attached to the Proposed Code Agreement.

33. The Claimant argues that the code rights granted under the 2014 Lease continued under p30 of the Code. The Claimant is an operator entitled to serve notice under p33 on the Respondent seeking termination and renewal of the code agreement. There may be an argument on terms if additional rights are sought over land the Respondent does not own, but that does not mean the Tribunal has no jurisdiction to hear the reference because it has power under paragraph 34(10) to determine any disputed terms of the agreement.

34. The ECA appears not to have significantly changed since that shown on the plan of the 2003 lease. It then principally comprised two elements; a large equipment cabin mounted on steel grillage platform attached to the roof; a 7.5m tower mounted on the roof of the building's plantroom supporting up to 10 antennae, with associated access ladders and electricity apparatus. The 2014 lease plan shows almost identical apparatus and equipment in the same locations but with an additional plan that edges red the large equipment cabin and shows the access route to the building was through the main entrance doors. In 2019 the parties varied the 2014 Lease to upgrade the Specification by including some additional apparatus on the tower and some additional cable trays and safety rails.

35. The plans on the Proposed Code Agreement show the ECA. It does not appear to differ materially from the 2019 specification save that the mast area is also edged red. The proposed access shaded brown now runs along the accessway on the north side of the building which leads to the external access ladder to the plant room roof. Mr Philip Harris, the Claimant's witness, briefly gave evidence confirming that the operator had been using the external accessway for some time with the occupier's agreement because it was more convenient to both that the operator did not to access the roof through the building. The plan on the Proposed Code Agreement reflects the current position.

36. Apart from updating the plans to show the varied access there appears to be no material change to the ECA or the locations it occupies on the roof since the 2003 Lease. The only material difference is the edging of the tower area red. The effect of which is to extend the legal estate created by the lease to include that area in addition to the plant room area. The operation of the Code is not however concerned with the status of the code rights as a legal estate or interest in land, many are granted on licence. There may be an enforceability issue for the operator if the code rights include areas which require third party consents but that is not an issue which puts this reference outside the jurisdiction of Part 5 of the Code.

37. P33 allows an operator to require a change to the terms of an existing agreement once it expires. It requires the 'site provider' to enter into an agreement with the operator. On an application under p33 the Tribunal has jurisdiction to order termination of the existing agreement and order the 'site provider' to enter into a new agreement. Part 5 is not concerned with site provider's legal title to the land. If the new agreement includes rights over areas that are no longer owned or controlled by the site provider,

the operator may have to seek an order under Part 2 for the third party to be bound. That does not put the p33 reference outside the Tribunal's jurisdiction. Neither does any dispute over terms concerning access. That, and any other objection the Respondent may have concerning the terms of the new agreement can be determined by the Tribunal under p34(10).

Determination and costs

38. For the above reasons I determine the preliminary jurisdiction issue in favour of the Claimant. As the Claimant is the successful party, I make an order that the Respondent do pay the Claimants reasonable costs of the preliminary issue hearing, to be summarily assessed if not agreed.

39. With regard to the ongoing conduct of the case I make the following directions.

DIRECTIONS

40. The Directions order dated the 18 September 2024 is varied as follows:

Listing

1 The final hearing of the reference will take place at the 13th Floor, Centre City Tower, 5-7 Hill Street, Birmingham, B5 4UU with a time estimate 1 day to be listed in a 3-month trial window commencing on **1 May 2026**.

Disputed terms

4 The Claimants shall provide to the Respondent, by email, a travelling draft of the Code agreement proposed by the Claimants in Word format by **13 February 2026.**

5 The Respondent shall return the travelling draft by email showing any proposed amendments and any counter proposals clearly marked, by **27 February 2026**.

6 The Claimants shall return the travelling draft, showing which of the amendments are agreed and which are disputed, clearly marked, by **13 March 2026.**

7 The parties or their solicitors shall communicate by **2 April 2026** on a without prejudice basis with a view to narrowing the issues on the terms of the Code agreement.

8 An agreed final version of the travelling draft shall be filed by the Claimants no later than seven days before the final hearing date showing the parties' rival positions on only those terms which remain in dispute.

Evidence

9 Each party shall file and exchange the statements of any witnesses of fact on whom they intend to rely by **17 April 2026**, limited to one witness per party.

Expert evidence

10 To the extent it is not already agreed, the parties shall seek to agree the consideration payable for the site in accordance with previous Tribunal guidance (in the event that the parties are required to enter into a new agreement). If the parties are unable to agree the consideration payable, and either party wishes to rely on expert evidence they are to seek permission, giving reasons why expert evidence will be required.

11-15 Deleted

Hearing

16 The parties are to keep the provisional time estimate under review and shall inform the Tribunal promptly if the estimate changes.

17 The parties shall agree which documents should be included in the hearing bundle. Not less than 14 days before the hearing the Claimant shall provide a draft bundle index to the Respondent. The Respondent shall provide its comments to the Claimants within three working days of receipt of the draft index.

18 The Claimants shall lodge two copies of the hearing bundle at the Tribunal and serve on the Respondent's solicitors an indexed and paginated bundle of documents not less than 7 days before the hearing. No document shall appear more than once in the hearing bundle and no document or correspondence other than that which is likely to be specifically referred to shall be included.

19 Skeleton arguments must be exchanged and lodged by no later than 3 days before the hearing, and the Claimants' counsel shall lodge two copies of a joint bundle of statutory material and authorities no later than 2 days before the hearing.

Other

20 The dates in paragraphs 4 to 9 above (but not subsequent dates) may be extended by up to 14 days by agreement between the parties without the need for an application to the Tribunal, but the Tribunal must be notified of any such agreement; any longer extension, any extension which is not agreed, or any second or subsequent extension of the time for any individual step, must be the subject of an application to the Tribunal made in good time before the expiry of the relevant time limit.

21 If any procedural step has not been complied with by the date fixed by this order, or any permitted extension of that date, both parties shall write to the Tribunal forthwith informing it of the reasons for the delay and the date by which it is intended that the step will be taken.

22 Witness statements and agreed statements must be filed with the Tribunal electronically and (unless otherwise directed) need not be provided to the Tribunal in hard copy until they are included in the hearing bundle. Any documents sent between solicitors in accordance with these directions may be sent by email.

23 The parties may apply for further directions if required.

D Barlow
Deputy Regional Judge