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

| | | |
|---|---|---|
| **Case Reference** | **:** | **BIR/00CN/ECR/2025/0805 – 0810**<br>**BIR/00CN/ECR/2025/0813 – 0821**<br>**BIR/00CN/ECR/2025/0822 – 0826** |
| **Properties (Abbreviated Site Name)** | **:** | **Edward House (0805), Moseley Court (0809), Palace Bingo (0823),**<br>**Upperwood House Farm (0821),**<br>**Cosmopolitan Hotel (0826),**<br>**Crown House (0810),**<br>**Elland Hall Farm (0818) and Haughley (0819)** |
| **Claimants** | **:** | **EE Limited (1)**<br>**Hutchison 3G UK Limited (2)** |
| **Representative** | **:** | **Oliver Radley-Gardner KC**<br>**instructed by DAC Beachcroft LLP** |
| **Respondent** | **:** | **AP Wireless II (UK) Limited** |
| **Representative** | **:** | **Toby Watkin KC and Tom Morris**<br>**instructed by Freeths LLP** |
| **Application** | **:** | **Electronic Communications Code**<br>**Paragraph 34 (renewal)** |
| **Hearing** | **:** | **17th and 18th June 2026**<br>**Centre City Tower, Birmingham** |
| **Tribunal** | **:** | **Judge D Jackson** |
| **Date of Decision** | **:** | **8th July 2026** |

---

**DECISON**

---

1. On 18th March 2026 I gave Directions for the following six issues in the proceedings to be dealt with as Preliminary Issues under FTT Rule 6(3)(g):

   *(1) In 0805 Edward House, 0809 Mosley Court, and 0823 Palace Bingo, is each of the existing agreements a subsisting agreement being a lease to which Part II of the Landlord and Tenant Act 1954 applies, within the meaning of paragraph 6 of Schedule 2 to the Digital Economy Act 2017, to which Part 5 of the Code does not apply?*

   *(2) If the agreement in 0823 Palace Bingo was a lease, did the deed of variation dated 1 December 2011 vary the demise so that there was a surrender and regrant of a new lease which was not contracted out of the Landlord and Tenant Act 1954?*

   *(3) In 0821 Upperwood House Farm, did the First Claimant become contractually bound to enter into the relevant lease before the notice from the landlord purportedly satisfying section 38 of the 1954 Act and Schedule 2 to the 2003 Order was given, so that the agreement to exclude the effect of sections 24 to 28 of the 1954 Act was void and so that Part 5 of the Code does not apply to the agreement?*

   *(4) In 0826 Cosmopolitan Hotel, did the relevant agreement create a term of years certain within the meaning of section 38(4)(a) of the Landlord and Tenant Act 1954 in force at the time so that it could be contracted out of that Act?*

   *(5) In 0810 Crown House and 0818 Elland Hall Farm, were the Para 33 notices relied upon valid?*

   *(6) In 0819 Haughley, was the existing agreement relied upon surrendered by operation of law so that the Claimants occupy the site under a periodic tenancy which is not a Code agreement to which Part 5 of the Code applies?*

2. The Preliminary Issues were heard over two days, 17th and 18th June 2026. The Claimants were represented by Oliver Radley-Gardner KC (Skeleton Argument 12th June 2026). The Respondent was represented by Toby Watkin KC and Tom Morris (Skeleton Argument dated 12th June 2026).

3. I received oral evidence from David Powell (Regional Asset Manager AP Wireless Group. Witness Statement dated 21st May 2026 [284-965]). The parties have prepared Statement of Agreed and Assumed Facts [AF1-58]. I have considered Bundle of documents [1-1925], Supplemental Bundle [SB1-172] and Further Supplemental Bundle [FSB1-68].

**(1) In 0805 Edward House, 0809 Mosley Court, and 0823 Palace Bingo, is each of the existing agreements a subsisting agreement being a lease to which Part II of the Landlord and Tenant Act 1954 applies, within the meaning of paragraph 6 of Schedule 2 to the Digital Economy Act 2017, to which Part 5 of the Code does not apply?**

4. This issue is in essence a lease/licence dispute. The sites concerned are Edward House, Moseley Court and Palace Bingo. However, I have also been asked to determine the same issue in respect of Upperwood House Farm under Preliminary Issue (3) and Cosmopolitan Hotel under Preliminary Issue (4).

**Edward House**


5. The rooftop at Edward House is used by two operators, Vodafone and the Claimants, whose apparatus occupies different parts of the rooftop space. The Claimants apparatus comprises a large cabin fixed to steel beams which span the width of the building. These steels are attached to additional steelwork placed on top of structural columns (see paragraphs 17-18 of witness statement of David Powell [288-290]). The antenna array sits separately above the plant room. Site photographs can be found in APW Site Inspection 25th May 2017 [SB 11-20] and in APW Site Inspection 19th May 2026 [372-392].

6. The Claimants occupy the site under a lease dated 24 September 2023 between Edward House (Stockport) Limited (1) and T-Mobile (UK) Limited (2) [990-1006]. Clause 2 of the agreement grants "The Right" for "Statutory Purposes" to execute "The Works" (clause 2.1.1) and thereafter to "*install, keep, operate, maintain, adjust, repair, alter, upgrade, add to, renew, replace, relocate, remove and inspect Apparatus*" (clause 2.1.2) [993]. "Works", as defined in clause 1.1, means "*the works required to be carried out on the Land to install Apparatus in accordance with the Plan and to lay any necessary telecommunications and electricity supply cable*" [992]. Positioning of apparatus is to be "*as per the Plan*" and any apparatus not shown on the Plan is subject to "*Owners prior approval (such approval not to be*

*unreasonably withheld or delayed)".* Clause 2.1.2 is subject to proviso "*that T-Mobile may not install Apparatus beyond that set out in Schedule 2"* [1004].

7. The Plan as defined at clause 1.1. by reference to specific plan numbers [992] has been lost. Mr Watkin invites me to infer that the Plan shows Apparatus in the same place as shown in the APW Site Inspection photographs. Mr Radley-Gardner did not demur from that reasonable inference.

**Moseley Court**


8. The rooftop of Moseley Court is used by Vodafone and O2 (CTIL) as well as the Claimants. It appears that the roof was also occupied in the past by an unknown user which turned out to be West Midlands Police Service who subsequently removed their apparatus. The Claimants' apparatus is located on the main roof and upper plant roof. The Second Claimant (H3G) also has a decommissioned legacy cabinet and equipment.

9. The Claimants' apparatus comprises 2 large cabins installed on substantial steelwork (see paragraph 25 of witness statement of David Powell [291-292]). Site photographs can be found in cell:cm Inspection Reports of 7th September 2020 [SB29-55] and 22nd June 2021 [SB 56-62] and AP Wireless Site Inspection of 16th May 2026 [452-477].

10. The Claimants occupy the site under an agreement dated 24th January 2001 made between Richard Henry Jaffa (1) and One 2 One (2) [1064-1079]. The agreement has been executed as a deed [1079]. Clause 3 grants "The Right" for "Statutory Purposes" to execute "the Works" (clause 3.1.1 [1068]). Clause 3.1.3 grants the right to keep, operate and inspect Apparatus once installed [1069]. The Right is granted over the

"Site" (part of the land shown as having Apparatus thereon on the Plan) and the "Land" (defined as Moseley Court) [1067].

11. "Works" are defined in clause 1.1 as the works required to be carried out in accordance with the Plan [1067]. The Plan has been lost. I draw the inference that the Plan showed apparatus in the same position on the roof as shown in the Inspection Reports.

### Palace Bingo


12. The Claimants' apparatus comprises antenna mounted on an antenna support pole at roof level together with 4 cabinets at ground level [495]. As Mr Powell indicates at paragraph 34 of his witness statement "*Claimants do not have the usual compound at ground level*" [294]. The Claimants' cabinets are located at the end of a walled passageway which forms the side access to the Bingo Hall (shown behind the two red cars on the photograph above). Lease plan [1136] shows "*existing doorway through wall",* "*existing open cellar to be covered by grillage*", "*existing handrail*" and proposed cabinets on concrete bases. There is also shown what Mr Watkin referred to as a "nib" of wall. However, the furthest part of the passageway where the apparatus was to be installed is not enclosed. Drawings prepared by Daly International/ Everything Everywhere dated 20th June 2011 [SB63-67] show that the cellar had been filled in by that time, but both the handrail and "nib" remain. However, the site is still not enclosed (see in particular [SB64]).

13. The Respondent inspected the site shortly before the hearing in February 2026. The following photograph described as "access route" [554] shows the current state of the site:

One of the Claimant's white cabinets can be seen at the end of the passageway. I am concerned with the position as at date of grant in 2003 and have to make findings of fact as at that time. Comparing the lease plan [1120] with the photograph it is apparent that the cellar has been filled in and the handrail removed. The "nib" of wall remains. My finding of fact is that as at the date of grant in 2003 the end of the passageway where the Claimants have sited their equipment was not enclosed and has not been enclosed at any subsequent time.

14. Further photographs are contained in AP Wireless Site Inspection 22nd March 2017 [SB 68-75] and cell:cm inspection 26th April 2022 [SB96-110]. AP Wireless reinspection of 22nd February 2026 [549-564] describes Equipment Location: "*Rear of the bingo hall in open yard. Fully accessible by anyone in the bingo hall*" [552].

15. The site is held by the Claimants under an agreement dated 9th July 2003 between Paul Roy Hocking and Karen Lesley Hocking (1) and the Second Claimant (H3G) [1117-1136] as varied by Licence to Assign and Vary dated 1st December 2011 [1137-1143]. Rights granted are at clause 2 [1120]. Rights are more particularly detailed in Schedule 1 [1128-1129]. Clause 3.1 deals with Works as detailed in the Plan which may be installed in stages throughout the agreement period [1120]. The Works are set out in Schedule 2 [1130] by reference to the installation of Apparatus (defined at clause 1.1. [1119]) shown on the Plan (drawing no. 00206061) [1136].

**Issue (1) - deliberation**

16. In **AP Wireless II (UK) Limited v On Tower UK Limited** [2024] UKUT 263 (LC) ("Sandbach") paragraphs 73-94 Edwin Johnson J, Chamber President identified the correct approach to lease/licence dispute and at paragraphs 95-101 considered

what is exclusive possession. I do not repeat those paragraphs here but have them well in mind when carrying out my own analysis of the agreements at Edward House, Moseley Court and Palace Bingo.

17. My starting point, as identified at paragraph 109 of **Sandbach** following Lewison LJ in **Global 100 Ltd v Laleva** [2021] EWCA Civ 1835, is:

    *"to identify the legal rights and obligations of the parties as a matter of contract before going on to classify them"*

18. The first point made by Mr Watkin is that the existence of substantial equipment cabinets to which the site owner has no key. The Chamber President deals with chattels at paragraphs 162 – 175 of **Sandbach**. Having reviewed the authorities the Chamber President said, at paragraph 170:

    *"The observation of the Tribunal that the right to keep equipment installed on land does not necessarily involve a grant of exclusive possession seems to me uncontroversial. Whether a grant of exclusive possession is involved will depend upon all the relevant circumstances, including the nature of the equipment involved. It would clearly be unrealistic to describe land occupied by an automated teller machine or, say, a vending machine, located in the middle of a supermarket or other premises open to the public, as land in the exclusive possession of the owner of the teller machine or vending machine. These are not however the facts of the present case. The present case involves two sites which are and were intended to be enclosed, for the purposes of housing telecommunications equipment which was substantial and needed to be enclosed in order to allow its safe and secure operation and to ensure the protection of the general public. Essentially, the telecommunications equipment with which the present case is concerned is at the other end of the spectrum to an automated teller machine or a vending machine."*

19. I prefer Mr Radley-Gardner's submissions on this point. A locked telecommunications cabin of the kind shown on the site falls very much at the automated teller/vending machine end of the spectrum. Equally importantly none of the three sites are enclosed and, on that basis, I am able to distinguish those sites from **Sandbach**. The presence of locked cabins on the rooftop of Edward House and Moseley Court and at the end of the unenclosed passageway at Palace Bingo does not involve a grant of exclusive possession.

20. At Edward House Mr Watkin relies on the following terms of the agreement:

    - Clause 2.1.7 – The Right to have access to the Apparatus and to such parts of the land as are reasonably required to give effect to the Right on 24 hours' notice between the hours of 9am to 5.30pm (except in the case of emergency) [994]. In Mr Watkin's submission restrictions on access points toward lease rather than licence. I do not accept that submission. The access restriction relates to the Claimant's access to its Apparatus and is inconsistent with the grant of a lease.
    - Clause 5.1.1 – Owners Responsibilities not to move interfere or tamper with the Apparatus [995]. In Mr Watkin's submission this clause is redolent of exclusive possession.

- Clause 5.1.5 – Owners Responsibilities not to occupy or grant a third party rights to occupy or enter that part of the roof of the building upon which the apparatus is situated [996]. In Mr Watkin's submission this total exclusion the owner points strongly to the grant of exclusive possession.
- Clause 9 – assignment of the benefit of the agreement subject to owner's consent (not to be unreasonably withheld or delayed) [997]
- Clause 11.7 – Owner may determine agreement after 4 years and 6 months of the term on 12 months prior notice in the event the Owner wishes to improve and/or redevelop the land and cannot conveniently do so if Apparatus remains on site [998]. Owner will use all reasonable efforts to relocate the Apparatus (clause 11.7.2) and grant T-Mobile a new agreement (clause 11.7.3). In Mr Watkin's submission the reference to "a new agreement" is redolent of demise.
- Clause 12.1 – Agreement shall bind successors in title [998]. Taken together with Clause 1.3 – references to Owner and T-Mobile include successors [993] "*point strongly towards the Agreements being intended to take effect as leases and not licences*" (**Sandbach** at paragraph 231(5))

21. At Moseley Court Mr Watkin relies on the following terms of the agreement:

- Executed as a deed [1079]. In **Sandbach** (paragraph 233) it was said that *"the absence of deeds is an indication against the parties having had the intention to create leases*". In Mr Watkin's submission it must therefore follow that execution by deed is an indication that the parties did intent to create a lease.
- Clause 3.1.6 – Access at all times subject to reasonable stipulations of the Owner and, if necessary, provision of a key by the Owner [1069]
- Clause 5.1.9 – To permit the Owner reasonable access to the Site by appointment accompanied by a representative of One 2 One for the purpose of inspection only [1070]. In **Sandbach** (paragraph 156) owner's rights of access limited to reasonable access by prior appointment only was found to be "*strongly suggestive of a lease*".
- Clause 6.1.1 – Owner's Responsibilities not knowingly to interfere or tamper with the Apparatus [1070]
- Clause 6.1.5 – Owner's Responsibilities not to grant third party rights to occupy or enter the Site during the Term. As at Edward House Mr Watkin submits this points strongly to grant of exclusive possession.
- Clause 12.1 – Agreement shall bind successors in title [1073] and Clause 1.3 – references to Owner and T-Mobile include successors [1068]. Both point strongly to lease and not licence.

22. At Palace Bingo Mr Watkin relies on the following terms of the agreement:

- Executed as a Deed [1134]
- Clauses 1.7 and 6.5 – successors in title [1120 and 1125]
- Clause 3.6 – keep the Apparatus in good and tenantable repair [1121]. In **Sandbach** (paragraph 243) obligation to maintain equipment found to be "equally consistent with the agreements being leases or licences"
- Clause 3.9 - not assign let sublet 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 (other than group company) [1121]. I note that the

alienation provision applies to Rights and Apparatus and not the site or Building.

- Clause 4.1 – quietly exercise the Rights without any interruption by the Owner [1123]. In **Sandbach** (paragraph 242) this was a neutral factor "*if the agreements did take effect as leases, a covenant for quiet enjoyment would be implied*".
- Clause 6.1 - proviso for re-entry and forfeiture [1124-1125]. Described as "*neutral*" in **Sandbach** (paragraph 246).
- Clause 8.2 – Determination Provision where Owner can show settled intention to Develop the Building or a substantial part thereof and could not reasonably do so without obtaining possession of the parts of the Building on which the Apparatus is situated (at any time after 5th anniversary on 12 months' notice) [1126]
- Clause 9 – Repositioning of Apparatus by Operator within the Building at any time after 5th anniversary of term [1126]. Rights of relocation and redevelopment were considered in **Sandbach** (paragraphs 176-191). The Chamber President held, at paragraph 191, that such clauses "*are capable of being consistent with a lease or a licence*".

23. The Upper Tribunal has considered lease/licence issue previously in **EE Limited v Edelwind Limited** [2020] UKUT 271 (LC) ("Edelwind"). In **Sandbach** the Chamber President was careful to distinguish **Edelwind**. At paragraph 146 of **Sandbach** the Chamber President said:

*It seems to me that the decision in Edelwind is clearly distinguishable, in the case of both Agreements. The agreement in Edelwind was a very different type of agreement, which gave the operator the right to install and operate telecommunications equipment on a roof. In the present case each of the Agreements went much further than this, granting a bundle of rights over and for the benefit of a defined area of land which was to be an enclosed area of land, enclosing the relevant telecommunications equipment.*

At paragraph 158 the Chamber President added:

*I have no quarrel with this analysis of Judge Cooke in Edelwind but, as I have explained, Edelwind was a very different case. In the present case the rights of inspection in Clause 4.1 of the 2002 Agreement were created in a very different context. The Telecommunications Equipment was not to be sited on a roof but within a fenced compound, access to which was restricted.*

24. I agree with the submissions of Mr Radley-Gardner. A rooftop site or rooftop with ground based cabinets is entirely different from an enclosed greenfield site. The language and structure of a rooftop agreement focuses on Code Rights and makes provision for the disaggregated installation of Equipment and Apparatus. The site provider is not physically excluded from the rooftop. At Edward House and Moseley Court, the rooftop is in concurrent use with other operators who have installed their own equipment/apparatus. There is no compound, fencing or identifiable area of exclusive possession at any of the three sites. Whilst as was said in **Sandbach** (at paragraph 136) "*the absence of specific words of demise ... is not decisive*" there is no

"red line" plan or, to use Mr Radley-Garner's expression, "zone of exclusivity" at any of the three sites.

25. I prefer the analysis of Judge Cooke in **Edelwind** (paragraphs 59 and 60):

*"59. I take the view that there is no grant of exclusive possession of the roof. The second respondent has unrestricted access to it save for the exclusion zones which are in place for safety purposes and for the cabinet (which is the operator's property in any event). The operator can access the roof only within certain hours, and therefore, as Mr Clark says, the agreement cannot be said to be conferring a right to occupy the roof, let alone to grant exclusive possession of it. The second respondent's covenant not to enter the equipment cabinet is consistent with its not having granted exclusive possession (if it had, the covenant about the cabinet would not be needed). The right to inspect the equipment on notice is about inspection of the equipment, not about possession. The provisions for fee review, the warranty of title and the alienation covenant are perfectly consistent with a licence. The contracting out of the Landlord and Tenant Act 1954 is no more determinative of the matter than is the declaration that the agreement is not a lease; the parties have expressed themselves both ways, but the substantive provisions of the agreement make it clear that this is a licence not a lease.*

*60. Ms Tozer QC argued that the demise itself is restricted to the exclusion zones and to the area occupied by the cabinet. The difficulty with that is that when the parties entered into the primary Code agreement they did not know where the exclusion zones were; the first claimant was obliged to provide them. And the plan shows only the proposed location of the cabinet. So it is impossible to regard the agreement as conferring exclusive possession of any defined area. Moreover, the subject matter of the primary Code agreement is the whole rooftop. To regard it as a lease of the area occupied by the cabinet and of the exclusion zones, with the rest of the rooftop being subject to ancillary rights perhaps by way of licence or easement, is an unrealistic description and a mischaracterisation."*

26. The legal rights and obligations in all three agreements point both ways. There are terms which are strongly suggestive of a lease, other terms which are neutral and terms which point towards a licence. The presence of locked equipment cabinets supported by steelwork on the roof of Edward House and Moseley Court and on concrete plinths at the end of the unenclosed passageway at Palace Bingo does not amount to exclusive possession. In **Sandbach** it was acknowledged that roof top sites are different to a fenced compound. I prefer what was said in **Edelwind**. I find that the agreements at Edward House, Moseley Court and Palace Bingo do not grant exclusive possession of any defined area of the roof or of the passageway in the case of Palace Bingo.

27. The agreements at Edward House, Mosley Court, and Palace Bingo are not leases to which Part II of the Landlord and Tenant Act 1954 applies. Accordingly, the Tribunal has jurisdiction in respect of all three sites under Part 5 of the Code.

**(2) If the agreement in 0823 Palace Bingo was a lease, did the deed of variation dated 1 December 2011 vary the demise so that there was a surrender and regrant of a new lease which was not contracted out of the Landlord and Tenant Act 1954?**

28. It is not strictly necessary for me to decide Preliminary Issue (2) following my decision in Preliminary Issue (1) that the agreement at Palace Bingo is a licence. However, the Respondent seeks to put its case on two alternate bases. Either I am wrong about Preliminary Issue (1) and the agreement is a lease in which case the Licence to Assign and Variation acted as a surrender and regrant. Alternatively, if the agreement is, as I have found, a licence the Licence to Assign and Variation acted as surrender of the licence and grant of a lease. Central to the Respondent's case on either basis is that the Licence to Assign and Variation varied the demise.

29. Licence to Assign and Variation dated 1st December 2011 was made between Paul Roy Hocking and Karen Lesley Hocking (1) the Second Claimant (H3G) and the First and Second Claimants (EE and H3G) [1137-1143]. Clause 4.3 of the Licence varies Schedule 2 of the agreement dated 9th July 2003 between Paul Roy Hocking and Karen Lesley Hocking (1) and the Second Claimant (H3G) as follows [1140]:

    *Schedule 2 shall be amended to read as follows:*

    *The Works*

    *"The installation of the Apparatus and the other works to be carried out by H3G and Everything Everywhere Limited as shown and described in the following plans drawings and specifications:*

    *Drawing Nos CV0040-001C, CV0040-002C, CV0040-003C, CV0040-004C, CV0040-005C. All drawings dated 17/12/2010*

30. The parties have been unable to locate a copy of revision "C". However, Claimants' disclosure contains at [1762-1764] copies of revision "A" of drawing nos CV0040-001-004. Drawing 005 cannot be found in either "C" or "A" version. Those drawings are all dated 17th December 2010 i.e. the same as revision "C". Neither party has proposed that I do anything other than proceed on the basis that revision "A" and revision "C" are the same for the purposes of Preliminary Issue (2).

31. Drawings at [1763-1764] show the roof level antenna which is to be mounted on a new longer antenna support pole. Clearly these proposed works do not affect the demise.

32. Drawing at [1762] shows the Claimants' ground based cabinets at the end of the passageway. It is worth noting that by this date the cellar had been filled in but the handrail remains. The Claimant's equipment is not enclosed. Point 4 of the General Notes states: *"items shown boxed are proposed works by operator. All other items are existing site features."* There are only two boxed items. Both relate to the new antenna pole. There is no variation of the demise.

33. I find as fact that the Licence to Assign and Variation dated 1st December 2011 did not vary the demise so that there was a surrender and regrant of a new lease.

**(3) In 0821 Upperwood House Farm, did the First Claimant become contractually bound to enter into the relevant lease before the notice from the landlord purportedly satisfying section 38 of the 1954 Act and Schedule 2 to the 2003 Order was given, so that the agreement to exclude the effect of sections 24 to 28 of the 1954 Act was void and so that Part 5 of the Code does not apply to the agreement?**

34. The Claimants occupy the site at Upper Hall Farm under the terms of an agreement dated 12th March 2009 made between Harold Crowther, Christopher Crowther and Alison Crowther (1) and T-Mobile (UK) Limited and Hutchison 3G Limited (2) [1165-1182]. The plans attached to the agreement (95468-001 (issue D)) have been lost. However, plans showing the site edged red, bearing the same reference numbers are at [SB118-121]. Clause 2.1.8 of the agreement contains a fencing obligation [1169]. AP Wireless Inspection of 6th March 2026 contains a picture of a stone built operators equipment hut. The agreement of 12th March 2009 is clearly a lease.

35. The main terms of the agreement are:

- Fee £4,000 p.a. from 29th June 2004 ("the term commencement date") and £4,400 from 29th June 2007 [1167] subject to "greater of RPI/OMV" review at Schedule 1 [1177-1179]
- Plan 95468-001 (issue D)
- Term 20 years [1168]
- User (clause 4.1.7 [1171] only in connection with the Right for Statutory Purposes (see clause 2)
- Insurance £1,000,000 (clause 6 [1172])
- Assignment to group company without consent and to other with consent (clause 9 [1173])
- Third party rights subject to 30% payaway (clause 10 [1173]
- Operator's termination – 2nd, 5th and 10th anniversary (clauses 11.3 and 11.4 [1174])

36. For the purposes of Preliminary Issue (3) the most important provision is clause 16 [1176]:

*16. Exclusion Order*

*16.1 Notice and decleration*

*On 11th Decemebr 2008 the Landlord served a notice on the Operators pursuant to the provisions of the 1954 Act Section 38A(3) as inserted by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 and on 23rd February 2009 the Operators made a decleration pursuant to Schedule 2 of the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003.*

*16.2 Agreement to exclude*

*Pursuant to the porovisions of the 1954 Act Section 38A(1) as inserted by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, the parties agree that the provisions of the 1954 Act Sections 24-28 inclusive are to be excluded in relation to the tenancy created by this lease.*

[spelling of December, declaration and provisions are as in the original]

37. Schedule 2 of the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 makes provision for the service of notices and the making of declarations:

*2. Subject to paragraph 4, the notice referred to in section 38A(3)(a) of the Act must be served on the tenant not less than 14 days before the tenant enters into the tenancy to which it applies, or (if earlier) becomes contractually bound to do so.*

*3. If the requirement in paragraph 2 is met, the tenant, or a person duly authorised by him to do so, must, before the tenant enters into the tenancy to which the notice applies, or (if earlier) becomes contractually bound to do so, make a declaration in the form, or substantially in the form, set out in paragraph 7.*

*4. If the requirement in paragraph 2 is not met, the notice referred to in section 38A(3)(a) of the Act must be served on the tenant before the tenant enters into the tenancy to which it applies, or (if earlier) becomes contractually bound to do so, and the tenant, or a person duly authorised by him to do so, must before that time make a statutory declaration in the form, or substantially in the form, set out in paragraph 8.*

The Respondent’s case rests on the requirement that notices must be served and declarations made “*before the tenant enters into the tenancy .... or .... becomes contractually bound to do so*”.

38. Some six years prior to the signing of the 2009 agreement the parties entered into an agreement set out in a letter dated 25th July 2003 from T-Mobile to Messrs HCA and A Crowther (the initials of the three members of the Crowther family who entered into the 2009 agreement) [1765-1766]. On 9th September 2003 the letter was countersigned:

*I/We hereby confirm that T-Mobile (UK) Limited may have access to the Site (as defined above) upon the terms and conditions set out above.*

The letter provides that:

*In consideration of you, Messrs H. C. A A. Crowther, allowing T-Mobile (UK) Limited ("T-Mobile") physical access to the Site at anytime after the 15th day of September 2003 for the purpose of installing and operating a telecommunications system ("the Works") upon the Site (in accordance with drawings numbered 95468 PLAN 001 attached hereto) T-Mobile undertakes ...*

The most important undertakings are at points 4 and 7 of the letter:

*4. enter into an Agreement in a form to be settled between our respective Solicitors in respect of the Site incorporating the Heads of Terms dated 13th March 2003 agreed by you and annexed hereto whereupon our liabilities under this letter shall cease and determine absolutely*

*7. from either the date of physical access to Site to commence the Works or 12 months following the date of completion of the Agreement whichever is the earlier to pay to you the sum of £4000 per annum payable annually in advance.*

39. Heads of Terms dated 13th March 2003 are at [1767-1770]. The words "subject to contract" have been crossed out and the HOTs are signed for and on behalf of the site owner [1770]. There is also a manuscript addition, which appears to have been signed by signed by T-Mobile Regional Surveyor [1769]:

*"In accordance with an Early Access Letter, T-Mobile may wish to access the site on receipt of satisfactory planning approval and in advance of legal completion, in return for which a one off payment of £1000 will be made"*

40. The HOTS are identical to the terms subsequently contained in the 2009 agreement:

- Term 20 years
- Fee £4,000 p.a.
- Fee review – greater of RPI/OMV
- Assignment to group company without consent
- Subletting subject to 30% payaway
- T-Mobiles' break – 2nd, 5th and 10th years of term
- Insurance £1,000,000
- User – a telecommunications base station

At this stage it is important to note the final term (appearing just before the manuscript amendment) [1769]:

**Landlord & Tenant Act 1954** *The lease to be contracted out of the Landlord & Tenant Act 1954*

41. What happened between 9th September 2023 when the Crowthers countersigned the T-Mobile letter and 12th March 2009 when the agreement was completed is a mystery. No evidence has been called by either side. The Respondent's case is that 2003 letter is an agreement for lease and that the Crowther's were contractually bound to enter into the 2009 agreement before the notices were issued and declarations made under the 2003 Order. Accordingly, 2009 agreement was not effectively contacted out under section 38A of the 1954 Act and the 2003 Order.

42. Mr Radley-Gardner's first answer is that the 2003 letter cannot be a binding agreement for lease because the date of commencement of the term is not certain. In **Pretoria Energy Co (Chittering) Ltd v Blankney Estates Ltd** [2023] EWCA Civ 482 Lewison LJ said:

*"57. The time from which the term of a lease is to begin is, in my judgment, a term that the law regards as essential to the creation of a binding contract for lease. Thus,*

*even where it is plain that the parties intended to enter into a binding contract for lease, if the time from which the lease is to begin is uncertain, the agreement is incomplete and there is no binding contract."*

*62. .... The idea of a "rolling" 25 year term is the antithesis of certainty. As Mr Pickering acknowledged, Pretoria had no express obligation to apply for planning permission; and even if such an obligation were to be implied, there was no timetable for making such an application. If, therefore, the agreement for lease was contractually binding, but the lease would not come into effect until the date on which it was actually executed, Blankney's land might be sterilised indefinitely"*

43. It is clear from the 2003 letter and HOTs that the term would be for 20 years. No commencement date is specified. The letter provides:

*allowing T-Mobile (UK) Limited ("T-Mobile") physical access to the Site at anytime after the 15th day of September 2003*

HOTs set out **Fee Commencement Date:**

*From either the date of physical access to Site to commence the build works, or 12 months following the date of legal completion, whichever is the earlier. If physical access is taken to Site, prior to completion of the Legal Agreement, the first such payment or a proportionate part thereof is to be paid on the date of legal completion.*

44. I agree with Mr Radley-Gardner. The position at Upper Hill Farm is the same as in **Praetoria Energy**. The 2003 letter allows access "*at anytime*" after 15th September 2003. There is no timetable for completion of the legal agreement. Accordingly on the basis that date of commencement of the term is uncertain there is no binding agreement for lease. For the purposes of section 38A of the 1954 Act and the 2003 Order the Claimants were not contractually bound to enter into the 2009 agreement as at the date of service of the notices and the making of the declarations.

45. Mr Radley-Gardner's second answer turns on the following provision in HOTs:

**Landlord & Tenant Act 1954** *The lease to be contracted out of the Landlord & Tenant Act 1954*

46. Such a provision was also considered in **Praetoria Energy** at paragraph 35.

*Second, the judge said, the HoT envisaged that the lease would be contracted out of the Landlord and Tenant Act 1954. That process requires the intending landlord to give notice to the intending tenant and requires the intending tenant to make a declaration (or statutory declaration) that he has understood the consequences of contracting out. All this must be done before the tenant becomes contractually bound. Mr Pickering's first answer to this point is that the HoT were conditional on the grant of planning permission. Planning permission was not granted until June 2014. Accordingly, it was not until June 2014 that Pretoria became contractually bound. The first flaw in this argument, to my mind, is that it also assumes the answer to the very question that must be decided. In other words, it assumes that clause 1 of the HoT creates a valid agreement for lease, subject only to the grant of planning* *permission. The second flaw, to my mind, is that if there was a binding agreement, the implementation of which was suspended until the grant of planning permission, then neither party would have been free to withdraw until it were known that planning permission would not be granted. Mr Pickering confirmed during his oral submissions that on his analysis Pretoria was not free to walk away following the signing of the HoT. In those circumstances, the tenant would have been contractually committed before the procedure for contracting out of the 1954 Act had been undertaken. The whole point of the procedure laid down for contracting out of the 1954 Act is to enable the intending tenant to walk away if the lack of security of tenure is unacceptable. Mr Pickering's second answer was that there was no evidence that the parties had turned their minds to the mechanics of contracting out of the 1954 Act. But the thought processes of the actual parties are not relevant to the objective appraisal of the HoT. In my judgment the express understanding that the lease would be contracted out of the Landlord and Tenant Act 1954 is another weighty pointer against the conclusion that a binding agreement had been reached, because to hold otherwise would frustrate one of the few provisions relating to the proposed lease that the parties had actually agreed. As Knox J put it in Cardiothoracic Institute v Shrewdcrest Ltd [1986] 1 W.L.R. 368, 377 (at a time when the court needed to approve an agreement to contract out of the 1954 Act):*

*"... there is, in my judgment, implicit in a condition that the tenancy agreement negotiated between the parties should be subject to the making of a court order under section 38(4) of the Landlord and Tenant Act 1954, a term that unless and until the court order is obtained no legally binding grant or acceptance of the tenancy should be made."*

47. As Mr Morris astutely pointed out the 2003 letter was signed on 9th September 2003. The 2003 Order came into force on 1st June 2004. Therefore, the 2003 letter was signed at a time when court approval of contracting out was still required under section 38(1) (section 38A not being substituted until the 2003 Order came into force). Accordingly on the authority of **Cardiothoracic** as approved in **Praetoria Energy** no legally binding agreement could be made until a court order had been obtained.

48. I find that, as at the date of the Landlord's Notice given on 11th December 2008 and as at the date of the operators' declaration made on 23rd February 2009, the Claimants were not contractually bound to enter into the tenancy because no court order had been obtained.

49. Mr Morris also helpfully drew to my attention to Article 29(4) - Transitional Provisions of the 2003 Order:

*If a person has, before the coming into force of this Order, entered into an agreement to take a tenancy, any provision in that agreement which requires an order under section 38(4) of the Act to be obtained in respect of the tenancy shall continue to be effective, notwithstanding the repeal of that provision by Article 21(2) of this Order, and the court shall retain jurisdiction to make such an order.*

I do not consider that the transitional provisions assist the Respondent. Firstly, because there was no provision in the HOTs specifically requiring a Court Order and secondly because, for the reasons given above, there was no binding agreement to take a tenancy.

50. In Upperwood House Farm, the agreement to exclude the effect of sections 24 to 28 of the 1954 Act was effective and Part 5 of the Code applies to the agreement.

**(4) In 0826 Cosmopolitan Hotel, did the relevant agreement create a term of years certain within the meaning of section 38(4)(a) of the Landlord and Tenant Act 1954 in force at the time so that it could be contracted out of that Act?**

51. This is a rooftop site comprising two antennas hidden within new GRP chimneys and equipment at ground level.

**The agreement**

52. The claimants occupy the site under the terms of an agreement dated 26th September 2003 made between Cousin of Pubmaster Limited (1) and the Second Claimant ("H3G") ("the 2003 agreement") [1198-1220]. Th terms of the agreement referred to in argument are:

- Clause 3.1. The agreement grants The Rights set out in Schedule 1 to carry out The Works in Schedule 2 [1202]
- Schedule 1 – H3G's right of access to the Apparatus is limited to the hours of 8 a.m. – 6p.m. [1211]
- Schedule 2 – The Works are the installation of Apparatus in accordance with the Plan [1212]
- The Plan – shows unfenced disaggregated equipment at ground level comprising proposed meter cabinet and proposed outdoor unit [1220]. A partially folded colour copy of the plan is at [FSB 53]
- Clause 4.17 – Owner may access Apparatus for inspection purposes subject to prior written notice [1205].
- Clause 4.18 – If the Owner wishes to carry out any works of repair or maintenance H3G must turn off, remove or relocate the Apparatus.
- Clauses 1.7 and 7.5 – successors in title [1201 and 1207]
- Clause 4.9 – Not to assign Rights or Apparatus without Owners consent [1203]
- Clause 11 – Exclusion of ss24-28 Landlord and Tenant Act by Order of Newcastle County Court made on 20th August 2003.

53. Cell:cm carried out a site inspection on 22nd April 2020 [SB 146-156]. It was noted that site provider was using the compound for storage [SB147]. Photographs at [SB153] described as "SP Storage" show bags of charcoal, gardening equipment and building materials within the compound. The photograph below shows the operators equipment within a wooden fence which has been painted purple as well as bags of charcoal [SB150]

54. AP Wireless carried out a Site Inspection on 26th March 2026 [SB157-172]. At [SB160] it is noted:

*"Telecoms equipment within enclosure SP uses for storage, closed board fencing to 2 sides 1.775m high".*

Compound location (painted purple) is shown at [SB162]. Charcoal and other site provider items are shown next to operator equipment at [SB169]. The meter cabinet (also painted purple as is the brickwork of the flowerbeds) appears unfenced and is shown at [SB170]

55. I am cautious about the photographs taken long after the agreement was entered into in 2003. They are, however, not consistent with exclusive occupation by the operator. There is no fencing obligation in the 2003 agreement. My finding is that the ground based apparatus situated at the rear of the hotel does not occupy an area of exclusive possession. I repeat my findings at Preliminary Issue (1) and find that the 2003 agreement did not grant exclusive possession either of the rooftop or the areas occupied by ground based equipment. The 2003 agreement is not a lease.

## Conditional agreement

56. The agreement provides:

- Agreement Period – *the period commencing on the Commencement Date and expiring on 31st December 2021 (subject to earlier determination in accordance with this agreement) [1199]*
- Commencement Date – *the date on which the Pre-Condition is satisfied*

- Clause 2.1 – Conditional Agreement. "*The unconditional clauses shall come into effect on the date hereof and all other provisions of this agreement shall be conditional upon the Pre-Condition being satisfied*" [1201]

- Pre-Condition – *H3G giving written notice to the Owner that:*

  *(i) any planning permissions and approvals, listed buildings consents and conservation area consents required by H3G for the Works and the operation and use of the Apparatus at the Building have been obtained and are in a form and on terms satisfactory to H3G (in its absolute discretion) or no such permission approval or consent is required to be obtained; and*

  *(ii) any technical, building, environmental, health and safety, ground condition or other report or survey required by H3G (whether in relation to the Building itself or the adequacy of the Building for the installation and subsequent beneficial use of the Works or otherwise) has been obtained and the results are satisfactory to H3G (in its absolute discretion) [1200-1201]*

57. The Pre-Condition requires H3G to give written notice to the Owner [1200]. No evidence as to written notice ever having been given has been produced by the Claimants. However, as the agreement was entered into over 23 years ago, the Apparatus installed and rent demanded, paid and accepted, I can safely infer that either notice has been given or waived.

58. The end date of the 2003 agreement is 31st December 2021 being the expiry of the Agreement Period [1199]. The 2003 agreement is a Conditional Agreement with the Commencement Date being the date the Pre-Condition is satisfied. Woodfall at 26.062 deals with certainty of term:

    *Although the date of commencement of the term must be certain, it may be expressed by reference to the happening of an uncertain event, provided the event has taken place when the agreement is sought to be enforced (Brilliant v Michaels [1945] 1 All E.R. 121). See, for instance, Swift v MacBean [1942] 1 K.B. 375, where it was held that an agreement for a lease to commence on the declaration of war, if that should occur within one year, was valid.*

    Accordingly, the date of commencement of the term of the 2003 agreement is certain as the Pre-Condition (the uncertain event) has taken place.

59. The position at Cosmopolitan Hotel is different from Upper Hall Farm. The 2003 agreement does not create a "rolling term" as understood in **Praetoria Energy**. The position is also different to **Newham LBC v Thomas-Van Staden** [2008] EWCA Civ 1414 referred to by Mr Morris in argument. In summary in that case, it was held that:

    *"A term of a lease for a fixed period but which was defined to include "any period of holding over or extension of it whether by statute or at common law or by agreement" is not a "term of years certain" for the purposes of s.38(4) of the Landlord and Tenant Act 1954. Therefore, the court had no jurisdiction to make an order purporting to contract the lease out of the provisions of ss.24–28 in Pt II of the Act."*

The 2003 agreement does not include "the words of extension." Accordingly the issue in **Van Staden** does not arise and Newcastle County Court had jurisdiction to make the order of 20th August 2003 as recorded at clause 11 of the 2003 agreement [1209]:

*"Having been authorised to do so by an Order of the Newcastle County Court made on the 20 day of August Two thousand and three under the provisions of Section 38(4) of the Landlord and Tenant Act 1954 (as amended) the Owner and H3G agree that the provisions of sections 24 and 28 of that Act shall be excluded in relation to any tenancy created in this agreement, the costs of obtaining the said order being borne by H3G"*

60. I therefore find that the 2003 agreement is for a term certain having a fixed end date of 31st December 2021 and a commencement date by reference to an event which has long since taken place. In my judgement nothing turns on the expression "term of years certain" in section 38(4)(a) of the Landlord and Tenant Act 1954. As Mr Radley-Gardner rightly submits the wording in section 38(4)(a) simply contrasts a lease for a term certain with a periodic tenancy which cannot be contracted out of the protections of the 1954 Act.

61. In Cosmopolitan Hotel the relevant agreement created a term of years certain within the meaning of section 38(4)(a) of the Landlord and Tenant Act 1954 and has been validly contracted out of that Act.

62. There is a further potential issue at Cosmopolitan Hotel in respect of registration of the assignment to the Claimants under the Land Registration Act. I will deal with that matter under Preliminary Issue (6).

**(5) In 0810 Crown House and 0818 Elland Hall Farm, were the Para 33 notices relied upon valid?**

63. The Claimants occupy the site at Crown House under an agreement dated 3rd December 2012 between The Angel Foundation (1) and the Claimants (2) [1259-1286]. The 2012 agreement was made on surrender of a previous agreement made on 10th May 2006. The Schedule to the 2102 agreement contains Modification of Previous Agreement [1264-1265] as follows:

*2. A new definition of "Minimum Term" shall be inserted into clause 1.1 of the Previous Agreement as follows and any reference to the "Term" throughout the Previous Agreement shall be interpreted as meaning the "Minimum Term":*

*Minimum Term" means 3 years 6 months from*

*3. Clause 3.1 is to be deleted in its entirety and replaces with the following new clause 3.1:*

*"3.1 This Agreement shall commence on the Term Commencement Date and shall, subject to clause 11 continue for no less than the Minimum Term."*

*4. Clauses 11 of the Previous Agreement is to be deleted in its entirety and the following new Clause 11 is to be inserted:*

....

*11.3 This Agreement may be terminated by either party giving to the other party not less than 18 months' written notice to expire at any time on or after the expiry of the Minimum Term*

64. The Paragraph 33 Notice at Crown House is dated 4th January 2024 [1705-1708] and at paragraph 6 proposes:

    *The day from which we propose that:*
    ....
    *d. the Agreement should be terminated, and from which the new agreement set out in Annex should have effect is 11 July 2024*

65. The agreement at Elland Hall Farm is dated 1st April 1993 and made between JS Morton & Sons (1) and Hutchison Microtel Limited (2) [1319-1330]. Clause D sets out Minimum Term of 10 years from 1st April 1993. Clause 2.1 provides:

    *This Agreement shall come into effect on the date shown above and shall continue for no less than the Minimum Term. It may be terminated by either party giving to the other not less than 12 months' notice in writing to expire at any time on or after the expiry of the Minimum Term.* [1322]

66. The same parties entered into a Supplemental Agreement on 3rd January 2001 [1331-1341] whereby the Minimum Term in clause D was extended to 15 years from 3rd January 2001 [1336]

67. The Paragraph 33 Notice at Elland Hall farm is dated 29th April 2025 [1494-1497]. Paragraph 6 proposes:

    *The day from which we propose that:*
    ....
    *d. [the Agreement should be terminated, and from which the new agreement set out in Annex 1 should have effect]is 30 April 2026 or, if that date does not fall after the period required under paragraph 33(3) of the Code, then the earliest date that does.*

68. No notice to terminate either agreement has been given. Mr Radley-Gardner submits that does not matter – the P33 Notices perform "double duty" in the same way as notices given under the 1954 Act. Mr Radley-Gardner accepts that the date of 11th July 202**4** in respect of Crown House is wrong. However, a reasonable recipient would have realised that 18 months' notice was required to terminate the agreement and that 11th July 202**5** was intended by the giver of the notice.

69. Mr Watkin submits that the answer to Preliminary Issue (5) is obvious from the heading of Paragraph 33 "How may a party to a code agreement require a change to the terms of **an agreement which has expired**?". Mr Watkin also relies on Paragraph 33(3)(b) which provides that the date specified must fall:

    *(b) after the time at which, apart from paragraph 30, the code right to which the existing code agreement relates would have ceased to be exercisable or to bind the*

*site provider or at a time when, apart from that paragraph, the code agreement could have been brought to an end by the site provider.*

70. Much of what was said before me has already been the subject of the decision of the Court of Appeal in **On Tower UK Ltd v British Telecommunications plc** [2025] EWCA Civ 844 albeit in the context of Paragraph 31 rather than Paragraph 33. I have been referred to the following passages from the judgement of Holgate LJ i:

*66 In suggesting that Parliament used the word "could" rather than "would" in paragraph 31(3)(b) to obviate any legal requirement for a break notice or notice to quit to be served, both BT and the tribunal invested the word "could" with more meaning than it could possibly bear in this context. Both "could" and "would" are words used in the conditional tense. The word "would" is used because if a code agreement reaches its term date, it would inevitably expire by effluxion of time in the absence of statutory continuation under paragraph 30(2). But termination of the agreement by a notice to quit or by a break clause depends upon a party entitled to exercise that right electing to do so. In that sense the site provider "could" have brought the code agreement to an end by operating a break mechanism in the absence of paragraph 30(2) and the consequential requirement to comply with paragraphs 31 and 32 in order to terminate the continued agreement.*

*67 If no break notice is served, the code agreement continues until the term date by virtue of that contract (or in this case the lease) and not by statutory continuation under paragraph 30(2). BT's contention, accepted by the tribunal, that paragraph 31(3)(b) applies where a break clause is exercisable but not exercised is inconsistent with the Supreme Court's decision in Compton Beauchamp that a code agreement cannot be varied (or terminated) under Part 5 until the agreement continues by force of paragraph 30(2) instead of the terms of the agreement itself. The correct position is that the parties are held to the terms of the original agreement until it expires or it is terminated contractually by one or other party serving a valid notice to quit or break notice. A party (whether the site provider or the operator) can only propose in a paragraph 33 notice that the existing agreement be modified or replaced by a new agreement from a date which falls after the date when the contractual agreement has expired or been terminated (see paragraph 33(2) and (3)(b)).*

*68 ....*

*69 Absent a provision in a code agreement for termination before the term date, a site provider cannot rely upon paragraph 31 to terminate the agreement before that date. The Code leaves untouched the tenure provided by a contract, but when that agreement comes to an end, the tenure is extended by paragraph 30(2). Likewise, where an agreement contains a break clause exercisable by the site provider serving a notice relying on specified grounds, and subject to conditions, whether precedent or subsequent, neither paragraph 31 nor anything else in the Code indicates that the legislation overrides such contractual terms. The contrary view would remove rights and/or protections to which the operator is entitled and by which the site provider is bound according to the terms of the parties "bargain". It would allow the site provider to use paragraph 31 of the Code to bring about the termination of the agreement before it has expired or been terminated contractually. This would run counter to the general legislative purpose of seeking to confer broader rights and more flexibility on operators, without intruding upon their existing contractual* *rights (see e g Fancourt J in EE Ltd v Stephenson [2021] 4WLR 116 at paras 46—47 and paragraphs 289—291 of the Explanatory Notes accompanying the Digital Economy Bill).*

*70 BTs interpretation of the Code that a break clause need only be exercisable, not exercised so as to terminate a contract, is also incompatible with conditional break clauses…*

*71….*

*72 The correct and straightforward way in which to understand paragraphs 30(2) and 31(3)(b) of the Code is that they apply where a contractual agreement either expires or is terminated before the term date in accordance with the terms of that agreement.*

*73 This construction of the Code would not prejudice site providers in any material sense. A site provider would simply have to abide by the terms of the code agreement to which it had agreed, or which the court had determined to be appropriate.*

….

*78 For all these reasons, I reach the firm conclusion that OTs construction of paragraphs 30(2) and 31(3)(b) of the Code is correct and ground 1 should be upheld. Where a site provider relies upon a break clause in order to found an entitlement to serve a paragraph 31 notice, it must exercise its right to break the contractual term in compliance with the terms of that clause and the agreement….*

71. I am not persuaded by Mr Radley-Gardner's submissions that I should distinguish the **On Tower** case from the matters before me. The Court of Appeal were considering Paragraph 31 and not Paragraph 33. However, as the Court of Appeal said at paragraph 33 of the judgement "*Paragraph 33(3)(b) is in essentially the same terms as paragraph 31(3)(b)"*. Mr Radley-Gardner also argues on a point of distinction that he Court of Appeal was considering a conditional rather than unconditional break clause. It seems to me that the basic principles are the same in either case and that any practical solution should not seek to distinguish one type of break clause from another.

72. I now turn to Mr Radley-Gardner's **Mannai** point in respect of Crown House. This rather exposes the difficulty inherent in the "double duty" argument. The OFCOM prescribed form does not accommodate two dates. In the case of Crown House 18 months is required to terminate the agreement whereas the minimum period under the Code is 6 months. Paragraph's 7, 11 and 12 of the Notice all refer to "*the end of six months beginning with the day on which this notice is given*". The Notice was served under solicitor's covering letter also dated 4th January 2024 [1488-9]. That letter also refers to the period of 6 months. A reasonable recipient would have been under no doubt that the date of 11th July 202**4**, was intended because the Notice was solely concerned with the requirements of the Code.

73. In Crown House and Elland Hall Farm, the Para 33 notices relied upon are not valid because the Claimants have not exercised their right to break the contractual term.

**(6) In 0819 Haughley, was the existing agreement relied upon surrendered by operation of law so that the Claimants occupy the site under a periodic tenancy which is not a Code agreement to which Part 5 of the Code applies?**

74. The Agreed Facts are:

*53. The Claimants together have ECA installed at the site and are making payments to the Respondent in respect of the site, which the Respondent has accepted.*

*54. The Claimants rely on an agreement dated 11 June 2002 between (1) James Wilfred Bevan and (2) the First Claimant (then called T-Mobile (UK) Limited) (the "Haughley Agreement") for a term of 20 years. The Haughley Agreement was registered against the freehold title.*

*55. On 19 September 2008 the First Claimant and the Claimants together executed a deed of assignment of the Haughley Agreement to the Claimants jointly (the "Haughley Deed of Assignment").*

*56. A copy of the Haughley Deed of Assignment was sent to James Wilfred Bevan under cover of a letter from MLM Carwright dated 23 September 2008.*

*57. The Claimants together made payments to Mr Bevan in respect of the Site and Mr Bevan accepted such payments.*

75. The 2002 lease being for a term of less than 21 years was not registerable at HM Land Registry, at that time, as at date of grant. However, by the time of the 2008 assignment the Land Registration Act 2002 had come into force and under section 4(2)(b) of the Act the requirement of registration applied to the assignment as a transfer of a leasehold estate in land for a term which, at the time of the transfer, has more than seven years to run. Accordingly, the Claimants had a duty under section 6(4) of the Act to apply for registration of title within the 2 month period of registration. It is common ground that no such registration took place.

76. The Respondent's case is that the assignment became void for non-registration on expiry of the two month period of registration. Rent was demanded, paid and accepted and in such circumstances a period tenancy arose with consequent surrender by operation of law of the 2002 agreement.

77. **Rahimi v Westminster City Council** [2024] EWCA Civ 73 contains a particularly helpful summary of the circumstances in which it is proper to infer a tenancy at will at paragraph 58:

*....What is of particular interest in the context of this case is that Nourse LJ said that the case turned on well-established principles of the law of landlord and tenant; but the cases to which he referred (notably Marcroft Wagons Ltd v Smith [1951] 2 K.B. 496) lay down the ordinary principles which apply when the court is asked to infer the grant of a tenancy by conduct. In Marcroft, having referred to the Rent Acts, Denning LJ said at 506:*

*"In these circumstances, it is no longer proper for the courts to infer a tenancy at will, or a weekly tenancy, as they would previously have done from the mere acceptance*

*of rent. They should only infer a new tenancy when the facts truly warrant it. The test to be applied in Rent Restriction Acts cases is the same test as that laid down by Lord Mansfield in cases of holding over: "The question therefore is, quo animo the rent was received, and what the real intention of both parties was?": see Doe v Batten, followed by this court very recently in Clarke v Grant. If the acceptance of rent can be explained on some other footing than that a contractual tenancy existed, as, for instance, by reason of an existing or possible statutory right to remain, then a new tenancy should not be inferred."*

78. In my judgement Mr Watkin is wrong when he says that the 2008 assignment was void. It was not. Section 7 of the 2002 Act sets out the *"Effect of non-compliance with section 6":*

*(1) If the requirement of registration is not complied with, the transfer, grant or creation becomes void as regards the transfer, grant or creation of a legal estate.*

*(2) On the application of subsection (1)—*

*(a)in a case falling within section 4(1)(a) or (b), the title to the legal estate reverts to the transferor who holds it on a bare trust for the transferee,*

It is important to note that the assignment was not void ab initio. It "becomes" void if not registered within the 2 month period of registration. At that point the assignment became void "*as regards the transfer of the legal estate*". The assignment is not void in toto. In law the effect of the assignment is that the assignor, T-Mobile (now EE), holds the legal title on a bare trust. The beneficiaries of the bare trust are the Claimants.

79. Accordingly, acceptance of rent as set out in AF 53 and 57 can be explained on some other footing other than Mr Watkin's periodic tenancy:

(1) The Claimants are beneficiaries under a bare trust of the legal estate
(2) The Claimants may perfect their title by late application if the registrar is satisfied that there is good reason for doing so under section 6(5) of the 2002 Act
(3) The Claimants have protection under both the Old and New Code in respect of their ECA. As Mr Radley-Gardner points out code rights are not subject to registration under P2(7) of the Old Code and P14 of the Code
(4) Protection under Schedule 2, paragraph 3 of the 2002 Act as tenants in occupation (overriding interest). (In fact, the 2002 Agreement is noted in the Schedule of Notices of Leases to the Respondent's freehold title no: SK400884 [1388-1390])

80. Accordingly, the Claimants occupation and payment of rent is readily explainable by their statutory rights under the 2002 Act and both Old and New Code. In conclusion the assignment is only void in respect of the transfer of the legal estate. The 2002 agreement was not surrender by operation of law, and no periodic tenancy is to be inferred.

81. There is another reason why rent was demanded, paid and accepted. The provisions of the Assignment dated 19th September 2008 [1374-1382] contains the following provisions:

*4.3 The Assignees covenant as a separate covenant with the Landlord that from the date of this assignment and for the residue of the term of the Lease to pay the rents and all sums payable under the Lease and to observe and perform the covenants and conditions on the part of the tenant contained in or referred to in the Lease* [1378]

*6. A person who is not a party to this deed shall not have any rights under or in connection with it by virtue of the Contracts (Rights of Third Parties) Act 1999 save in respect of the rights of the Landlord pursuant to clause 4.3.* [1379]

Notice of Assignment was sent to Mr Bevan on 23rd September 2008 [1383]. Accordingly rent is payable to the Landlord under clause 4.3 of the Assignment and the 1999 Act. Under such circumstances it is unnecessary to infer a periodic tenancy.

82. Finally, under Preliminary issue (6), Mr Watkin raises the issue of whether the Claimants are "a party to a code agreement" and can therefore access Part 5. This issue was considered by the Court of Appeal in **On Tower UK Ltd v AP Wireless II (UK) Ltd** [2026] EWCA Civ 43. At paragraph 63 Newey LJ said:

*"In my view, an operator with merely the benefit of a code agreement is such a party."*

As beneficiaries under the bare trust arising under section 7(2)(a) of the 2002 Act the Claimants have the benefit of the 2002 Code agreement. The Claimants are therefore parties to a Code Agreement.

83. At the hearing the parties canvassed the possibility of expanding Preliminary Issue (6) to include Cosmopolitan Hotel. I do not have the benefit of the parties agreed position on the payment of rent nor disclosure of any consents or otherwise of the Landlord to the assignment. Under those circumstances I have not dealt with registration issues at Cosmopolitan Hotel. I hope that my general remarks on the statutory protections enjoyed by the Claimants under the 2002 Act and the Code may assist the parties to resolve matters without the need for further litigation.

84. In Haughley, the existing agreement relied upon was not surrendered by operation of law. The Claimants do not occupy the site under a periodic tenancy. The existing agreement at Haughley is a Code agreement to which Part 5 applies.

## Decision

85. Preliminary Issue (1): The agreements at Edward House, Mosley Court, and Palace Bingo are not leases to which Part II of the Landlord and Tenant Act 1954 applies. Accordingly, the Tribunal has jurisdiction in respect of all three sites under Part 5 of the Code.

86. Preliminary Issue (2): Licence to Assign and Variation dated 1st December 2011 in respect of Palace Bingo did not vary the demise. There was no surrender and regrant of a new lease.

87. Preliminary Issue (3): In Upperwood House Farm, the agreement to exclude the effect of sections 24 to 28 of the 1954 Act was effective and Part 5 of the Code applies to the agreement.

88. Preliminary Issue (4): In Cosmopolitan Hotel the relevant agreement created a term of years certain within the meaning of section 38(4)(a) of the Landlord and Tenant Act 1954 and has been validly contracted out of that Act.

89. Preliminary Issue (5): In Crown House and Elland Hall Farm, the Para 33 notices relied upon are not valid because the Claimants have not exercised their right to break the contractual term.

90. The references in Crown House and Elland Hall Farm are struck out under FTT Rule 9(2)(a).

91. Preliminary Issue (6): In Haughley, the existing agreement relied upon was not surrendered by operation of law. The Claimants do not occupy the site under a periodic tenancy. The existing agreement at Haughley is a Code agreement to which Part 5 applies.

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

BIR/00CN/ECR/2025/0805: **Edward House**, Edward Street Stockport Greater Manchester, SK1 3DQ

BIR/00CN/ECR/2025/0809: **Moseley Court**, Wake Green Road, Moseley, Birmingham, West Midlands, B13 9PU

BIR/00CN/ECR/2025/0823: **Palace Bingo**, Leicester Road, Bedworth, CB12 8AB

BIR/00CN/ECR/2025/0821: **Upperwood House Farm**, Holmfirth Road, Oldham, OL3 7NW

BIR/00CN/ECR/2025/0826: **The Cosmopolitan Hotel**, Durham Street, Hartlepool, TS24 0JB

BIR00CN/ECR/2025/0810: **Crown House**, Borough Road, Sunderland, Tyne & Wear, SR1 1HW

BIR/00CN/ECR/2025/0818: J.S Morton & Sons, **Elland Hall Farm**, Exley Lane, West Elland, HX5 0SL

BIR/00CN/ECR/2025/0819: **Haughley** - Tomtits Lane, Junction off Tomtits Lane & Plashwood Road, Wetherden, Stowmarket, Suffolk, IP14 3LW