Neutral Citation Number: [2024] UKUT 263 (LC)

Case Number: LC-2023-000815

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

First-tier Tribunal Reference: LC-2023-000322 and 000348

9th September 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE – CODE AGREEMENTS – LEASE/LICENCE DISPUTE - sites in open country – agreements entered into granting code operator the right to install and operate telecommunications equipment – whether agreements took effect as leases or licences – whether one of the agreements was granted for a term which was capable of being a term certain – whether either or both of the agreements granted exclusive possession of a defined area of land to the code operator – decision that both agreements did grant exclusive possession of a defined area of land – decision that only one of the agreements took effect as a lease because, in the case of the other agreement, the agreement was not granted for a term which was capable of being a term certain and took effect only as a licence – appeal allowed in part

BETWEEN:

AP WIRELESS II (UK) LIMITED

Appellant

-and-

ON TOWER UK LIMITED

Respondent

Land lying to the West of Burlington Gardens,
Hullbridge, Hockley, SS5 6BD and
Land at Meadowley and Fields Farm,
150A and 150B, Congleton Road, Sandbach

The President, Mr Justice Edwin Johnson
24th May 2024

David Holland KC and Wayne Clark, instructed by Freeths LLP, for the Appellant
Oliver Radley-Gardner KC, instructed by Gowling WLG (UK) LLP, for the Respondent

The following cases are referred to in this decision:

Street v Mountford [1985] AC 809
EE Limited and Hutchison 3G UK Limited v London Borough of Islington [2019] UKUT 53 (LC)
Clear Channel UK v Manchester City Council [2005] EWCA 1304
Addiscombe Garden Estates Ltd v Crabbe [1958] 1 QB 513, at page 522:
Global 100 Ltd v Laleva [2021] EWCA Civ 1835 [2022] 1 WLR 1046
Mexfield Housing Co-operative Ltd v Berrisford [2011] UKSC 52 [2012] 1 AC 955, at [107]:
Rainy Sky SA v Kookmin Bank [2011] UKSC 50 [2011] 1 WLR 2900, at [21]:
Vodafone Ltd v Potting Shed Bar and Gardens Ltd [2023] EWCA Civ 825
Smith v Chadwick (1882) 20 ChD 2 27
Sattar v Sattar [2009] EWHC 289 (Ch)
JA Pye (Oxford) Ltd v Graham [2002] UKHL 30 [2003] 1 AC 419
Powell v McFarlane (1977) 38 P&CR 452
Seddon v Smith (1877) 36 LT 168
EE Ltd v Edelwind [2020] UKUT 0272 (LC)
AG Securities v Vaughan [1990] 1 AC 417
Leadenhall Residential 2 Limited v Stirling [2001] EWCA Civ 1011 [2002] 1 WLR 499
Manchester Airport Plc v Dutton [2000] QB 133
Gilpin v Legg [2017] EWHC 3220 (Ch) [2018] L&TR 6
EE Limited and Hutchison 3G Limited v London Borough of Islington [2019] UKUT 0053 (LC)
Dresden Estates Ltd v Collinson (1988) 55 P&CR 47
PG Lewins Limited v Hutchison 3G UK Limited and EE Limited (County Court at Bristol – 9th March 2018)
Burana v Leeds Teaching Hospitals NHS Trust [2017] EWCA Civ 1980 [2018] 1 WLR 1965
Davies v Jones [2009] EWCA Civ 1164 [2010] 1 P&CR 22
On Tower UK Limited v AP Wireless II (UK) Limited (LC-2023-000322, 323, 332, 348 and 365)
Leeds City Council v Broadley [2016] EWCA Civ 1213 [2017] 1 WLR 738
Ashburn Anstalt v Arnold [1989] Ch 1
Prudential Assurance Co Ltd v London Residuary Body [1992] 2 AC 386
Breams Property Investment Co Ltd v Stroulger [1948] 2 KB 1

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Introduction

1. This appeal is concerned with the status of two agreements, each relating to the installation and operation of telecommunications equipment on an area of land. The question which arises is whether each of these agreements (one of which was subsequently amended) took effect as a licence or a lease.

2. The question of whether these agreements constituted licences or leases came before the First-tier Tribunal (**"the FTT"**) by way of preliminary issues in two references made pursuant to the provisions of Part 5 of the Electronic Communications Code in Schedule 3A to the Communications Act 2003 (**"the Code"**).

3. In each of those references (**"the References"**) the Respondent to this appeal, On Tower UK Limited (**"OT"**), sought the termination of the existing agreement and an order that the parties enter into a new agreement, pursuant to paragraph 34(6) of the Code.

4. The respondent to each Reference, and the Appellant in this appeal, is AP Wireless II (UK) Limited (**"APW"**), which is the freehold owner of the respective areas of land which are the subject of each of the agreements.

5. The preliminary issues were heard in the FTT by Judge Jackson (**"the Judge"**). For the reasons set out in his decision (**"the Decision"**) dated 30th October 2023 the Judge decided that each agreement constituted a licence, and not a lease.

6. With the permission of the Judge APW appeals against the Decision. APW says that the Judge was wrong to decide that each agreement took effect as a licence, and that each agreement took effect as a lease. For its part OT resists the appeal (**"the Appeal"**). OT says that the Judge was right to decide that each agreement took effect as a licence, both for the reasons given in the Decision and for certain additional reasons relied upon by OT in the Appeal.

7. The particular reason why the lease/licence point matters is that the agreements, when they were originally entered into, were subject to the Telecommunications Code in Schedule 2 to the Telecommunications Act 1984, as amended (**"the Old Code"**). The agreements qualify as subsisting agreements for the purposes of the Code, within the meaning of paragraph 1(4) of the transitional provisions in Schedule 2 to the Digital Economy Act 2017. The catch is that paragraph 6(2) of these transitional provisions provides that Part 5 of the Code does not apply to a subsisting agreement which is a lease of land in England and Wales if (i) it is a lease to which Part II of the Landlord and Tenant Act 1954 (**"the 1954 Act"**)

applies and (ii) there is no agreement under Section 38A of the 1954 Act, excluding the lease from the protection of Part II.

8. It is common ground that the agreements, if they did take effect as leases, were not contracted out of the protection of Part II of the 1954 Act, but were and remain subject to that protection. If therefore the agreements did take effect as leases, the References fall to be struck out, on the basis that the FTT has no power under paragraph 34(6) of the Code to terminate the agreements or order the parties to enter into new agreements. Instead, OT will have to seek renewal of the agreements, as leases, pursuant to the provisions of Part II of the 1954 Act.

9. At the hearing of the Appeal APW was represented by David Holland KC and Wayne Clark. OT was represented by Oliver Radley-Gardner KC. The hearing was listed for a day. When I saw the joint list of authorities for the hearing, this looked highly optimistic. The list of authorities was quite remarkable in its length, and was supplemented by the arrival of further authorities at the hearing itself. It was not easy to be sure that Mr Holland's opening line, to the effect that the joint list of authorities had not quite reached *Donoghue v Stevenson*, was actually meant in jest. That said, both leading counsel were efficient and organised in their submissions, and it proved possible to complete the oral argument by sitting late within the listed day. I am grateful to all counsel for their written and oral submissions and for their assistance in my consideration of the question of whether the Judge was right to find that the agreements were licences rather than leases.

Preliminary matters

10. All references to Paragraphs in this decision are, unless otherwise indicated, references to the paragraphs of the Decision. Reference to **"the Tribunal"** mean the Upper Tribunal Lands Chamber. I will use the collective expression **"the Agreements"** to refer to the two agreements with which the Appeal is concerned. The expressions *"lease"* and *"tenancy"* are used interchangeably. Italics have been added to quotations.

11. I have already mentioned the volume of authorities which were before me in the Appeal. Normally, this would be a ground for criticism of the parties' legal teams, for their failure to edit down the authorities to more manageable proportions, ensuring that only one authority was cited for each proposition of law relied upon. In the present case, and unusually, I am prepared to accept that the parties' legal teams, with some limited exceptions, were not guilty of excessive citation of authorities. As will become apparent, the lease/licence dispute raised an unusually wide range of issues, which in turn engaged a wide range of authorities.

12. There is one further point to add, in relation to the authorities. I have not found it necessary, in this decision, to make reference to each and every authority referred to in the written and oral submissions. All of these authorities have been taken into account in my consideration of the Appeal but, as I have said, I have not found it necessary to make express reference to every authority.

The 1997 Agreement

13. The first of the Agreements is an agreement in writing dated 11th March 1997, entered into between a Mr Thornhill (**"Mr Thornhill"**), as owner of the site with which this agreement was concerned, and Orange Personal Communications Services Limited (**"Orange"**). The agreement (**"the 1997 Agreement"**) was signed by each party, but was not made by deed.

14. The 1997 Agreement bore the following heading:

> *"AGREEMENT FOR THE INSTALLATION OF PCN EQUIPMENT – GREENFIELD"*

15. The 1997 Agreement was split into two parts. The first part contained the essential terms agreed between the parties, lettered A-E, although clause A may be said to be more akin to a recital. In terms of what the parties agreed, by clauses A-E, it is easiest simply to set out clauses A-E in full:

> *"A. The Owner is entitled to a legal estate in the site described below ("the Site") as identified in red on the attached plan:*
> *GREENFIELD SITE AT FIELDS FARM, SANDBACH*
> *B. The Owner has agreed that Orange shall have the right at its own risk and expense:*
> *(i) to install operate maintain repair and renew PCN Equipment on the Site in connection with Orange's PCN System,*
> *(ii) to run maintain repair and renew an electricity cable from the Owner's electricity supply to the PCN Equipment or if required a mains electricity service from the boundary of the premises to the PCN Equipment,*
> *(iii) to run maintain repair and renew or permit any other Public Telecommunications Operator to run maintain repair or renew a communications cable from the PCN Equipment to the boundary of the Premises in such positions as shall be agreed between the parties,*
> *(iv) to obtain vehicular access at all times to and from the Site.*
> *C. Orange has agreed to pay for such rights a Tariff of £3,300 per annum exclusive of VAT payable in accordance with clause 3.1 of the attached terms and conditions.*
> *D. The Minimum Term is 10 years from the date shown above.*
> *E. This Agreement shall be subject to and shall incorporate the terms and conditions attached."*

16. It will be noted that the 1997 Agreement identified the site which was the subject of the 1997 Agreement as a greenfield site at Fields Farm, Sandbach. I will use the expression **"the Sandbach Site"** to refer to this land, that is to say *"the Site"*, as the Site was defined and identified in the 1997 Agreement. In its identification of the Sandbach Site, the 1997 Agreement made reference to an attached plan. The attached plan (**"the 1997 Sandbach Plan"**) has not been located.

17. The second part of the 1997 Agreement contained the terms and conditions referred to in clause E, which were divided into ten numbered clauses. I will need to come back to these clauses, in detail, later in this decision. There are two particular points which I should note at this stage.

18. First, clause 1 of these terms and conditions contained a list of defined expressions used in the 1997 Agreement. PCN Equipment was defined to mean *"such aerials transceiver and switch equipment cabling power supply equipment and support structures including a mast or tower or any combination of such equipment necessary as is required by Orange for the operation of a PCN system,"*. I will use the expression **"the PCN Equipment"** to mean the telecommunications equipment which Orange was granted the right to *"install operate maintain repair and renew"* by clause B(i) of the 1997 Agreement.

19. Second, it will be noted that clause D defined what was referred to as the Minimum Term as 10 years from 11th March 1997. Clause 1 of the terms and conditions defined the Minimum Term by reference to clause D. Clause 2 of the terms and conditions then provided as follows, under the heading of *"Term and Termination"*:

> *"2.1 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.*
> *2.2 Notwithstanding the provisions of clause 2.1 Orange may terminate this Agreement at any time on not less than 3 months prior written notice expiring on a Payment Day in the event of circumstances arising such that the Site is no longer suitable for the operation of PCN Equipment including (but not limited to) the erection of new buildings or environmental changes to the area in which the Site is located or the complete or partial destruction of the Site.*
> *2.3 In the event that a redevelopment of the Site is to take place the Owner agrees to consult with Orange and agree to a suitable relocation of its PCN Equipment within the Premises. If a relocation is not possible then the Owner shall have the right to terminate this Agreement at any time upon giving not less than 12 months prior written notice to Orange."*

20. As can be seen, clause 2.1 made it clear that the term of 10 years was the minimum term. Assuming that the rights of earlier termination in clauses 2.2 and 2.3 were not operated, clause 2.1 provided that the 1997 Agreement was to continue for a minimum term of 10 years, and could then 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 (of ten years).

21. Clause 2.1 gave rise to an issue distinct to the 1997 Agreement. OT argued that, independent of its other arguments on the lease/licence dispute, the 1997 Agreement could not have taken effect as a lease because its term was uncertain or, putting the matter the other way round, because there was no term certain. I will refer to this separate issue, which generated a good deal of complex argument on the relevant case law, as **"the Term Issue"**.

22. The 1997 Agreement was supplemented by a further written agreement dated 2nd November 2000 and entered into between Mr Thornhill and Orange. Again, this supplemental agreement (**"the 2000 Supplemental Agreement"**) was signed by each party, but was not made by deed. By clause 3.1 of the 2000 Supplemental Agreement the parties agreed that, with effect from the date of the 2000 Supplemental Agreement, the 1997 Agreement should be amended in accordance with the provisions set out in Schedule 1 to the 2000 Supplemental Agreement.

23. Schedule 1 to the 2000 Supplemental Agreement did three things. First, it substituted new plans of the Sandbach Site for the (now missing) 1997 Sandbach Plan. Second, it increased the amount of the *"Tariff"* payable under the 1997 Agreement. Third, Orange agreed to carry out a landscaping scheme, and maintain the same for a period of five years from the date of the 2000 Supplemental Agreement.

24. The plans which were attached to the 2000 Supplemental Agreement, which were collectively described as the *"New Plan"*, are available. I will refer to these plans as **"the 2000 Sandbach Plans"**.

25. The 2000 Sandbach Plans comprise three plans. One is an elevation plan, showing the telecom tower and other equipment on the Sandbach Site. One of the other two plans, which is dated October 2000, appears to be a landscaping plan of some kind and may have been connected in some way to the landscaping obligation which Orange undertook in the 2000 Supplemental Agreement. I will refer to this plan as **"the Sandbach Landscaping Plan"**. The final plan is described as a site plan. I assume that this plan (**"the Sandbach Site Plan"**) was intended to show the Sandbach Site, but the delineation of the boundaries of the Sandbach Site on the Sandbach Site Plan is not clear. Clause A in the 1997 Agreement described the Sandbach Site *"as identified in red on the attached plan"*. It is unclear whether this red edging was carried over into any of the 2000 Sandbach Plans. The Sandbach Site is defined in the 2000 Supplemental Agreement as *"The land more particularly described as such in the Existing Agreement* [the 1997 Agreement]*."*.

26. In the remainder of this decision references to the 1997 Agreement mean, unless otherwise indicated or unless the context otherwise requires, the 1997 Agreement as amended by the 2000 Supplemental Agreement. The same applies to references to the 1997 Agreement within collective references to the Agreements.

27. The bundle of documents for the Appeal contains photographs of the Sandbach Site. The photographs show an area, situated in open fields, enclosed by a wooden post and rail fence with a metal barred gate. Within this fenced off area is a smaller area, enclosed by a higher metal mesh fence, topped with strands of barbed wire and incorporating a padlocked metal mesh double gate. A number of safety/information notices are affixed to the gate, including a notice stating no entry to unauthorised persons. Within this smaller area, which is best described as a compound, the telecommunications equipment is located. This equipment includes the telecommunications tower, which is bolted to a concrete pad, and also includes a fairly substantial structure, perhaps best described as a cabin, which I assume houses telecommunications equipment/plant, and a separate smaller structure which I understand to be an electricity cabinet. The evidence before the Judge included a witness statement of David Powell, a Regional Asset Manager of APW. A fuller description of the Sandbach Site, and what is known of its history can be found in Mr Powell's witness statement. The Decision records, at Paragraph 20, that Mr Powell was not called to give oral evidence. Given that the Judge took the evidence in Mr Powell's witness statement into account, I assume that this means that Mr Powell's evidence in his witness statement was not challenged, and was incorporated into the evidence before the Judge on that basis.

28. The evidence of Mr Powell is that APW purchased the freehold interest in the Sandbach Site on 31st October 2022. I believe that the freehold title to the Sandbach Site is registered under title number CH718616. The office copy entries for this freehold title disclose that APW was registered as proprietor of the Sandbach Site on 7th November 2022.

29. The operator of the telecommunications equipment now present on the Sandbach Site is OT. I will refer to this equipment as **"the Sandbach Equipment"**. I use this separate definition because I do not know to what extent, if at all, the Sandbach Equipment is the same telecommunications equipment which was originally installed on the Sandbach Site, pursuant to the 1997 Agreement; that is to say the original telecommunications equipment which I am referring to as the PCN Equipment.

Identification of the Sandbach Site

30. Although the 1997 Sandbach Plan, as originally entered into, is now missing, and although the copies of the 2000 Sandbach Plans which I have seen leave something to be desired, in terms of their identification of the Sandbach Site, it seems to me that it is possible, with the assistance of the photographs and Mr Powell's evidence and notwithstanding the absence of colouring on the 2000 Sandbach Plans, to identify the extent of the Sandbach Site, as the same was identified in the 1997 Agreement and the 2000 Supplemental Agreement.

31. Starting with the Sandbach Landscaping Plan, it shows an area marked as *"EXISTING COMPOUND"*, together with an adjacent area marked as *"PROPOSED COMPOUND EXTENSION"*. There are gates shown on the Sandbach Landscaping Plan which appear to be either the gates shown in the photographs, or gates in the same position. My reference to the gates shown on the photographs means (i) the gate in the post and rail fence which provides access from the neighbouring field into the area of land within which is located what I am referring to as the compound (housing the Sandbach Equipment), and (ii) the gate to the compound itself. So far as the post and rail fence is concerned, I also note that the Sandbach Landscaping Plan identifies this fence as *"STOCK FENCE TO BE MAINTAINED BY THE FARMER"*.

32. Moving on to the Sandbach Site Plan, it shows an enclosed area which appears to comprise the areas shown on the Sandbach Landscaping Plan as the then existing compound and the proposed compound extension. The Sandbach Site Plan also shows that this enclosed area is located within a larger fenced area. The boundary lines of the enclosed inner area are identified as *"PROPOSED NEW 1.8m HIGH DIRICKX FENCING WITH 3 STRANDS BARBED WIRE ON TOP"*. The boundary line of the larger area is identified as *"EXISTING ELECTRIC STOCK PROOF FENCE TO BE REPLACED WITH WOODEN POST AND FIVE RAIL FENCE"*. The double gates to the inner area are identified as *"COMPOUND ACCESS GATES min* [illegible figure] *mm WIDE"*. The gate to the larger area is identified as *"EXISTING GATE AND FENCING TO BE RETAINED"*.

33. The 1997 Agreement made reference to *"the Site"* and *"the Premises"*. I have already set out the definition of the Site, which I am referring to as the Sandbach Site. The Premises were defined in the 1997 Agreement to mean *"any land, property or buildings under the control of the Owner of which the Site forms part"*. The Premises were further defined in the 2000 Supplemental Agreement to mean *"The property known as land at Fields Farm, Congleton Road, Sandbach, Cheshire, as more particularly described in the Existing Agreement."*. The relevant points are (i) that the Premises clearly constituted a larger area than the Sandbach Site, and (ii) that the Sandbach Site lay within the Premises. This is consistent with the evidence of the photographs and the Sandbach Plans which show the fenced compound housing the Sandbach Equipment as contained within the larger area of land in the ownership of APW. This larger area of land is registered under title number CH718616. The registered title plan shows the larger area, edged in red, but also shows, within the red edging, an inner area which roughly corresponds to the fenced compound.

34. Clause 5.1.8 of the 1997 Agreement imposed the following obligation upon Orange to erect fencing.

> *"5.1.8 to erect a stock fence to fully enclose the PCN Equipment and to maintain the stock fence in a good and safe state of repair and condition,"*

35. In his witness statement Mr Powell describes a visit he made to the Sandbach Site, when he spoke to Mr Thornhill, who had previously owned *"the land"*. I take the reference to *"the land"* to be a reference to the land in which the Sandbach Site is situated. According to Mr

Thornhill, the Sandbach Site was originally built around 1992 and had always been fenced off, originally with a lower timber stock fence, which was subsequently upgraded to the current wire (metal mesh) fence topped with barbed wire. Mr Thornhill was apparently not sure when the fence was upgraded. Mr Powell speculates that this was done in or around November 2000; being the date of the 2000 Supplemental Agreement. It seems to me that the information provided by Mr Thornhill is broadly consistent with the evidence of the Sandbach Site Plan, which shows the *"PROPOSED NEW 1.8m HIGH DIRICKX FENCING WITH 3 STRANDS BARBED WIRE ON TOP"* along the boundary lines of the enclosed inner area. It seems reasonable to assume that the proposed new fencing corresponds to the upgraded wire fence referred to by Mr Thornhill. It also seems reasonable to assume that this upgrading took place around the time of the 2000 Supplemental Agreement, and replaced the stock proof fence erected pursuant to Orange's obligation under clause 5.1.8 of the 1997 Agreement (quoted above).

36. I draw the following inferences from (i) the 2000 Sandbach Plans, (ii) the terms of the 1997 Agreement, and (iii) the photographs:
    (1) The enclosed area of compound which can now be seen in the photographs is the same area as the two areas shown on the Sandbach Landscaping Plan as *"Existing Compound"* and *"Proposed Compound Extension"*.
    (2) The enclosed area of compound which can now be seen in the photographs is the same area as the area shown on the Sandbach Site Plan which is enclosed by a fence described as proposed new Dirickx fencing of 1.8m height.
    (3) Subject to the qualification in my next sub-paragraph, the enclosed area of compound which can now be seen in the photographs is the same area as the area identified in the 1997 Agreement and the 2000 Supplemental Agreement as *"the Site"*; that is to say what I am referring to as the Sandbach Site.
    (4) The area of the Sandbach Site was increased by the 2000 Supplemental Agreement. I say this because (i) there are the references to *"EXISTING COMPOUND"* and *"PROPOSED COMPOUND EXTENSION"* on the Sandbach Landscaping Plan, (ii) these two areas coincide with the Sandbach Site, as it now appears in the photographs, (iii) the 2000 Supplemental Agreement substituted new plans, namely the 2000 Sandbach Plans, which were not necessarily required if the Sandbach Site was not being enlarged, and (iv) the tariff payable under the 1997 Agreement was increased, in proportionate terms, by quite a significant amount. It is difficult to be certain that the area of the Sandbach Site was increased by the 2000 Supplemental Agreement, in the absence of express reference to enlargement of the Sandbach Site in the 2000 Supplemental Agreement. In my view there is sufficient evidence to draw the inference that there was an increase in the area of the Sandbach Site, which was effected by the 2000 Supplemental Agreement. I add this point. Assuming that there was such an enlargement of the Sandbach Site, the 1997 Agreement was clearly intended to continue to apply to the Sandbach Site, as enlarged.

The 2002 Agreement

37. The second of the Agreements is an agreement in writing dated 21st January 2002, entered into between David Pinkerton and Andrew Pinkerton (**"the Pinkertons"**), as owners of the site with which this agreement was concerned, and Orange. The agreement (**"the 2002 Agreement"**) was signed by each party, but was not made by deed.

38. The 2002 Agreement bore the following heading:

"AGREEMENT FOR THE INSTALLATION OF TELECOMMUNICATIONS EQUIPMENT"

39. The 2002 Agreement was also split into separate parts. The first part contained the essential terms agreed between the parties, lettered A-E, although clause A may, again, be said to be more akin to a recital. As before, it is easiest simply to set out clauses A-E in full:

> *"A. The Owner is entitled to a legal estate in the site described below ("the Site") shown for identification purposes only edged in red on the attached plan, part of Hanover Farm, Lower Road, Lower Road, Hullbridge, Essex as shown on plan number:*
> *30/ESX0311/01 Issue A*
>
> *B. The Owner has agreed that Orange shall have the following rights ("the Rights"):*
>
> *(i) at Orange's expense to install operate maintain repair renew replace upgrade and add to the Telecommunications Equipment on the Site,*
>
> *(ii) at Orange's expense to run maintain repair renew and replace an electricity cable from the Owner's electricity supply to the Telecommunications Equipment or if required a mains electricity service from the boundary of the Premises to the Telecommunications Equipment in such positions as shall be agreed between the parties,*
>
> *(iii) at Orange's expense to bring onto and keep and operate on the Premises in a position to be agreed between the parties for any period when the electricity supply to the Telecommunications Equipment has been interrupted a back up power generator together with any associated sockets and cables,*
>
> *(iv) at Orange's expense to run maintain repair renew and replace a communications link from the Telecommunications Equipment to the boundary of the Premises in such positions as shall be agreed between the parties,*
>
> *(v) to obtain access including vehicular access subject to giving 24 hours reasonable prior notification except in the case of emergency when access shall be unrestricted to and from the Site over and along the route shown in blue on the attached plan including where necessary a right to lay a hardcore track along such route together with a right of access on reasonable notice (except in all cases of carrying out Emergency Works (as defined in the Schedule to this Agreement) when no notice shall be required) to such parts of the Premises as are reasonably necessary to exercise the Rights provided that Orange will comply with such reasonable safety and security procedures as are required by the Owner."*
>
> *C. Orange has agreed to pay for such rights a Fee of £4,000 per annum ("the Fee") exclusive of VAT payable and subject to review in accordance with the attached terms and conditions set out in the Schedule to this Agreement.*
>
> *D. The Term is 20 years from the date shown above ("the Term").*
>
> *E. This Agreement shall be subject to and shall incorporate the terms and conditions set out in the Schedules to this Agreement."*

40. The 2002 Agreement identified the site which was the subject of the 2002 Agreement as a part of Hanover Farm, Lower Road, Hullbridge, Essex. In common with Mr Powell in his witness statement, I will use the expression **"the Lubbards Site"** to refer to this land, that

is to say *"the Site"*, as the Site was defined and identified in the 2002 Agreement. I will refer collectively to the Sandbach Site and the Lubbards Site as **"the Sites"**.

41. It will be noted that the Lubbards Site was shown, for identification purposes only, on a plan attached to the 2002 Agreement. There is a plan attached to the 2002 Agreement. The version of this plan which I have seen is a black and white copy of the original plan (**"the Lubbards Plan"**). If there was red edging on the original version of the Lubbards Plan, the copy plan which I have seen does not show where the red edging ran.

42. Schedule 1 to the 2002 Agreement contained the bulk of the terms and conditions referred to in clause E, which were divided into ten numbered clauses. Again, I will need to come back to these clauses, in detail, later in this decision. As with the 1997 Agreement, clause 1 of these terms and conditions contained a list of defined expressions used in the 2002 Agreement. Telecommunications Equipment was defined to mean *"any combination of antennas transceiver and switch equipment cabling power supply equipment and any equipment ancillary thereto and support structures including a mast or tower as required from time to time as set out in Schedule 2 to this Agreement."*.

43. Schedule 2 to the 2002 Agreement further defined the Telecommunications Equipment in the following terms:

> *"15 metre (excluding lightning protection and antennae) tower/mast, antenna system with supporting structure to give up to 360 degrees radio coverage and including up to 6 antennae up to 4 microwave dish antennae, equipment cabin (s)/cabinet (s) not exceeding in aggregate 35 cubic metres in volume, associated feeders, LNAs and associated equipment all cabling and ancillary equipment, cable gantries and power equipment as required."*

44. I will use the expression **"the Telecommunications Equipment"** to mean the telecommunications equipment which Orange was granted the right to *"install operate maintain repair renew replace upgrade and add to"* by clause B(i) of the 2002 Agreement.

45. The bundle of documents for the Appeal also contains photographs of the Lubbards Site. These photographs show an area (again best described as a compound) enclosed by a high metal mesh fence, topped with strands of barbed wire and incorporating a padlocked metal mesh double gate. Two safety/information notices are affixed to the gate, including a notice stating no entry to unauthorised persons. Within this enclosed compound, various items of telecommunications equipment are located, including a cylindrical telecommunications tower. Access from the road to the land in which this enclosed area is situated is obtained through a metal barred gate. A fuller description of the Lubbards Site, and what is known of its history can be found in Mr Powell's witness statement.

46. The evidence of Mr Powell is that APW purchased the freehold interest in the Lubbards Site on 22nd June 2017. According to Mr Powell, APW's title includes land around the enclosed compound which I have described above. The land owned by APW is, I believe, registered under four separate titles. The office copy entries for these titles disclose that APW was registered as proprietor of the land in these titles on 26th June 2017.

47. The operator of the telecommunications equipment now present on the Lubbards Site is OT. I will refer to this equipment as **"the Lubbards Equipment"**. As with the Sandbach Equipment, I use this separate definition because I do not know to what extent, if at all, the Lubbards Equipment is the same telecommunications equipment which was originally

installed on the Lubbards Site, pursuant to the 2002 Agreement; that is to say the original telecommunications equipment which I am referring to as the Telecommunications Equipment.

Identification of the Lubbards Site

48. Although the Lubbards Plan, in common with the 2000 Sandbach Plans, leaves something to be desired, in terms of its identification of the Lubbards Site, it seems to me, again, that it is possible, with the assistance of the photographs and Mr Powell's evidence and notwithstanding the absence of colouring on the Lubbards Plan, to identify the extent of the Lubbards Site, as the same was identified in the 2002 Agreement.

49. As I have explained, the photographs show that the enclosed compound lies within land which is also in the ownership of APW. One reaches the compound from the road by passing through a gate and crossing some rough open land to the locked gate to the compound. The distance between the gate on to the road and the gate into the compound looks to be around 10 metres or so. The photographs show what look like the overgrown remains of a track or road in this location, which I assume once provided a better standard of access between the road and the compound.

50. The Lubbards Plan has the title *"SITE PLAN"* in the title box at the foot of the page. The Lubbards Plan actually contains two plans on the same page. The first and larger of these plans is labelled *"COMPOUND PLAN"*. This larger plan (**"the Lubbards Compound Plan"**) appears to have been intended to show the works to be carried out by Orange on the Lubbards Site, both by way of installation of the Telecommunications Equipment and otherwise. The obligations in the terms and conditions in Schedule 1 to the 2002 Agreement included, at clause 5.1.6, the following obligation to erect a fence around the Telecommunications Equipment:

> *"following completion of the Works to erect a stock proof fence to fully enclose the Telecommunications Equipment and to maintain such fence in a good and safe state of repair and condition throughout the Term."*

51. The Lubbards Compound Plan shows what I am referring to as the compound, as an area comprising a square, surrounded by what is described as a 15m by 15m fence, of a height of 1.8m. The specific description of this fence on the Lubbards Compound Plan is *"PROPOSED 15m x 15m HIGH DIRICKX FENCE COMPOUND REFER TO Std. Drg. No. GF/STD/F/01 FOR DETAILS"*. It seems reasonable to assume that this fence or a replacement of this fence is the metal mesh fence, topped with barbed wire, which encloses the compound and the Lubbards Equipment, and can be seen in the photographs.

52. The smaller of the two plans on the Lubbards Plan is labelled *"SITE PLAN"*. There are two particular features of this smaller plan (**"the Lubbards Site Plan"**) which I note.

53. First, the Lubbards Site Plan also shows what I am referring to as the compound, as comprising a square. The boundaries of the square are delineated by relatively thick lines. It seems to me a reasonable inference that these lines, in the original of the Lubbards Plan, constituted the red edging referred to in clause A of the 2002 Agreement, and thus delineated the Lubbards Site, for identification purposes. In the absence of a coloured version of the Lubbards Plan, it is not possible to be certain of this.

54. Second, and going back to clause B(v) in the 2002 Agreement, which I have set out above, one of the rights granted to Orange was a right to obtain access to and from the Lubbards Site *"over and along the route shown in blue"* on the Lubbards Plan. The Lubbards Site Plan shows, by hatching, an access route running from the gate on the road to the gate of the compound. This hatched route is described on the Lubbards Site Plan as *"SITE ACCESS"*. The location of that hatched route appears to coincide with the overgrown remains of the track or road, which can be seen on the photographs, running between the gate to the road and the gate to the compound. Again, in the absence of a coloured version of the Lubbards Site Plan it is not possible to be certain of this, but it seems to me a reasonable inference that the route shown in blue on the Lubbards Plan is the hatched route shown on the Lubbards Site Plan.

55. I draw the following inference from (i) the Lubbards Plan, (ii) the terms of the 2002 Agreement, (iii) the photographs, and (iv) the absence of any evidence that the Lubbards Site has been moved from its original location. The enclosed area of compound which can now be seen in the photographs is the same area as the area identified in the 2002 Agreement and on the Lubbards Plan as *"the Site"*; that is to say the Lubbards Site.

The Decision

56. The Judge commenced the Decision, at Paragraphs 1-10, with an introduction to the preliminary issues which he had to decide. The Judge identified the preliminary issues as whether each of the Agreements was a lease to which Part II of the 1954 Act applied. The Judge then reviewed, by reference to a number of cases, the case law on the lease/licence distinction, at Paragraphs 11-19, and summarised the evidence of Mr Powell in his witness statement, at Paragraphs 20-22.

57. At Paragraph 23 the Judge identified his approach to resolving the lease/licence question, in relation to each of the Agreements:

> *"23. I now turn to deal with the factors identified by the parties which it is said point in the direction of either a lease or a licence."*

58. The Judge then proceeded to work through the provisions in each of the Agreements, considering whether they pointed to each of the Agreements being a lease or a licence.

59. The Judge dealt with the Term Issue at Paragraphs 24 and 25. The Judge concluded that the 1997 Agreement has been made for a term certain, and had not been prevented from taking effect as a lease for this reason:

> *"24. Clause D of the 1997 Agreement provides "The Minimum Term is 10 years from the date shown above". 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".*
>
> *25. The initial term of 10 years is certain. As was said in Berrisford (FC) v Mexfield Housing Cooperative Limited [2011] UKSC 52 the periodic tenancy that arises on expiry of the Minimum Term without fetter on giving notice is also a term certain. I find that the 1997 Agreement is for a term certain."*

60. At Paragraph 75 the Judge came to his conclusions. At Paragraph 75 the Judge made specific reference to Lord Templeman's statement, in his speech in *Street v Mountford* [1985] AC 809 (at 826H-827B), that it may sometimes appear from the surrounding circumstances that the right of exclusive possession of the relevant premises is referable to a legal relationship other than a tenancy, and to the examples given by Lord Templeman of such other relationships. The Judge then went on, at Paragraph 76, to cite from the decision of the Upper Tribunal in *EE Limited and Hutchison 3G UK Limited v London Borough of Islington* [2019] UKUT 53 (LC), where the point was made, at [43]-[45], that rights under the Code, and under the Old Code, could be granted by way of lease or licence.

61. At Paragraph 77 the Judge made the following observations of the nature of the legal relationship created by each of the Agreements:

> *"In the case of the 1997 and 2002 Agreements I am not concerned with residential accommodation where there is, for the very good reason of providing protection for a person occupying property as their home, often a bright line between lease and licence. In the context of this reference, I am concerned with "a legal relationship other than a tenancy". That does not mean that that other legal relationship must be a purely personal contractual right. The 1997 and 2002 Agreements are long term arrangements for the installation and operation of electronic communications apparatus. Bearing in mind the rapid speed of development of electronic communications it is entirely understandable that the parties intended that those long term agreements should be assignable and bind successors in title. Indeed, that is exactly what has happened to both agreements. The provisions allowing for sharing and upgrading are standard terms in telecommunications agreements. They are vital to enable the parties to meet the challenges of a rapidly developing technology. To seek to use the lease/licence distinction, to say that an agreement is either one or the other is simply inappropriate in the modern world of electronic communications. Lord Templeman speaking in 1985 could not possibly have anticipated the technological changes that have taken place since that time. He did however leave the door open to legal relationships other than a tenancy. As the Upper Tribunal observed in* ***Islington*** *there is a diverse spectrum of telecommunications rights which can be granted. Sometimes a lease is the most convenient way forward equally there are situations where there is no grant of exclusive possession."*

62. At Paragraphs 78 and 79 the Judge explained that he had considered, separately, the totality of the rights and obligations contained in each of the Agreements. Some pointed to exclusive possession. Some were more consistent with a legal relationship other than a tenancy. The Judge added that he had disregarded any labels attached by the parties:

> *"78. In order to discover the intention of the parties I have considered the totality of rights and obligations contained in both the 1997 and 2002 agreements separately. In doing so I have considered the surrounding circumstances at the time the agreement was entered into. As set out above some clauses point towards exclusive possession, others are more consistent with a legal relationship other than a tenancy. I have disregarded any labels attached by the parties.*
>
> *79. As in* ***Edelwind*** *"the parties have expressed themselves both ways". Length of term, inspection (1997 Agreement only), chattels (per* ***Gilpin v Legg****), assignment and successors in title all point strongly to exclusive possession and*

a lease. Other terms such as absence of covenant for quiet enjoyment, warranty of title, repair, rates and insurance are neutral."

63. The Judge came to his decision at Paragraphs 80 and 81:

> *"80. My decision is finely balanced. There are clearly clauses to be found in "Terms and Conditions" attached and incorporated into the 1997 Agreement and contained in Schedule 1 to the 2002 Agreement which are resonant of a lease. However, those terms and conditions are, in my judgment, outweighed by clause B to both Agreements. The intention of the parties was that the operator would be granted a bundle of rights in connection with the installation and operation of PCN/Telecommunications Equipment. There is no grant of exclusive possession with a corresponding interest in land. The "lift and shift" provisions provide a qualified right for the site owner, in consultation with Orange, to more the Site to another location within the Premises (of which the Site forms a part). The Plans attached to the agreement do not demarcate the site. The Plans are in fact technical drawings of the PCN/Telecommunications Equipment. The quite extraordinary fencing and the almost "Orwellian" security observed by Mr Powell are not intended to demarcate the site or keep the landlord out. Fencing and security is present to protect the PCN/Telecommunications Equipment in both the 1997 and 2002 Agreements. The Site is secondary.*
>
> *81. I find that neither the 1997 nor the 2002 Agreement grant exclusive possession. That does not mean that they grant purely personal contractual rights either. Both are telecommunications agreements. Such agreements are not leases to which Part 2 of the Landlord and Tenant Act 1954 applies."*

64. The Judge thus decided that the Agreements were not leases to which Part II of the 1954 Act applied.

The grounds of the Appeal

65. In overall terms the case of APW is that the Judge was wrong to construe the Agreements as licences, when he should have held that the Agreements were both leases.

66. In term of the specific grounds of appeal, as set out in APW's application to the FTT for permission to appeal (**"the Grounds of Appeal"**), they can conveniently be divided into two parts.

67. First, APW contends that the Judge was mistaken in his approach to construing the Agreements; see paragraph 7 of the Grounds of Appeal. The specific complaints are as follows:
    (1) The Judge concentrated on the form of the clauses in the Agreements and the plans annexed to them rather than on their substance and effect.
    (2) The Judge reached his decision by balancing out a number of clauses which were, in his view, indicative of the Agreements being leases against those which were indicative of them being licences, when he should have concentrated on the substance and effect of each clause.
    (3) The Judge held that an agreement granting code rights was *"a legal relationship other than a tenancy"* by reason of which the grant of exclusive possession did not constitute the grant of a lease.

68. Second, APW contends that the Judge went wrong in his conclusions on the meaning and effect of various provisions and/or features of the Agreements; see paragraph 8 of the Grounds of Appeal. The specific provisions and/or features of the Agreements which are the subject of this part of the Appeal are identified as follows in the Grounds of Appeal:
    (1) Clause B of each Agreement.
    (2) The plans annexed to each Agreement.
    (3) Clause 10.1 of each Agreement
    (4) The lack of any reference to the 1954 Act.
    (5) The fencing obligations in, respectively, clause 5.1.8 of the 1997 Agreement and clause 5.1.6 of the 2002 Agreement.
    (6) Clause 4.2 of the 1997 Agreement and clause 4.1 of the 2002 Agreement.
    (7) The fact that the Agreements were not made by deed.
    (8) Clause 7.5 of the 1997 Agreement and clause 7.7 of the 2002 Agreement.
    (9) Clause 8.1 of each Agreement.
    (10) Clause 2.3 of the 1997 Agreement and clauses 2.4 and 2.5 of the 2002 Agreement.

69. As part of this attack on the Judge's conclusions in relation to the provisions and/or features of the Agreements, APW says that the Judge, in considering the 2000 Supplemental Agreement, failed properly or at all to have regard to and/or properly to understand certain matters; see paragraph 9 of the Grounds of Appeal. The specified matters are as follows:
    (1) The 2000 Sandbach Plans, as evidence of what the operator had in fact done pursuant to the terms of the 1997 Agreement; and/or
    (2) The factual position as evidenced by the 2000 Sandbach Plans which made it clear, objectively, that the operator had asserted an entitlement to exclusive possession of the Sandbach Site, under the terms of the 1997 Agreement; and/or
    (3) The factual matrix known to the parties at the time when the 2000 Supplemental Agreement was made; and/or
    (4) The intention of the parties as evidenced by the 2000 Sandbach Plans, which made it clear, objectively, that the parties were intending to confer upon the operator an entitlement to exclusive possession of the extended compound, as shown on the 2000 Sandbach Plans.

70. In relation to the 2000 Supplemental Agreement, the case of APW is that the Judge should, on a proper consideration of the plans and the factual matrix as at the date of entry into the 2000 Supplemental Agreement, have found that the 2000 Supplemental Agreement granted a lease of the Sandbach Site (as extended), even if the 1997 Agreement had not granted a lease; see paragraph 10 of the Grounds of Appeal.

71. The Grounds of Appeal, as summarised above, have now been elaborated by the written and oral submissions of Mr Holland and Mr Clark for the hearing of the Appeal.

The respondent's notice

72. OT has filed a respondent's notice in response to the Appeal, supported by a statement of case. For present purposes it is not necessary to go into the arguments set out in the statement of case, which have now been elaborated by Mr Radley-Gardner's written and oral submissions for the hearing of the Appeal. I need note only two points. First, the statement of case set outs the reasons why the Decision should be upheld. Second, those reasons include the Term Issue, which the Judge decided against OT.

The lease/licence dispute – the correct approach

73. I find it convenient to start by identifying the general principles which apply, in considering whether an agreement has given rise to a lease or a licence. The skeleton argument prepared by Mr Holland and Mr Clark contained a very helpful summary of these general principles. What follows is drawn largely from that summary, including the classification of those principles adopted by counsel. As I understood the position this summary of the general principles was not materially disputed by Mr Radley-Gardner. The dispute lay in the application of those principles to the Agreements.

74. The starting point is *Street v Mountford* [1985] AC 809. The question of whether a contractual agreement for the occupation of land creates a lease or a licence depends upon whether the agreement grants exclusive possession of the relevant land for a term at a rent. Where the agreement does grant exclusive possession of the relevant land for a term at a rent, and provided that the grant of exclusive possession is not referable to a legal relationship other than a lease, the result will be a lease. This is so whatever label is placed upon the agreement by the parties. In order to determine whether the relevant agreement does or does not grant exclusive possession for a term at a rent, it is necessary to look at the substance of the relevant agreement.

75. In *Street v Mountford* the relevant agreement had been stated by the parties to be a licence and recorded the acceptance of Mrs Mountford, the occupier of the relevant premises, that the agreement was not intended to give her a tenancy protected under the Rent Acts. This however was not sufficient to prevent the agreement from taking effect as a tenancy, and thereby enjoying Rent Act protection. As Lord Templeman memorably explained, at 819D-F:

> *"In the present case, the agreement dated 7 March 1983 professed an intention by both parties to create a licence and their belief that they had in fact created a licence. It was submitted on behalf of Mr. Street that the court cannot in these circumstances decide that the agreement created a tenancy without interfering with the freedom of contract enjoyed by both parties. My Lords, Mr. Street enjoyed freedom to offer Mrs. Mountford the right to occupy the rooms comprised in the agreement on such lawful terms as Mr. Street pleased. Mrs. Mountford enjoyed freedom to negotiate with Mr. Street to obtain different terms. Both parties enjoyed freedom to contract or not to contract and both parties exercised that freedom by contracting on the terms set forth in the written agreement and on no other terms. But the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade."*

76. The Court of Appeal had decided, in *Street v Mountford*, that the agreement created a licence. In his judgment in the Court of Appeal Slade LJ reasoned that if the defendant (Mrs Mountford) was to displace the express statement of intention embodied in the declaration that the agreement created a licence, she had to show that the declaration was either a deliberate sham or at least an inaccurate statement of what was the true substance of the real transaction between the parties. Lord Templeman disagreed. As he explained, at 826H-827B:

> *"My Lords, the only intention which is relevant is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent. Sometimes it may be difficult to discover whether, on the true construction of an agreement, exclusive possession is conferred. Sometimes it may appear from the surrounding circumstances that there was no intention to create legal relationships. Sometimes it may appear from the surrounding circumstances that the right to exclusive possession is referable to a legal relationship other than a tenancy. Legal relationships to which the grant of exclusive possession might be referable and which would or might negative the grant of an estate or interest in the land include occupancy under a contract for the sale of the land, occupancy pursuant to a contract of employment or occupancy referable to the holding of an office. But where as in the present case the only circumstances are that residential accommodation is offered and accepted with exclusive possession for a term at a rent, the result is a tenancy."*

77. *Street v Mountford* was concerned with residential premises. It is however clear from the subsequent case law, involving lease/licence disputes in relation to business premises, that the principles stated in *Street v Mountford* apply equally to business premises. I refer, by way of example only, to the judgment of Jonathan Parker LJ in *Clear Channel UK v Manchester City Council* [2005] EWCA 1304, a case which raised the question of whether an agreement which granted the right to use sites for advertising hoardings was a lease or a licence. In his judgment in that case, at [11], Jonathan Parker LJ recorded, without qualification, that it was common ground that the principles in *Street v Mountford* applied.

78. Two particular points follow from Lord Templeman's explanation of the law in *Street v Mountford*.

79. First, the label or labels (if any) attached by the parties to the relevant agreement may be indicative, but they are not determinative. As Jenkins LJ explained, in *Addiscombe Garden Estates Ltd v Crabbe* [1958] 1 QB 513, at page 522:

> *"As to the first question—whether the so-called licence of 1957 April 12, 1954, in fact amounted to a tenancy agreement under which the premises were let to the trustees—the principles applicable in resolving a question of this sort are, I apprehend, these. It does not necessarily follow that a document described as a licence is, merely on that account, to be regarded as amounting only to a licence in law. The whole of the document must be looked at; and if, after it has been examined, the right conclusion appears to be that, whatever label may have been attached to it, it in fact conferred and imposed on the grantee in substance the rights and obligations of a tenant, and on the grantor in substance the rights and obligations of a landlord, then it must be given the appropriate effect, that is to say, it must be treated as a tenancy agreement as distinct from a mere licence."*

80. This leads on to the second point, which is that it is necessary to look at the whole of the relevant agreement and analyse the substance and effect of the rights granted and the obligations undertaken.

81. This approach is not of course peculiar to the determination of the question of whether an agreement creates a licence or a tenancy. In *Global 100 Ltd v Laleva* [2021] EWCA Civ 1835 [2022] 1 WLR 1046 the Court of Appeal had to consider the lease/licence question in the context of a dispute over whether an agreement for the occupation of property by a property guardian had created a tenancy rather than (as the agreement was described) a

licence. After quoting from Lord Templeman in *Street v Mountford*, at page 819, Lewison LJ made the point that Lord Templeman's approach was not confined to the lease/licence question. As Lewison LJ explained, at [36]:

> *"36 This approach is not peculiar to the question whether an agreement creates a licence or a tenancy. In Secret Hotels2 Ltd (formerly Med Hotels Ltd) v Revenue and Customs Comrs [2014] 2 All ER 685, para 32 the Supreme Court approved an observation of mine in an earlier case:*
>
> > *"The court is often called upon to decide whether a written contract falls within a particular legal description. In so doing the court will identify the rights and obligations of the parties as a matter of construction of the written agreement; but it will then go on to consider whether those obligations fall within the relevant legal description. Thus the question may be whether those rights and obligations are properly characterised as a licence or tenancy (as in Street v Mountford [1985] AC 809); or as a fixed or floating charge (as in Agnew v Comr of Inland Revenue [2001] 2 AC 710), or as a consumer hire agreement (as in TRM Copy Centres (UK) Ltd v Lanwall Services Ltd [2009] 1 WLR 1375). In all these cases the starting point is to identify the legal rights and obligations of the parties as a matter of contract before going on to classify them."*

82. In the present case, if the totality of the rights and obligations in each Agreement had the effect of a grant to Orange of exclusive possession of the relevant Site for a term at a rent, the result will be that each Agreement took effect as a lease, even though each Agreement was not described as a lease and notwithstanding that each Agreement may not have contained the conventional language of a lease.

83. This leads into the question of construction of the provisions of the Agreements. What principles apply? The answer is that ordinary principles of contractual construction apply. Leases and licences are construed according to the same principles as apply to any other contract. As Lord Clarke explained in *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52 [2012] 1 AC 955, at [107]:

> *"107 As I see it, the ordinary principles governing the true construction of a contract apply to tenancy agreements and leases. The principles have been discussed in many cases, notably of course, as Lord Neuberger MR said in Pink Floyd Music Ltd v EMI Records Ltd [2010] EWCA Civ 1429 at [17], by Lord Hoffmann in Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749, passim, in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, 912F—913G and in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, paras 21—26. I agree with Lord Neuberger MR (also at para 17) that those cases show that the ultimate aim of interpreting a provision in a contract is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. As Lord Hoffmann made clear in the first of the principles he summarised in the Investors Compensation Scheme case, at p 912H, the relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."*

84. The Agreements were commercial agreements, in the sense that there were entered into for business purposes by Orange, a commercial entity. In these circumstances I accept that

business common sense has a role to play in the construction process. This role was explained by Lord Clarke in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 [2011] 1 WLR 2900, at [21]:

> *"21 The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."*

85. As Lord Clarke explained, construction of a contract involves ascertaining what a reasonable person would have understood the parties to have meant. The relevant reasonable person is one who has all the background knowledge available to the parties in the situation in which they were at the time of the contract. This requires examination of the circumstances in which the agreement was made. Returning specifically to the lease/licence context and to *Global 100*, Lewison LJ confirmed the requirement to consider the surrounding circumstances. At [37] Lewison LJ quoted Lord Templeman, in explaining the requirement to consider the circumstances in which the relevant agreement was made, in the following terms, at [37]:

> *"37 As well as what is written on the page, the court may consider the circumstances in which the agreement was made. In AG Securities v Vaughan [1990] 1 AC 417, 458 Lord Templeman put it this way:*
>
> > *"In considering one or more documents for the purpose of deciding whether a tenancy has been created, the court must consider the surrounding circumstances including any relationship between the prospective occupiers, the course of negotiations and the nature and extent of the accommodation and the intended and actual mode of occupation of the accommodation."*

86. There is a further point which can usefully be made at this stage, in relation to the question of the correct approach to determining whether the Agreements created leases or licences. Both of the Agreements gave rise to rights under the Old Code. Both of the Agreements are now subsisting agreements within the meaning of paragraph 1(4) of the transitional provisions in Schedule 2 to the Digital Economy Act 2017. As such, and subject to the transitional provisions, the Agreements are subject to the Code. This engages the question of what role, if any, the application of the Old Code to the Agreements plays in the process of determining whether the Agreements created leases or licences.

87. The answer to this question can, it seems to me, be found in the decision of the Court of Appeal in *Vodafone Ltd v Potting Shed Bar and Gardens Ltd* [2023] EWCA Civ 825. The question before the Court of Appeal in the *Potting Shed* case was a very different one, concerning the question of whether a person with an interest in land, derived from the original grantor of an agreement subject to the Code or derived from a successor of the grantor, could be treated as a party to the agreement by virtue of paragraph 10(3) of the Code. The Court of Appeal answered this question in the affirmative, deciding that the wording of paragraph 10(3) was not intended to be exhaustive and could apply to a person who, as in that case, was entitled to the benefit and burden of the relevant leasehold interest

held by the site operator by virtue of a concurrent lease granted by a successor in title of the freehold owner of the site and original grantor of site operator's lease. Nugee LJ explained this conclusion in the following terms, at [75]:

> *"75. Applying that approach, it seems to me that the regime is intended to work in such a way that the person currently entitled to the benefit and burden of the agreement as operator, and the person currently entitled to the benefit and burden of the agreement as site provider, are parties to the agreement and can exercise the rights conferred by Part 5 of the Code. That can in my judgement be achieved by construing paragraph 10(3) as not intended to define exhaustively who is to be treated as a party to the agreement. On that basis APW, being currently entitled to both the benefit and the burden of the Lease by virtue of the Concurrent Lease, is to be regarded as a "party to the agreement" with the result that it can invoke paragraph 31 by serving notice on Vodafone, and both it and Vodafone can invoke paragraph 33 by serving notice on each other as "the other party to the agreement.""*

88. In rejecting the arguments of Vodafone, the site operator, Nugee LJ said this, at [78]:

> *"78. Mr Read said that the Code created "a sui generis form of statutory rights" (Compton Beauchamp at [117] per Lady Rose), and was "designed to be, so far as possible, a self-contained Code" (Cornerstone Telecommunications Infrastructure Ltd v University of London [2019] EWCA 2075 at [34] per Sir Terence Etherton MR, Lewison and Arnold LJJ). It was intended to be a unified set of rules that covered all situations from a one-off licence in relation to tree lopping to a long-term full-blown lease. That I accept. The Code has to be applied both to contractual arrangements such as licences or wayleaves and to the grants of property rights such as leases. But I do not accept that this means that one jettisons the ordinary law of landlord and tenant, or, as Lewison LJ put it in argument, that the Code exists in a legal vacuum."*

89. So far as the present case is concerned, I derive the following guidance from what was said by Nugee LJ at [78]. First, the Code does not exist in a legal vacuum. It is subject to the ordinary law of landlord and tenant, where this is relevant. The same, it seems to me, should apply equally when considering an agreement which was, when it was entered into, subject to the Old Code. Second, in considering whether an agreement subject to the Code (or the Old Code) created a lease or a licence, the principles set out in *Street v Mountford* and subsequent case law continue to apply. They are not ousted by the Code (or the Old Code). The fact that the agreement was subject to the Code (or the Old Code) may be relevant context, but it does not alter the overall approach.

90. Finally, it is convenient to mention, in the context of the correct approach to the lease/licence question, two general principles of construction to which Mr Radley-Gardner made reference.

91. The first principle is the principle that while documents forming part of the same transaction may be used to construe a document in that transaction, documents outside that transaction cannot be used in the same way; see the judgment of Jessel Mr in *Smith v Chadwick* (1882) 20 Ch D 2 27, at pages 62 and 63 of the report. I accept this principle, but I do not think that it is of much relevance in the present case. It seems to me that the 1997 Agreement and the 2002 Agreement were clearly not part of any single or continuous transaction, with the

consequence that one Agreement cannot be used to construe the other Agreement. The same applies to other agreements entered into between the parties or other parties. I did not however understand the arguments of APW in the Appeal to attempt to do any of these things and, if and in so far as APW did attempt to do any of these things, I do not consider that it was entitled to do so. It is an important feature of the present case is that there are considerable similarities, both as between the terms of the 1997 Agreement and the terms of the 2002 Agreement, and as between the evidence of the circumstances in which each of the Agreements was entered into. This does not however mean that one Agreement or the circumstances in which that Agreement was entered into can be relied upon to construe the other Agreement. What it does mean is that the bulk of the arguments in the Appeal raised points common to both Agreements. This was however the consequence of similarity of terms and circumstances. It was not the consequence of one Agreement and the circumstances in which it was entered into being available to construe the other Agreement.

92. The second principle is the principle that the conduct of parties subsequent to their entering into an agreement cannot, as a general rule, be relied upon for the purposes of construing the agreement itself; see *Sattar v Sattar* [2009] EWHC 289 (Ch). In his judgment in that case, at [35] and [36], Sales J (as he then was) explained the principle in the following terms:

> *"35. Mr McPherson, for Bashir, sought to rely upon what happened after the making of the Agreement as indicating what the parties' intentions were regarding the proper interpretation of clause 5. I do not accept these submissions, for three reasons.*
>
> *36. First, in my judgment these were not matters which could properly be prayed in aid to establish the true objective construction of clause 5. It was common ground that the general rule is that the parties' conduct after the making of a contract cannot be taken into account to indicate what its true meaning is, judged on an objective standard: see e.g. James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] AC 572; Chitty on Contracts, 13th ed., vol. 1, para. 12-126. A party's later conduct might indicate what that party's own subjective understanding was of what had been agreed. However, as a matter of principle, the meaning of a contract is not given by reference to the parties' subjective understandings (even if, as it so happens, they might coincide) but by the objective interpretation which the court gives to the words used in their factual and legal context. Conduct of a party after the making of the contract does not provide relevant factual context to explicate the meaning with which the parties used the words at the time they made the contract."*

93. I accept this principle. Again, however I do not think that the principle has much relevance in the present case. In their submissions, counsel for APW did seek to derive some assistance from the documents by which subsequent assignments of the Agreements were expressed to have been made, but I accept that subsequent documents of this kind cannot be relied upon for the purposes of construing the Agreements. It seems to me that they fall into the category of subsequent conduct of the kind referred to in *Sattar*. Where the principle is potentially relevant is in relation to the 2000 Supplemental Agreement. Even in this respect however it seems to me that the 2000 Supplemental Agreement is of limited relevance. I do not think that the actual provisions of the 2000 Supplemental Agreement throw light on the meaning and effect of the provisions of the 1997 Agreement, even if it would be legitimate to rely on the terms of the 2000 Supplemental Agreement for this purpose. In construing the words used in the 1997 Agreement I do not think that there is assistance to be gained from the provisions of the 2000 Supplemental Agreement, independent of the

point that the principle of construction identified by Sales J in *Sattar* would appear to preclude this.

94. Where however the 2000 Supplemental Agreement is relevant is in the evidence contained in the 2000 Sandbach Plans. The reason for this is that the 2000 Sandbach Plans provide evidence as to the content of the missing 1997 Sandbach Plan and as to the situation on the ground when the 1997 Agreement was entered into; see my earlier analysis of the 2000 Sandbach Plans. It seems to me that the general principle articulated in *Sattar* does not preclude the use of the 2000 Sandbach Plans and the 2000 Supplemental Agreement for these evidential purposes; that is to say as evidence of what land was shown as the Sandbach Site on the 1997 Sandbach Plan and as evidence of what the situation on the ground was when the 1997 Agreement was entered into. Nor does this general principle seem to me to preclude the use of the evidence of Mr Powell and the photographs for the same purpose.

What is exclusive possession?

95. The three hallmarks of a lease, as identified by Lord Templeman in *Street v Mountford*, are (i) the grant of exclusive possession, (ii) for a term, (iii) at a rent. In the present case it is not in dispute, as I understand the position, that the tariff payable under each of the Agreements was capable of functioning as the rent, if the other hallmarks of a lease were present. It is also not in dispute that the 2002 Agreement was entered into for a term, namely 20 years, which satisfied the requirement for a term. In the case of the 1997 Agreement there is the Term Issue. I shall set out the law relating to the requirement for a term, in the context of a lease, when I come to the Term Issue.

96. This leaves the requirement for exclusive possession. In the present case, subject to the Term Issue, this was, as is usually the case in lease/licence disputes, the battleground between the parties. In these circumstances I should explain, as briefly as possible, what is meant by exclusive possession. In their summary of the general principles which apply, when considering whether an agreement creates a lease or a licence, APW's counsel included their explanation of exclusive possession. This was not wrong, but I prefer to separate out my explanation of exclusive possession, given that it is central to the dispute between the parties.

97. The concept of possession was considered by the House of Lords in *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30 [2003] 1 AC 419. The issue in that case was whether title to land had been acquired by adverse possession, but the explanation of the concept of possession which is to be found in this case is of wider application. In his speech in this case Lord Browne-Wilkinson made extensive reference to the judgment of Slade J (as he then was) in *Powell v McFarlane* (1977) 38 P&CR 452. At [40] Lord Browne-Wilkinson drew upon the judgment of Slade J in order to identify the two basic elements of possession:

> *"40. In Powell's case 38 P & CR 470 Slade J said, at p 470:*
>
> *"(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prime facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner. (2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ('animus possidendi')."*

Counsel for both parties criticised this definition as being unhelpful since it used the word being defined—possession—in the definition itself. This is true: but Slade J was only adopting a definition used by Roman law and by all judges and writers in the past. To be pedantic the problem could be avoided by saying there are two elements necessary for legal possession: (1) a sufficient degree of physical custody and control ("factual possession"); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess").”

98. There are therefore two elements necessary for a party to have legal possession of premises. The first is factual possession; meaning a sufficient degree of physical control and custody. The second is an intention to possess; meaning an intention to exercise such custody and control on one's own behalf and for one's own benefit.

99. In relation to factual possession Lord Browne-Wilkinson, at [41], quoted further from the judgment of Slade J:

> *“41. In Powell's case Slade J said, at pp 470-471:*
>
> > *"(3) Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed ... Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so."*
>
> *I agree with this statement of the law which is all that is necessary in the present case. The Grahams were in occupation of the land which was within their exclusive physical control. The paper owner, Pye, was physically excluded from the land by the hedges and the lack of any key to the road gate. The Grahams farmed it in conjunction with Manor Farm and in exactly the same way. They were plainly in factual possession before 30 April 1986.”*

100. It is to be noted that the question of what acts constitute a sufficient degree of *“exclusive physical control”* must depend on the circumstances, in particular the nature of the relevant land and the manner in which land of that nature is commonly used or enjoyed.

101. One other, rather older case is also worth citing in the present context. The case is *Seddon v Smith* (1877) 36 LT 168. This case was cited by the Judge, at Paragraph 37, as part of his consideration of the position in relation to fencing, both in respect of the Sites and in respect of the obligations to fence in the Agreements. The case was concerned with a claim in trespass and conversion relating to the alleged wrongful abstraction of minerals from land previously vested in the lord of the manor. The plaintiff claimed title to the land by adverse possession and, on that basis, claimed title to the mines and minerals as against the successor in title of the lord of the manor. The plaintiff's claim was upheld by the Court of Appeal in respect of three quarters of the land, on the basis that there had been sufficient acts of adverse possession in respect of that part of the land. These acts had not extended to actual enclosure

of the relevant part of the land, but the Court of Appeal were satisfied that the plaintiff's actions had been sufficient to constitute adverse possession, even in the absence of enclosure. For present purposes the relevance of the case lies in the stress which the Court of Appeal laid upon enclosure, as evidence of adverse possession. As Cockburn CJ stated, at page 169 of the report:

> *"Enclosure is the strongest possible evidence of adverse possession, but it is not indispensable."*

Analysis of the Appeal – overall approach

102. The Appeal raises issues common to both of the Agreements, whereas the Term Issue is confined to the 1997 Agreement. In these circumstances I will consider the Appeal first, given that the issues raised by the Appeal have to be determined, at least in relation to the 2002 Agreement, whatever my decision on the Term Issue. I will then consider the Term Issue.

103. In my analysis of the Appeal I find it convenient to adopt the following approach:
    (1) I will deal first with the arguments in paragraph 7 of the Grounds of Appeal.
    (2) I will then deal with the arguments in paragraph 8 of the Grounds of Appeal. As part of that analysis I will also deal with the arguments, specific to the 2000 Supplemental Agreement, set out in paragraphs 9 and 10 of the Grounds of Appeal.

104. In making reference to the arguments in the Grounds of Appeal I keep in mind, of course, that I am considering those arguments as they have been elaborated upon in the written and oral arguments of APW and OT at the hearing of the Appeal. I also keep in mind the respondent's notice filed by OT, save for the Term Issue, with which I will deal separately.

Analysis of the Appeal – the arguments in paragraph 7 of the Grounds of Appeal

105. Paragraph 7 of the Grounds of Appeal contains what may be described as the high level grounds of challenge to the Judge's conclusion that the Agreements took effect as licences rather than leases. In my view these grounds of challenge do not have merit. I say this for the following reasons.

106. APW says, first, that the Judge concentrated on the form of the clauses in the Agreement and the plans annexed to them, rather than on their substance and effect.

107. It seems to me that this was not what the Judge did in the Decision. The Judge started, at Paragraphs 11-19, by directing himself as to the law. The Judge referred to *Street v Mountford* and *Global 100*, and also to *EE Ltd v Edelwind* [2020] UKUT 0272 (LC), a decision of Judge Cooke, in the Tribunal, on whether a code agreement in relation to the equipment on the roof of a building took effect as a lease or a licence, and *AG Securities v Vaughan* [1990] 1 AC 417. As I understand APW's arguments, it is not suggested that the Judge misdirected himself as to the law. Indeed, the extracts from these authorities which the Judge cited make it quite clear that the Judge had well in mind the need to look at the substance and effect of the provisions of the Agreements, and to ask himself the question whether the Agreements had, by their substance and effect, taken effect as leases rather than licences.

108. After referring to the evidence of Mr Powell and dealing with the Term Issue, the Judge began the process of working through the provisions of each of the Agreements and determining whether the provisions of each Agreement pointed to a lease or licence. The

Judge then came to his conclusions at Paragraphs 75-81, ultimately concluding, at Paragraph 81, that neither of the Agreements had granted exclusive possession. In particular, in Paragraph 80, the Judge stood back and reviewed each of the Agreements as a whole. The outcome of standing back and carrying out this review was the Judge's final conclusion in Paragraph 81.

109. In going through the exercise described in my previous paragraph it seems to me that the Judge was following the process described by Lewison LJ in *Global 100,* at [36]. I have already quoted this paragraph from the judgment of Lewison LJ, but I repeat it for ease of reference:

> *"36 This approach is not peculiar to the question whether an agreement creates a licence or a tenancy. In Secret Hotels2 Ltd (formerly Med Hotels Ltd) v Revenue and Customs Comrs [2014] 2 All ER 685, para 32 the Supreme Court approved an observation of mine in an earlier case:*
>
> > *"The court is often called upon to decide whether a written contract falls within a particular legal description. In so doing the court will identify the rights and obligations of the parties as a matter of construction of the written agreement; but it will then go on to consider whether those obligations fall within the relevant legal description. Thus the question may be whether those rights and obligations are properly characterised as a licence or tenancy (as in Street v Mountford [1985] AC 809); or as a fixed or floating charge (as in Agnew v Comr of Inland Revenue [2001] 2 AC 710), or as a consumer hire agreement (as in TRM Copy Centres (UK) Ltd v Lanwall Services Ltd [2009] 1 WLR 1375). In all these cases the starting point is to identify the legal rights and obligations of the parties as a matter of contract before going on to classify them.""*

110. It seems to me that the Judge followed the course identified in the final sentence of the quotation from the *Secret Hotels2 Ltd* case. The Judge identified and considered the rights and obligations in each of the Agreements, as a matter of construction. The Judge then went on to consider the overall substance and effect of those provisions, in terms of whether they amounted to a grant of exclusive possession. I do not see how the Judge's overall approach can be faulted.

111. It seems to me that there are two central flaws in this part of APW's challenge to the Decision.

112. First, and as I have said, the grounds of appeal accuse the Judge of concentrating on the form of the clauses in the Agreement and the plans thereto, rather than on the substance and effect of the Agreements and their plans. I cannot see any basis for this accusation. By way of example, APW's counsel attempt to criticise the Judge, in their skeleton argument, for his treatment of clause B in each of the Agreements, which identifies what was being granted by the respective Agreements. At Paragraphs 26 and 27, the Judge made this point on clause B in each of the Agreements:

> *"26. There are no words of demise in either agreement. The demise is a central part of any lease as is the express grant of exclusive possession. Both are entirely absent in both the 1997 and 2002 Agreements. Instead, clause B in both agreements grant a bundle of "rights":*
>
> ***1997 Agreement***

B(i) install, operate, maintain, repair and renew PCN Equipment
(ii) connect electricity cable to the PCN Equipment
(iii) run a communications cable from the PCN Equipment
(iv) vehicular access to and from the Site

2002 Agreement
B(i) install, operate, maintain, repair, renew etc. Telecommunications Equipment
(ii) connect electricity supply to the Telecommunications Equipment
(iii) bring onto the Premises a backup generator
(iv) run a communications link from the Telecommunications Equipment
(iv) vehicular access to and from the Site on 24 hours notice

27. The absence of a demise of land points strongly to both agreements being licences. Of course, the labels used or in the case of "demise" not used are not determinative. However, the operative part of both agreements is the grant of a bundle of rights in connection with PCN/Telecommunications Equipment. The 1997 and 2002 Agreements contain "Orange's Undertakings" at paragraph 5 and "Owner's Undertakings" at paragraph 6. Those undertakings focus on the equipment and the rights granted rather than the site. This is a further very strong indication of a licence and not a lease."

113. This is one of the parts of the Decision which is relied upon by APW in order to accuse the Judge of concentrating on form rather than substance. The accusation is however without substance. It seems to me that it was perfectly legitimate for the Judge to point out that neither Agreement contains formal words of demise, of the kind which one would expect to see in a lease. In each case what is granted is expressed in terms of a bundle of rights. In the consideration of the overall substance and effect of each Agreement, the terms of clause B in each Agreement may be said to point more in the direction of a licence than a lease. The extent to which this is so depends upon analysis of all the relevant provisions in each Agreement. The Judge considered clause B, in each Agreement, to be a very strong indication of a licence and not a lease. Whether the Judge was right to give this weight to the provisions of the Agreements referred to in Paragraphs 26 and 27 is a question which falls within paragraph 8 of the Grounds of Appeal. So far as paragraph 7 of the Grounds of Appeal is concerned, I cannot see that the Judge took the wrong approach in Paragraphs 26 and 27, or in any other part of the Decision.

114. I can see that the position would be different if the Judge had simply concluded, without more, that the absence of formal words of demise in each Agreement had the consequence that each Agreement was a licence rather than a lease. On this hypothesis the Judge could have been accused of looking at the form of each Agreement, rather than its substance and effect. It is however clear from the Decision that the Judge did not do this. Indeed, in Paragraph 78 the Judge stated in terms that he had disregarded any labels attached by the parties to the Agreements.

115. Second, the arguments of APW in support of this ground of appeal seem to me to confuse the grounds of appeal in paragraphs 7 and 8 of the Grounds of Appeal. In their skeleton argument APW's counsel sought to focus on the Judge's treatment of various provisions in each Agreement and on the Judge's treatment of the plans as demonstrating that the Judge had concentrated on form over substance. In each such case however the reality is that the complaint is not that the Judge preferred form over substance. The actual complaint is that the Judge went wrong in his construction and understanding of the relevant provision of

each Agreement, including the plans. These complaints belong within paragraph 8 of the Grounds of Appeal, to which I shall come. I cannot see any grounds for a complaint that the Judge went wrong in his overall approach, in terms of preferring form over substance.

116. What I have said above applies equally to APW's second complaint in this context, which is that the Judge reached his conclusion by balancing out the number of clauses which were, in his view, indicative of the Agreements being leases against those which were indicative of the Agreements being licences. It is said that the Judge should have concentrated on the substance and effect of each clause. I find the terms of this ground of appeal somewhat baffling. For the reasons which I have set out, I do not think that the Judge went wrong in his overall approach. As a matter of overall approach the Judge did not prefer form over substance. Beyond this, I cannot see how the Judge went wrong, in Paragraph 80, in standing back and reaching a final conclusion on the basis of his review of the provisions of each Agreement. *"Balancing out"* is not an accurate description of the final reasoning of the Judge in Paragraphs 75-80 but, so far as this refers to the review conducted by the Judge in this part of the Decision, in particular at Paragraph 80, it seems to me that the Judge was right to adopt the approach and methodology which he used. Whether the Judge was correct in his construction of the provisions of the Agreements, and whether the Judge was correct to place the emphases where he did are, as I have already explained, matters which belong within paragraph 8 of the Grounds of Appeal.

117. APW's third and final complaint in paragraph 7 of the Grounds of Appeal is that the Judge went wrong in the distinction which he drew in Paragraph 77. For ease of reference, I repeat what the Judge said in Paragraph 77:

> *"77. In the case of the 1997 and 2002 Agreements I am not concerned with residential accommodation where there is, for the very good reason of providing protection for a person occupying property as their home, often a bright line between lease and licence. In the context of this reference, I am concerned with "a legal relationship other than a tenancy". That does not mean that that other legal relationship must be a purely personal contractual right. The 1997 and 2002 Agreements are long term arrangements for the installation and operation of electronic communications apparatus. Bearing in mind the rapid speed of development of electronic communications it is entirely understandable that the parties intended that those long term agreements should be assignable and bind successors in title. Indeed, that is exactly what has happened to both agreements. The provisions allowing for sharing and upgrading are standard terms in telecommunications agreements. They are vital to enable the parties to meet the challenges of a rapidly developing technology. To seek to use the lease/licence distinction, to say that an agreement is either one or the other is simply inappropriate in the modern world of electronic communications. Lord Templeman speaking in 1985 could not possibly have anticipated the technological changes that have taken place since that time. He did however leave the door open to legal relationships other than a tenancy. As the Upper Tribunal observed in Islington there is a diverse spectrum of telecommunications rights which can be granted. Sometimes a lease is the most convenient way forward equally there are situations where there is no grant of exclusive possession."*

118. In *Street v Mountford* Lord Templeman gave examples of legal relationships to which the grant of exclusive possession might be referable and which would or might negate the grant of an estate or interest in the relevant land. The examples given by Lord Templeman were

occupancy under a contract for the sale of land, occupancy pursuant to a contract of employment or occupancy referable to the holding of an office. These examples were not intended to be exhaustive. As Lloyd J (as he then was, but sitting in the Court of Appeal) explained in *Leadenhall Residential 2 Limited v Stirling* [2001] EWCA Civ 1011 [2002] 1 WLR 499, at [23]:

> *"23 Thus, there is no defined list of special cases in which a person who is let into, or allowed to remain in, another's property, with exclusive possession and paying for his occupation may be a licensee rather than a tenant. There are certain recognised categories, such as service occupiers and lodgers, but otherwise it depends on finding either that there is no intention to contract at all or that the circumstances are such as to justify attributing the possession to something quite distinct from a tenancy. The question is whether either of those findings is correct in the present circumstances."*

119. It is clear that a code agreement does not constitute an example of a legal relationship of this kind. Under both the Old Code and the Code a code agreement may take effect as a lease or a licence, by reference to the principles of common law which govern the distinction between a lease and a licence. This is clear from the analysis of Nugee LJ in the *Potting Shed* case, at [78] – [80]. I have already set out [78], but I repeat this paragraph, with [79] and [80], for ease of reference:

> *"78. Mr Read said that the Code created "a sui generis form of statutory rights" (Compton Beauchamp at [117] per Lady Rose), and was "designed to be, so far as possible, a self-contained Code" (Cornerstone Telecommunications Infrastructure Ltd v University of London [2019] EWCA 2075 at [34] per Sir Terence Etherton MR, Lewison and Arnold LJJ). It was intended to be a unified set of rules that covered all situations from a one-off licence in relation to tree lopping to a long-term full-blown lease. That I accept. The Code has to be applied both to contractual arrangements such as licences or wayleaves and to the grants of property rights such as leases. But I do not accept that this means that one jettisons the ordinary law of landlord and tenant, or, as Lewison LJ put it in argument, that the Code exists in a legal vacuum.*
>
> *79. On the contrary, the Law Commission in their Report very much took the view that leases that confer code rights should, as they put it, "look after themselves" and that the general law should apply (§2.123). Thus they said that the primary purpose of the old code provisions which are the equivalent of paragraph 10 in the Code "is to ensure that the sort of priority rules that work automatically (subject to registration) for leases will also apply to personal rights" (§2.87); and again that where code rights are contained in a lease "we take the view that the lease itself must govern priority" (§2.107).*
>
> *80. It is true that the Government did not entirely accept the Law Commission's recommendations, but the point on which they differed was whether any special provision should be made in respect of registration of code rights when they were contained in leases. The Law Commission had recommended that the Code make no special provision in this respect, with the result that leases conferring code rights, but not mere contractual arrangements, would need to be registered at HM Land Registry. The Government however disagreed, considering that code rights should be binding on successors without any requirement to register: see the Government's consultation response, A New Electronic Communications Code (May 2016), at [40]-[47]. The Government's view was duly given effect to in paragraph 14 of the Code. Subject to that point, however, there is no suggestion in*

the Government response that they disagreed with the Law Commission's recommendation that leases should look after themselves in accordance with the general law."

120. Returning to Paragraph 77, APW's case is that the Judge wrongly classified the Agreements as falling into a category of agreement, namely code agreements, which qualified as a legal relationship other than a lease. In other words, the complaint is that the Judge wrongly treated code agreements as being examples of legal relationships which do not qualify as leases, even where exclusive possession is granted by the relevant code agreement.

121. If this is what the Judge was saying in Paragraph 77, then I would agree with APW that the Judge was wrong to draw this distinction. As I have explained, code agreements may be leases or licences or, for that matter, legal arrangements such as wayleaves. Code agreements do not belong in a special category of their own, in terms of identifying what rights of use and/or occupation of land they may grant. The rights are to be identified by the application of the same principles which apply to the classification of any other agreements relating to land.

122. I do not think however that the Judge did go this far in Paragraph 77. I say this for two reasons.

123. First, in the Paragraphs which follow Paragraph 77, which contain the core of the Judge's reasoning on whether the Agreements took effect as leases or licences, the Judge was clearly applying the legal principles which derive from the authorities which the Judge cited in Paragraphs 11-19, and by reference to which the Judge directed himself as to the law. In other words, if the Judge did go wrong in Paragraph 77, it does not seem to me that the Judge perpetuated this error into his final reasoning, in Paragraphs 78-81.

124. Second, and on a careful reading of Paragraph 77 itself, I do not think that the Judge was saying that code agreements fall into a category of legal relationship of the type referred to by Lord Templeman. This seems to me to be clear, at least, from the language of the last two sentences of Paragraph 77. Rather, it seems to me that what the Judge was saying in Paragraph 77 was that the Agreements were long term agreements for the installation and operation of electronic communications apparatus, in an area of rapidly developing technology. As such, so the Judge considered, provisions which might otherwise be thought to point to the Agreements being leases, such as the provisions for the Agreements to be assignable and to bind successors in title, did not compel the conclusion, as they might do in other cases, that the Agreements were leases rather than licences. Putting the matter more simply it seems to me that the Judge was, in Paragraph 77, stressing the context of the Agreements as long term arrangements for the installation and operation of electronic communications.

125. The Judge clearly saw this context as important to his conclusion that the Agreements took effect as licences rather than leases. Whether the Judge was right in this reasoning seems to me to belong in paragraph 8 of the Grounds of Appeal. So far as paragraph 7 of the Grounds of Appeal is concerned, and on a careful reading of Paragraph 77, I do not think that the Judge did commit the error of treating the Agreements as falling into a category of legal relationships, of the kind identified by Lord Templeman in *Street v Mountford*; that is to say legal relationships which are not leases even though they involve the grant of exclusive possession.

126. In summary, and drawing together all of the above analysis, I do not think that the Judge did go wrong in any of the ways asserted in paragraph 7 of the Grounds of Appeal. I therefore conclude that the Appeal fails, so far as it is based upon paragraph 7 of the Grounds of Appeal.

127. This leaves the arguments in paragraphs 8-10 of the Grounds of Appeal, to which I now turn.

Analysis of the Appeal – the arguments in paragraphs 8-10 of the Grounds of Appeal

(i) Paragraphs 8-10 of the Grounds of Appeal - methodology

128. In my analysis of the arguments in paragraphs 8-10 of the Grounds of Appeal, I shall adopt the same overall approach as the Judge, which was also (notwithstanding APW's criticisms of the Judge in paragraph 7 of the Grounds of Appeal) the approach of the parties in their arguments. By this I mean that I will divide up my analysis of the provisions of each Agreement into separate sections, grouping the provisions in the form most convenient to my analysis. I will then stand back and consider each of the Agreements in its entirety, in order to determine, subject to my decision on the Term Issue in relation to the 1997 Agreement, whether the Judge was right to decide that the Agreements took effect as licences rather than leases.

129. In working through the provisions of each of the Agreements I do not consider it necessary to set out an express analysis of every single provision in each Agreement. While all the provisions of each Agreement have been taken into account in my analysis, I will, in common with the Judge and the parties, concentrate on those provisions which are most relevant to the determination of whether the Agreements took effect as licences or leases. While it is convenient to take equivalent or similar provisions in each Agreement in the same sections of my analysis, and while there is a considerable overlap in the analysis of the provisions of each Agreement, it is necessary, as the Judge pointed out at Paragraph 4, to keep in mind that each Agreement falls to be considered separately.

130. I also reiterate that the principal question under consideration is whether each Agreement took effect as the grant of exclusive possession of land to Orange. It is not in dispute that the 2002 Agreement was entered into for a term which qualified as a term certain, at the equivalent of a rent. For the purposes of considering paragraphs 8-10 of the Grounds of Appeal I will make the same assumption, of a term certain at the equivalent of a rent, in relation to the 1997 Agreement. Whether this assumption is correct in relation to the 1997 Agreement, so far as a term certain is concerned, will depend upon my decision on the Term Issue, to which I shall come.

131. This therefore leaves, so far as the Appeal is concerned, the question of whether either of the Agreements took effect as the grant of exclusive possession of land. Where I refer in my analysis to matters pointing towards a lease or a licence I am, as a general rule and with some exceptions, referring to the question of whether the relevant Agreement took effect as the grant of exclusive possession of land.

132. References to Clauses in my analysis, without more and where differentiation by Agreement is not necessary, are references to the clauses which appear with the same letter or number in each Agreement.

(ii) Paragraphs 8-10 of the Grounds of Appeal – Clause B and the plans attached to the Agreements

133. At Paragraph 26 the Judge noted that there were no words of demise in either Agreement. Instead, as the Judge saw matters, Clause B simply granted a bundle of rights. The Judge concluded that the absence of a demise pointed strongly to both Agreements being licences. So far as the plans annexed to the Agreements were concerned, the Judge took the view that these plans did not function to demarcate or identify any property being leased. In the view of the Judge the plans had a different function, which the Judge explained at Paragraphs 32-34:

> *"32. Most conveyances, transfers and leases have a plan showing the property edged red – usually for identification only. The plan functions to identify and demarcate the property being sold or leased. Plans usually show external features such as nearby roads or houses so that what is being sold /leased can be readily ascertained.*
>
> *33. However, the 3 plans annexed to the Supplemental Agreement do not fulfil that function. It is impossible to tell where the site is in relation to the farms themselves itself let alone the wider landscape. That is because what are referred to as plans are not plans as understood by either parties or a conveyancer. They do not identify or demarcate. Instead, they are highly technical drawings containing detailed specifications of landscaping, antenna, dishes, feeder cables and even a plan of the headframe complete with lighting finials and LNA Units. What the Respondent says are plans to demarcate the demise are in fact detailed technical specifications of the telecommunications equipment to be installed.*
>
> *34. The same observations apply to the plan annexed to the 2002 Agreement. Granted it is described as "Site Plan", but it does not identify where the site is, nor does it demarcate it. Again, it is a technical specification of the telecommunications apparatus to be installed containing details such as electricity requirements, equipment schedule, final antenna key etc. (Again, the position in the two references before me is in contrast to the plans in references LC-2023-000323 and 332 at pages 1027 and 1049 of the Trial Bundle.)"*

134. The Judge thus concluded, at Paragraph 36 that the nature of the plans was inconsistent with a demise, and that the plans pointed strongly towards a licence granting rights to install telecommunications apparatus.

135. So far as Clause B is concerned, I take the Judge's point. In the case of each Agreement Clause B is expressed to grant rights in relation to the installation and operation of telecommunications equipment. There is not, in the case of either Agreement and at least in express terms, the demise of an area of land. There is no express demise of, to adopt Mr Radley-Gardner's expression, *"a cube of air"*. I accept that, on its wording, Clause B is expressed to grant a bundle of rights.

136. This however seems to me to take matters only so far. The absence of specific words of demise is not, in my view, decisive. What matters is the overall substance and effect of what is granted by each Agreement. No specific words are necessary to create a lease. What is important is that there must be words used which show an intention to demise; see Woodfall's Law of Landlord and Tenant, Volume 1, at 5-017.

137. In the case of each Agreement the rights which were expressed to be granted were tied to an identified area of land; namely the Sandbach Site in the case of the 1997 Agreement and the Lubbards Site in the case of the 2002 Agreement. Equally, in the case of each Agreement, the Agreement drew a distinction between the Site, in respect of which rights were granted to Orange, and the Premises. The expression *"the Premises"* referred to land in the ownership of Mr Thornhill, in the case the 1997 Agreement, and to land in the ownership of the Pinkertons, in the case of 2002 Agreement. Each of the Sites formed part of the Premises. In the case of each Agreement, Orange was granted various rights of access and/or service rights over the Premises, for the purposes of installing and operating its telecommunications equipment on the relevant Site.

138. Turning to the plans I do not agree with the Judge's analysis, nor with the Judge's conclusions that the plans were inconsistent with a demise under a lease and pointed strongly towards a licence. I have spent some time analysing the plans earlier in this decision. The key points which emerge from that analysis, for present purposes, seem to me to be as follows.

139. Starting with the 1997 Agreement the 1997 Sandbach Plan, as annexed to the 1997 Agreement, is not available. It is however clear that there was such a plan; see Clause A of the 1997 Agreement. It is also clear that the 1997 Sandbach Plan showed the Sandbach Site, by some sort of red edging. What is also important is that the land identified in red on the 1997 Sandbach Plan can be identified by looking at the 2000 Sandbach Plans. As I have already explained, I accept the point made by Mr Radley-Gardner that, in the construction of a contract, subsequent dealings between the parties cannot, as a general rule, be taken into account; see *Sattar v Sattar*, as quoted earlier in this decision. As I have also explained however, it seems to me that this general principle does not preclude the use of the 2000 Sandbach Plans and the 2000 Supplemental Agreement as evidence of what land was shown as the Sandbach Site on the 1997 Sandbach Plan. Nor does this general principle preclude the use of the evidence of Mr Powell and the photographs for the same purpose.

140. I refer back to my analysis, earlier in this decision, of the identification of the Sandbach Site. By reference to the inferences which I have drawn, the Sandbach Site, as identified by the 1997 Sandbach Plan, was an enclosed area of compound occupying part of the existing enclosed area of compound. The original enclosed area of compound can be seen on the Sandback Landscaping Plan, described as *"EXISTING COMPOUND"*. The Sandbach Site was then enlarged by the 2000 Supplemental Agreement to the enclosed area of compound which remains in place, as seen in the photographs, and as can also be seen on the Sandbach Landscaping Plan, marked as *"PROPOSED COMPOUND EXTENSION"*.

141. I therefore conclude, in the case of the 1997 Agreement, that the land in respect of which and for the benefit of which the bundle of rights in Clause B of the 1997 Agreement was granted was identified as a particular area of land; namely the Sandbach Site as originally constituted. The effect of the 2000 Supplemental Agreement was to increase the extent of this area of land, to the defined area shown on the Sandbach Landscaping Plan.

142. It seems to me that it is also clear that the Sandbach Site, both as originally constituted and as enlarged by the 2000 Supplemental Agreement, was identified as and was intended by the parties to be a fenced compound. So far as the 2000 Supplemental Agreement is concerned, this is clear from the Sandbach Site Plan and the Sandbach Landscaping Plan. In the case of the 1997 Agreement it is clear from the 2000 Sandbach Plans that the Sandbach Site had, at least by the time of the 2000 Supplemental Agreement, become a

fenced compound. There is however the evidence of Mr Powell, reporting what he had been told by Mr Thornhill, namely that the Sandbach Site had always been fenced off and that the original timber stock fence had been upgraded to the wire fence which can now be seen. This is also consistent with Clause 5.1.8 in the 1997 Agreement, which required Orange both to erect and maintain a stock fence to fully enclose the PCN Equipment.

143. The same analysis applies in the case of the 2002 Agreement. I refer back to my earlier analysis of the identification of the Lubbards Site. On the basis of that analysis I conclude that the land in respect of which and for the benefit of which the bundle of rights in Clause B of the 2002 Agreement was granted was identified as a particular area of land; namely the Lubbards Site. I also conclude that the Lubbards Site was identified as and was intended by the parties to be a fenced compound. This is clear from the Lubbards Compound Plan and from the obligation in Clause 5.1.6 of the 2002 Agreement to erect a stock proof fence around the Telecommunications Equipment.

144. Mr Radley-Gardner sought to support the Judge's approach to Clause B and the plans, by arguing that the plans were intended to do no more than give an indication of the areas in which the rights granted by the respective Agreements could be exercised. I am not able to accept this submission, for the same reasons as I disagree with the Judge's analysis. It seems to me that the relevant language in each of the Agreements, together with the evidence of the plans themselves, contradicts this submission. In the case of each of the Agreements, the bundle of rights granted by Clause B was granted in respect of a specified area.

145. The Judge made reference, at Paragraph 35, to the *Edelwind* decision in his analysis of the plans attached to the Agreements. I assume that the Judge's point was that *Edelwind* involved an agreement to install and operate telecommunications equipment on the roof of a building. Judge Cooke decided that the agreement did not grant exclusive possession of any part of the roof to the operator, and took effect as a licence only. The essential reasoning of Judge Cooke can be found in paragraphs 59 and 60 of her decision:

> *"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 of the agreement. This was a licence agreement extending to the whole roof."

146. 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.

147. I accept Mr Radley-Gardner's point that a licence may give an occupier a great deal of territorial control of a site, without amounting to a lease. In my judgment however the extent of the control which Orange was given over each of the Sites, by the respective Agreement, points strongly against either Agreement being a licence. In this context Mr Radley-Gardner relied upon *Manchester Airports Plc v Dutton* [2000] QB 133, where it was decided by the Court of Appeal, by a majority, that a licensee was entitled to an order for possession against environmental activists who had occupied the land in respect of which the licensee, the airport company, had been granted a licence. It is however important to keep in mind the terms of the licence which was granted in *Dutton*. The licence was granted to the airport company in order to allow it to go on to the relevant land and carry out work of topping, lopping and felling trees, in order to ensure that the relevant land, which was near the proposed second runway at Manchester Airport, did not present obstacles to the use of the runway. It seems to me that there is an obvious contrast between an agreement of this kind, and an agreement allowing an operator of telecommunications equipment to come on to a demarcated and enclosed area of land, and use that land for the operation of the telecommunications equipment.

148. Drawing together all of the above analysis I disagree with the Judge's conclusions, both in relation to Clause B and in relation to the plans. My own analysis is as follows:
    (1) I do not see the wording of Clause B in each Agreement as indicative of a licence. In the case of each Agreement the bundle of rights granted was extensive. The wording of Clause B seems to me, if viewed in isolation, to be neutral, in terms of pointing either to a lease or a licence.
    (2) The wording of Clause B is not however to be viewed in isolation. In the case of each of the Agreements, Clause B has to be read with the remainder of the Agreement. I will defer until the end of this analysis the exercise of considering Clause B in the context of the whole of each Agreement, but for present purposes it seems to me that Clause B falls to be considered with the evidence of the plans which were attached to the Agreements, with the fencing obligations in each Agreement, and with the evidence on the ground. In this context it is apparent that the bundle of rights granted by Clause B, in the case of each Agreement, related to telecommunications equipment which was to be installed and operated within an enclosed compound. In my view, and in the case of each Agreement, this is more suggestive of a lease than a licence.
    (3) So far as the plans are concerned, I disagree with the Judge's conclusions in Paragraph 36. In the case of each Agreement, it seems to me that the relevant plans did identify specific areas of land which were the subject of the bundle of rights granted by Clause B. In my view, and in the case of each Agreement, the plans point more strongly to a lease than a licence.

(iii) Paragraphs 8-10 of the Grounds of Appeal – the fencing obligations

149. I have already mentioned the fencing obligations in, respectively, Clause 5.1.8 of the 1997 Agreement and Clause 5.1.6 of the 2002 Agreement. In my view, and for the reasons set out in the previous section of this decision, these fencing obligations point in the direction of a lease rather than a licence.

150. It is worth adding two points, specifically in the context of the fencing obligations.

151. First, both the Sandbach Site and the Lubbards Site are located in open country. They are not urban sites. Nor are they sites located on the roof of a building. Nor are they confined to a single structure such as a tower. It is clear from the photographs of the Sites that the Sandbach Equipment and the Lubbards Equipment each comprise a substantial set of telecommunications equipment. It is also clear from the security on each Site that it is considered necessary to take measures to exclude people from coming into either Site. It is reasonable to assume that these matters were also true of the PCN Equipment and the Telecommunications Equipment. As the Judge recorded, at Paragraph 43, the owner of the respective Premises, as defined in each Agreement, also has no key to the relevant Site. The Judge regarded this as a red herring; see Paragraph 43:

> *"43. The absence of the provision of a key to the Respondent or its predecessor in title is a red herring. The factual background – the installation of electronic communications apparatus and business common sense are crucial. As the signs observed by Mr Powell indicate "NO ENTRY UNAUTHORISED PERSONS" and "CAUTION RADIO TRANSMITTERS OPERATING". It would clearly be wholly inappropriate for unauthorised persons to have access to such highly technical and potentially dangerous equipment. The absence of a key is business common sense to protect the equipment from damage and persons from harm. It is not, as it would be in the case of a lease relating to a parcel of land, an unequivocal assertion of possession."*

152. I do not agree with this analysis. It seems to me that the enclosed nature of the Sites and the obligation imposed upon Orange, in the case of each Agreement, to ensure such enclosure, points towards a lease rather than a licence. Putting the matter more specifically, it seems to me that the enclosed nature of the Sites and the fencing obligations support the argument that each Agreement took effect as the grant of exclusive possession of the relevant Site, rather than as the grant of a bundle of non-exclusive rights to install and operate telecommunications equipment on the Sites.

153. Second, the Judge considered that the circumstances of the present case were different from *Seddon v Smith*. The Judge's essential reasons for reaching this conclusion can be found in Paragraph 42:

> *"42. The obligation in both agreements is to fence the equipment. It is not an obligation to fence the site. It is clear that the intention of the parties that it was the Equipment that was to be protected. The incidental consequence of course is that the site was enclosed. But that was not the intention of the parties. The operator wished to keep its valuable Equipment safe from the problem of "rural" crime and the site owner wished to ensure that livestock and potentially anyone walking in the fields was not injured by the presence of high voltage*

electrical Equipment. The circumstances are different from Seddon v Smith. The intention was not possession of the site but protection of the Equipment."

154. I do not agree with this analysis. While I can see that the fencing obligations were directed to ensuring that the telecommunications equipment was kept secure, rather than fencing off the bare land itself, this strikes me as a distinction without a difference. The fact was that the parties to the Agreement contemplated and agreed that the Sites should be enclosed, given the use to which the Sites were to be put. The facts of *Seddon v Smith* were somewhat different. In that case it was found that the plaintiff had acquired title to certain land, by adverse possession, by carrying out farming activities on the land. The statement that enclosure is the strongest possible evidence of adverse possession appears in the judgment of Cockburn CJ, where the point being made by Cockburn CJ was that the plaintiff's farming activities had been sufficient to found adverse possession, whether or not the plaintiff had enclosed the relevant land. There may be many reasons why parties may agree that land which one of the parties is to occupy should be enclosed and secure. This does not seem to me to alter the fact that there will be, in any such case, enclosure. Whether such enclosure supports an argument that there was a grant of exclusive possession of the relevant land will depend upon all the circumstances of the relevant case. What I cannot see is that such enclosure is excluded from constituting evidence of a grant of exclusive possession simply because the enclosure was required for a purpose such as protecting sensitive telecommunications equipment.

(iv) Paragraphs 8-10 of the Grounds of Appeal – rights of access

155. The relevant Clause in the 1997 Agreement is Clause 4, which is in the following terms:

> *"4.1 The Owner shall permit Orange its employees agents and independent contractors full and free access on reasonable notice (except in emergency including emergency maintenance when no notice shall be required) to all parts of the Premises as are reasonably necessary for the installation operation maintenance repair and renewal of the PCN Equipment at all times provided that all such persons will comply with such reasonable security and safety procedures as are required by the Owner and Orange agrees to meet all additional reasonable costs incurred by the Owner in providing such access.*
> *4.2 Orange shall permit the Owners reasonable access to the Site by prior appointment for inspection purposes only."*

156. Clause 4.1 of the 1997 Agreement is concerned with Orange's rights of access. Clause 4.2 of the 1997 Agreement is concerned with the Owner's rights of access. As can be seen, the Owner's rights of access are limited to reasonable access to the Sandbach Site by prior appointment for inspection purposes only. This is strongly suggestive of a lease. If the 1997 Agreement took effect as a licence, so that Orange did not have exclusive possession of the Lubbards Site, it would be odd to find the owner of the Lubbards Site having access only by prior appointment and for inspection purposes only.

157. Turning to the 2002 Agreement, the relevant clause is Clause 4.1, which provides as follows:

> *"4.1 Orange shall permit the Owner reasonable access to the Telecommunications Equipment by prior appointment for inspection purposes only."*

158. The Judge considered, at Paragraph 46, that there was a significant difference between Clause 4.1 of the 2002 Agreement and Clause 4.2 of the 1997 Agreement, in that Clause 4.1 of the 2002 Agreement refers to the Telecommunications Equipment. The Judge cited the decision of Judge Cooke in *Edelwind*, at paragraph 59 (which I have quoted above) where Judge Cooke considered that the right to inspect the equipment on notice was about inspection of the equipment, not about possession. 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. It seems to me that whether Clause 4.1 of the 2002 Agreement had referred to the Lubbards Site or to the Telecommunications Equipment, the reality was that the access to the Lubbards Site would have been similarly restricted. In these circumstances I do not consider that the absence of reference to the Site in Clause 4.1 of the 2002 Agreement is significant. In the case of the 2002 Agreement it seems to me that the reality was that the Owner was being granted similarly restricted rights of access to those to be found in Clause 4.2 of the 1997 Agreement, in terms strongly suggestive of a lease.

(v) Paragraphs 8-10 of the Grounds of Appeal – the absence of rights to share use of the Sites

159. Clause 8 in each of the Agreements contains provisions which deal with the ability of the Owner to install their own equipment or grant consent to any third party to install equipment. Each Clause is in materially the same terms, and I need only quote Clause 8 from the 1997 Agreement:

> *"8.1 Nothing in this Agreement shall prevent the Owner installing or granting consent to any third party to install any equipment at the Premises (but not the Site) provided that:*
>
> *8.1.1 prior to the Owner installing or granting any such consent the Owner shall consult with Orange and take account of any representations made by Orange as to possible interference with the operation of the PCN Equipment, and*
>
> *8.1.2 if after the installation of such equipment Orange can demonstrate to the Owner's reasonable satisfaction that such equipment is interfering with the operation of the PCN Equipment then the Owner shall procure such other equipment is switched off with immediate effect and remains switched off until such interference is cured.*
>
> *8.2 If the PCN Equipment is installed on a Site where other equipment is already installed and the Owner can demonstrate to Orange's reasonable satisfaction that the PCN Equipment is interfering with the operation of such other equipment then Orange shall switch off the PCN Equipment with immediate effect and such equipment shall remain switched off until such interference is cured. If Orange cannot reasonably cure such interference then it may by written notice terminate this Agreement with immediate effect.*
>
> *8.3 In the event of interference occurring Orange shall use its reasonable endeavours to achieve or co-operate in achieving technical resolution.*
>
> *8.4 For the purpose of this clause "interference" shall include but not be limited to electrical electromagnetic or mechanical interference."*

160. It will be noted that Clause 8.1 does not give the Owner any right to install equipment on either of the Sites. What Clause 8.1 does is to confirm that the Owner can install equipment

or licence a third party to install equipment at *"the Premises (but not the Site)"*. The effect of this is that there is no right of shared use of either of the Sites. Equipment can be installed adjacent to the Sites, but not within the Sites. The remainder of Clause 8 then deals with the problems which may arise from interference caused by having two sets of equipment in proximity.

161. The Judge considered that Clause 8.1 supported OT's case that both Agreements were licences granting rights and not leases granting exclusive possession; see Paragraph 55. I do not agree. It seems to me that Clause 8.1 is more consistent with the argument the Agreements granted exclusive possession of the Sites to Orange. Clause 8.1 makes it clear that the Owner has no right to share use of the Sites, either directly or by a third party. This falls to be contrasted with other provisions in each Agreement which make it clear, by contrast, that Orange was granted a variety of rights to share use of the Sites; see Clauses 7.4 - 7.8 of the 1997 Agreement and see Clauses 7.3, 7.4 and 7.6 of the 2002 Agreement. These provisions seem to me to be consistent with Clause 8.1 and to provide further support for the argument that the Agreements granted exclusive possession of the Sites to Orange, so that Orange was entitled, if it so chose, to share use of the Site with others. The Owner, by contrast, had no such rights.

(vi) Paragraphs 8-10 of the Grounds of Appeal – chattels

162. I deal with chattels next because there seems to me to be an overlap between the way in which the Agreements deal with chattels and my analysis of the provisions of the Agreements in sections (ii) – (v) above.

163. Clause 7 of the 1997 Agreement is headed *"OPERATING CONDITIONS"*. It contains, in particular, the following two provisions relating to the PCN Equipment:

> *"7.3 On the termination of this Agreement however caused Orange will vacate the Site and remove therefrom all PCN Equipment and shall if required by the Owner reinstate the Site to its former state and condition as at the date hereof to the reasonable satisfaction of the Owner."*
>
> *"7.5 For the avoidance of doubt the PCN Equipment shall belong to Orange as if it were a tenant's fixture."*

164. The equivalent provisions in the 2002 Agreement are in Clause 7 of the 2002 Agreement, which is also headed *"OPERATING CONDITIONS"*:

> *"7.2 Upon vacating the Site Orange shall remove therefrom all of the Telecommunications Equipment and shall if required by the Owner reinstate the Site to its former state and condition as at the date hereof (fair wear and tear excepted) to the reasonable satisfaction of the Owner."*
>
> *"7.7 For the avoidance of doubt the Telecommunications Equipment shall remain the property of Orange at all times."*

165. In this context APW's counsel relied, as they did before the Judge, upon the case of *Gilpin v Legg* [2017] EWHC 3220 (Ch) [2018] L&TR 6, a decision of His Honour Judge Paul Matthews, sitting as a Deputy Judge of the Chancery Division. The case was concerned with huts which rested on concrete blocks on the landowner's fields. A dispute arose between the landowner and the occupiers of some of the huts as to the status of their

occupation. This in turn raised an issue as to whether the huts were chattels, or had become annexed to the land on which they stood. The judge decided that the huts were chattels, on the basis that there was not a sufficient degree of annexation to the land for the huts to have become part of the land. The judge also decided that the occupiers had tenancies of the land on which the huts stood. The judge considered that the fact that the huts were chattels was not inconsistent with the occupiers having tenancies of the land on which the huts stood. The judge also decided that the huts themselves had the status of tenant's fixtures.

166. For present purposes the key part of the judge's reasoning in *Gilpin* can be found in his judgment at [64], where the judge was considering the lease/licence question. The relevant part of his reasoning on this question, at [64], was in the following terms:

> *"64 On the face of it, those three characteristics are present here, in all the claimants' cases.* ***First,*** *whether or not the huts are chattels (which I have already discussed above), in practice they occupy the same space throughout the whole time that they are in use. That means that the land which they sit on is not available for occupation or any other use by the landowner, who is therefore excluded. Accordingly, where a landowner grants the right to another person to site a hut or chalet of this kind, movable in practice only on the termination of the right, on his land, he is in substance granting a right to exclusive possession. Whilst that right subsists and is being enjoyed, the landowner cannot possibly use or exploit the land in any other way. It is in this sense like a claimed easement to park a car in a specified parking space: Batchelor v Marlow [2003] 1 W.L.R. 764, CA."*

167. The argument of APW's counsel was that this reasoning applies equally in the present case. The effect of the Agreements was to leave both Sites exclusively occupied by telecommunications equipment which was to remain Orange's property, and which did not have to be removed until termination of the Agreement (the 1997 Agreement) or until Orange vacated (the 2002 Agreement). Although the 2002 Agreement refers to Orange vacating the Lubbards Site, it seems to me that this effectively meant that Orange did not have to remove the Telecommunications Equipment until termination of the 2002 Agreement. As such, it seems to me that the relevant provisions in Clause 7 of each Agreement are in effectively the same terms.

168. The Judge rejected this argument. As he said, at Paragraph 50:

> *"However, clauses 7.5 and 7.7 are also consistent with a bundle of rights to install electronic communications equipment as set out in the other terms of both agreements. The factual matrix is crucial. Under both the 1997 and 2002 Agreements there is a distinction between use of land in accordance with a bundle of rights and occupation of that land."*

169. The Judge went on to make reference to the decision of the Tribunal in *EE Limited and Hutchison 3G Limited v London Borough of Islington* [2019] UKUT 0053 (LC). In this case the Tribunal (Martin Rodger KC, Deputy Chamber President, and AJ Trott FRICS) made the following observations, at [44] and [45], in the course of their discussion of the wide range of forms of agreement by which code rights might be granted:

> *"44. As Mr Read argued on behalf of the claimants, the circumstances in which Code rights may be required are diverse, and it is not surprising that Parliament should not have adopted a prescriptive approach to the form in which they may be granted. At*

one end of the spectrum Code rights may involve going on to land for a short period to cut back trees or to carry out a survey (which was the full extent of the Code right sought in Cornerstone Telecommunications Infrastructure Ltd v The University of London) for which it would not be necessary to acquire an interest in land. At the other end Code rights may involve keeping cabinets, masts and other electronic communications apparatus installed on land for a period of years, thereby effectively excluding the owner of the land from the area required. It may not be essential that such extensive rights be granted by lease, but the evidence of practice under the old code demonstrates that it will often be convenient.

45. On the other hand, the right to keep equipment installed on land does not necessarily involve a grant of exclusive possession. For example, the land on which an automated teller machine is located in a supermarket is capable of being concurrently in the occupation of the bank which owns the machine and the store which hosts it and to involve no grant of exclusive possession: see Cardtronics Europe Ltd v Sykes (VO) [2018] EWCA Civ 2472 at [81].”

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.

171. On the face of it therefore, the fact that the Agreements gave Orange what might reasonably be described as an exclusive right to keep and operate its telecommunications equipment on each of the Sites might be thought to support the argument that the Agreements did grant exclusive possession of the Sites to Orange. The Judge did not accept this, for the reason which he gave, which was that the factual matrix was crucial. Specifically, the Agreements each granted a bundle of rights to Orange to make use of the Sites, as opposed to a right of occupation of the Sites.

172. I do not agree with this reasoning. I refer back to my analysis of Clause B and the plans attached to the Agreements. As I have explained, I do not see the wording of Clause B in each Agreement as indicative of a licence. In the case of each Agreement the bundle of rights granted was extensive. The wording of Clause B seems to me, if viewed in isolation, to be neutral, in terms of pointing either to a lease or a licence. As I have also explained, if Clause B is considered with the evidence of the plans which were attached to the Agreements, the position is more suggestive, in the case of each Agreement, of a lease than a licence. I do not think that the point made by APW’s counsel in this context loses its force simply because Clause B can be characterised as a bundle of rights. The question in this context is whether the grant of that bundle of rights amounted to a grant of exclusive possession of each of the Sites.

173. Applying the reasoning of Judge Matthews in *Gilpin*, it seems to me that it is important in the present case that the Agreements gave Orange what, as I have said, might reasonably be described as an exclusive right to keep and operate its telecommunications equipment on each of the Sites. I do not think that this importance is diminished by the terms of Clause B, for the reasons which I have explained.

174. In summary, it seems to me that the provisions of the Agreement which confirm Orange's ownership of the telecommunications equipment on the Sites and Orange's right to maintain that telecommunications equipment until termination of the relevant Agreement, go to support the argument that the Agreements did grant exclusive possession of the Sites to Orange.

175. I state this conclusion however in advance of considering the rights of relocation of the telecommunications equipment and redevelopment of the Site which were reserved to the Owner by the Agreements. I therefore now turn to those rights of relocation and redevelopment.

(vii) Paragraphs 8-10 of the Grounds of Appeal – rights of relocation and redevelopment

176. Both of the Agreements contain provisions which grant rights of relocation and redevelopment to the Owner.

177. In the case of the 1997 Agreement Clauses 2.2 and 2.3 provide as follows:

> *"2.2 Notwithstanding the provisions of clause 2.1 Orange may terminate this Agreement at any time on not less than 3 months' prior written notice expiring on a Payment Day in the event of circumstances arising such that the Site is no longer suitable for the operation of PCN Equipment including (but not limited to) the erection of new buildings or environmental changes to the area in which the Site is located or the complete or partial destruction of the Site.*
>
> *2.3 In the event that a redevelopment of the Site is to take place the Owner agrees to consult with Orange and agree to a suitable relocation of its PCN Equipment with the Premises. If a relocation is not possible then the Owner shall have the right to terminate this Agreement at any time upon giving not less than 12 months prior written notice to Orange."*

178. In the case of 2002 Agreement Clauses 2.3 – 2.5 provide as follows:

> *"2.3 Orange may terminate this Agreement at any time giving the Owner not less than 3 months prior written notice in the event of circumstances arising such that the Site is no longer suitable in Orange's reasonable opinion for the operation of the Telecommunications Equipment including (but not limited to) the erection of new buildings or environmental changes to the area in which the Site is located or the complete or partial destruction of the Site.*
>
> *2.4 If at any time before the expiry of the fifth year of the Term the Owner requires to carry out any refurbishment, alteration or improvement to any part of the premises or any redevelopment as defined in Section 55 of the Town and Country Planning Act 1990 upon any part of the Premises upon which the Telecommunications Equipment is situated and has (if necessary) obtained valid planning permission for the same but is prevented from carrying out such*

work or redevelopment by reason of the existence of the Telecommunications Equipment the Owner may serve on Orange notice ("the Diversion Notice") requiring the Telecommunications Equipment to be relocated upon the Premises within a timetable to be agreed between the parties PROVIDED THAT Orange shall receive a minimum of 24 months notice of such relocation (such notice to expire on or before expiry of the fifth year of the Term).

2.5 The Owner will endeavour to relocate the Telecommunications Equipment in a location which is not less satisfactory to Orange than its position as shown in the Plan and shall take account of Orange's reasonable requirements in this respect.

Upon expiry of a Diversion Notice Orange will at the Owners expenses relocate the Telecommunications Equipment in accordance with the said timetable will make good any damage caused to the Site and the Premises to the reasonable satisfaction of the Owner.

If pursuant to these provisions the Telecommunications Equipment is relocated on another part of the Premises and this new location proves to be unsuitable for the operation of the Telecommunications Equipment then Orange may by written notice terminate this Agreement with immediate effect.

If pursuant to these provisions the Telecommunications Equipment is removed from the premises this Agreement shall automatically terminate and the obligations of the Parties under this Agreement shall cease."

179. The Judge accepted the submission of Mr Radley-Gardner that what the Judge referred to as *"this qualified right for the site owner to require relocation"* was inconsistent with exclusive possession; see Paragraph 56 – 58.

180. I do not think that the position is quite as straightforward as this.

181. Starting with the 1997 Agreement, Clause 2.2 is a break clause, which applies in the circumstances specified in Clause 2.2. It seems to me that this break clause is capable of being consistent with a lease or a licence.

182. Clause 2.3 of the 1997 Agreement requires more analysis. Pursuant to Clause 2.3 of the 1997 Agreement, if a redevelopment of the Sandbach Site is to take place the Owner has the right to terminate the 1997 Agreement, on 12 months prior written notice to Orange. The condition precedent to this right of termination is that the Owner must consult with Orange and seek to agree to a suitable relocation of the Sandbach Equipment within the Premises. If a relocation is not possible, then the right to terminate can be exercised by the Owner. While I can see the point that Clause 2.3 gives the Owner a right to require a relocation of the Sandbach Equipment, and that this can be said to be inconsistent with a grant of exclusive possession, I am not convinced of the force of this point. The important point seems to me to be that the right of relocation in Clause 2.3 can only be exercised in the event of a redevelopment of the Sandbach Site. There is no general right to require relocation of the Sandbach Equipment.

183. There is, in my view, a contrast to be drawn between the 1997 Agreement and the agreement which was under consideration in *Dresden Estates Ltd v Collinson* (1988) 55 P&CR 47. In this case the defendant, Mr Collinson, sought to argue that he had a lease of a workshop and

store which he occupied pursuant to an agreement with the plaintiff, Dresden Estates Limited, the owner of the premises. The agreement gave an unfettered right to Dresden to require Mr Collinson to transfer his occupation to other premises within the adjoining property owned by Dresden, and also to increase what was described as the licence fee payable under the agreement. The argument that the agreement created a lease was rejected by the Court of Appeal, essentially because the right to require Mr Collinson to relocate to other premises was considered incompatible with a lease. As Glidewell LJ explained, at page 53 of the report:

> *"What is even more important is to decide what clause 4(b) and also clause 4(f) mean. Clause 4(b) is the clause that starts by saying in terms: "This Licence confers no exclusive right for the Licensees to use and occupy the premises." It then goes on to give Dresden Estates Ltd. The right:*
>
> > *. . . from time to time on giving the Required Notice to require [Mr. Collinson] to transfer his occupation to other premises within [Dresden's] adjoining property.*
>
> *Clause 4(f) entitles Dresden Estates Ltd. by giving the required notice to increase the licence fee to such amount as the notice may specify. Both those clauses, if they have their apparent meaning, are inconsistent with there being a tenancy. You cannot have a tenancy granting exclusive possession of particular premises, subject to a provision that the landlord can require the tenant to move to somewhere else. The landlord can only do that by terminating the tenancy and creating a new one in other premises. So, too, with regard to the rent and licence fee. It is axiomatic that unless there is a rent review clause a landlord cannot for the duration of the tenancy alter the rent unilaterally. All he can do is to terminate the tenancy and then enter into a new agreement for the letting of the same premises at a new rent. Of course, the whole thing can be done by agreement. The tenancy agreement itself cannot give a landlord the power to alter a rent unilaterally."*

184. In the present case Clause 2.3 of the 1997 Agreement does not give the Owner an unrestricted right to relocate the Sandbach Equipment. Rather, Clause 2.3 of the 1997 Agreement gives the Owner the right to terminate the Agreement if a redevelopment of the Sandbach Site is to take place, subject to the condition precedent of seeking to agree a suitable relocation of the Sandbach Equipment within the Premises. If a relocation is not possible, the right of termination can be exercised.

185. A further point to keep in mind in this context is that paragraph 20 of the Old Code permitted the landowner, by notice given to the operator, to require the alteration of the relevant apparatus *"on the ground that the alteration is necessary to enable that person to carry out a proposed improvement of the land in which he has an interest"*. Paragraph 1(2) of the Old Code provided that references to the alteration of apparatus in the Old Code included references to the moving, removal or replacement of the apparatus. Paragraph 20(1) of the Old Code provided that this statutory right to require alteration could be exercised *"notwithstanding any agreement binding that person"*. This right could not therefore be excluded by agreement, although it could be varied by agreement; see the analysis of Recorder Sharp KC in *PG Lewins Limited v Hutchison 3G UK Limited and EE Limited* (County Court at Bristol – 9th March 2018), in paragraphs 27 – 43 of the Recorder's judgment in that case, in particular at paragraph 29. It is reasonable to assume that the parties had the provisions of the Old Code in mind when they entered into the 1997 Agreement. It seems to me that Clause 2.3 should be viewed as the version of the right of alteration, in paragraph 20 of the Old Code, upon which the parties had agreed. Viewed in this light, I do not think that it is right to characterise the qualified right in Clause 2.3 as

inconsistent with the grant of exclusive possession. Clause 2.3 set out a version of the right of alteration in paragraph 20 of the Old Code which, as the parties can be taken to have known, would have applied to the 1997 Agreement in any event.

186. In my view the overall outcome of the above analysis is that Clause 2.3 of the 1997 Agreement is properly put into the same category as Clause 2.2; that is to say a clause which is capable of being consistent with a lease or a licence.

187. It seems to me that the same analysis applies to Clauses 2.3 – 2.5 of the 2002 Agreement. Clause 2.3 of the 2002 Agreement granted a right of termination to Orange in the event of circumstances arising such that the Sandbach Site was no longer suitable in Orange's reasonable opinion for the operation of the Telecommunications Equipment.

188. Clauses 2.4 and 2.5 are more complex, but the important point is that they did not contain any unqualified right for the Owner to require the Telecommunications Equipment to be relocated. Instead, Clause 2.4 gave the Owner the right to require relocation of the Telecommunications Equipment in the event of the Owner requiring to carry out works of the kind specified in Clause 2.4. Clause 2.5 contained provisions dealing with the relocation of the Telecommunications Equipment, assuming the service of a valid Diversion Notice, with Orange having the option to terminate the 2002 Agreement if the new location for the Telecommunications Equipment proved to be unsuitable. By the final part of Clause 2.5, as I construe the same, the 2002 Agreement was also to terminate if the Telecommunications Equipment was removed from *"the premises"*, which I take to mean the Premises as defined in the 2002 Agreement. It also seems clear to me that the provisions of Clause 2.5 did not operate independently of Clause 2.4. The provisions of Clause 2.5 were only engaged if Clause 2.4 was engaged.

189. The right of relocation in Clause 2.4 has long since expired, given that it was expressed to be capable of exercise if the Owner required to carry out works of the kind specified in Clause 2.4 during the first five years of the term of the 1997 Agreement.

190. In relation to both sets of relocation provisions Mr Radley-Gardner made the fair point that, if the Agreements did take effect as leases, the rights of relocation in each Agreement do not explain what is to happen to the lease created by the relevant Agreement, if the rights of relocation are exercised or, in the case of the 2002 Agreement, were exercised before their expiration date. As he pointed out, if the Agreements did take effect as leases, relocation of the premises the subject of those leases would, in each case, appear to have required the surrender of the existing lease and the grant of a new lease. Neither Agreement however contained any agreement to that effect. I can see the force of this point. It seems to me that the only answer to this point, consistent with the Agreements having taken effect as leases, is to construe the relocation provisions as having the effect of working an implied surrender and regrant of the relevant lease, in the event that the relocation provisions were operated. It is however necessary to keep in mind that, as with the other provisions of the Agreements, the question I am answering is whether the provisions of each Agreement point to the relevant Agreement having taken effect as a lease or a licence. While I can see the force of Mr Radley-Gardner's point, I can see an answer to the point (the implied surrender and regrant referred to above), and the point has to be considered in the context of the overall structure of rights of redevelopment and relocation to be found in Clause 2 of each of the Agreements. Ultimately, I am not persuaded that Mr Radley-Gardner's point tips the scales in favour of a licence, so far as the redevelopment and relocation provisions in each Agreement are concerned.

191. In my view the outcome of the analysis is the same for Clauses 2.3–2.5 of the 2002 Agreement as it is for Clauses 2.2 and 2.3 of the 1997 Agreement. Clauses 2.3–2.5 of the 2002 Agreement are capable of being consistent with a lease or a licence.

(viii) Paragraphs 8-10 of the Grounds of Appeal – successors in title

192. Clause 10.1 of the 1997 Agreement provides as follows:

> *"10.1 It is the intention of the parties that this Agreement shall continue to bind their respective successors in title"*

193. Clause 10.1 of the 2002 Agreement contains a very similar provision:

> *"10.1 This Agreement shall bind the respective successors in title of the parties and those deriving title under them."*

194. A large part of the written and oral submissions for the hearing of the Appeal was devoted to the question of whether these Clauses were consistent with the Agreements, if the Agreements were assumed to have taken effect as licences. The arguments on this question ranged widely.

195. I start with the relevant part of the Decision. The Judge dealt with this question at Paragraphs 64 – 72. I should also make reference, in this context, to Paragraphs 64 – 66, which are relevant to this part of the Judge's reasoning because they deal with the question of whether the Agreements could be assigned. The Judge's conclusion, at Paragraph 72, was that Clause 10.1 in both Agreements, by the references to binding successors in title, was indicative of a lease.

196. Turning to the arguments of the parties, as they were presented in the Appeal, Mr Holland's argument was that if the Agreements took effect as licences, Clause 10.1 in each Agreement was meaningless. A licence is a personal agreement. A party cannot be a successor in title in relation to a licence because there is no title to succeed to. Equally, the burden of the obligations in a licence is not, under the general law, capable of assignment. If the Agreements took effect as leases, these problems did not arise. The benefit and burden of the obligations in the Agreements would have passed to the respective successors in title of the Owner and Orange, as in the case of any other lease. Clause 10.1 is therefore consistent, and only consistent with the Agreements taking effect as leases.

197. In response to this Mr Radley-Gardner deployed various arguments to the effect that, when the legal position was properly analysed, Clause 10.1 in each Agreement was not inconsistent with the Agreements taking effect as licences.

198. The starting point is the well-established principle of law that the burden of a contract cannot be assigned. For a restatement of this principle, I refer to the judgment of Beatson LJ in *Budana v Leeds Teaching Hospitals NHS Trust* [2017] EWCA Civ 1980 [2018] 1 WLR 1965, at [118]. The benefit of a contract can be assigned and, in the present case, there was no provision in either Agreement which prevented the benefit of the Agreement being assigned. If however the Agreements took effect as licences, assignment of the burden of the obligations in each Agreement would, without more, appear to have been prevented by the principle of law that the burden of a contract cannot be assigned.

199. Beyond this, it is also the case that the use of the expression *"successor in title"* is not apt to a licence. There is no title to which an assignee of the licence can succeed; see the analysis

of this expression in the judgment of Nugee LJ in the *Potting Shed* case, at [48] and [49]. The analysis was not directly concerned with licences, but it seems to me to follow from the analysis that it is not apt to speak of a successor in title to a licence. This point also applies to the reference to *"those deriving title under"* such successors in title, in Clause 10.1 of the 2002 Agreement. On the Owner's side the reference to a successor in title did make sense, because an assignee from the Owner of the benefit of the Agreements could be expected to be a party which had acquired the Owner's title to the Sites. On Orange's side the position was different. If the Agreements took effect as licences, they conferred no title to the Sites upon Orange. On that hypothesis, Orange and any assignee from Orange of the benefit of the Agreements had no more than a set of personal contractual rights to use the Sites.

200. Turning to the Old Code this also contained provisions concerning the extent to which rights under the Old Code were binding upon parties other than the original parties to the relevant code agreement. Paragraph 2(3) and (4) of the Old Code provided as follows:

> *"(3) If a right falling within sub-paragraph (1) above has been conferred by the occupier of any land for purposes connected with the provision, to the occupier from time to time of that land, of any telecommunication services and-*
>
> *(a) the person conferring the right is also the owner of the freehold estate in that land or is a lessee of the land under a lease for a term of a year or more, or*
>
> *(b) in a case not falling within paragraph (a) above, a person owning the freehold estate in the land or is a lessee of the land under a lease for a term of a year or more has agreed in writing that his interest in land should be bound by the right,*
>
> *then, subject to paragraph 4 below, that right shall (as well as binding the person who conferred it) have effect, at any time when the person who conferred it or a person bound by it under sub-paragraph (2)(b) or (4) of this paragraph is the occupier of the land, as if every person for the time being owning an interest in that land had agreed in writing to the right being conferred for the said purposes and, subject to its being exercised solely for those purposes, to be bound by it.*
>
> *(4) In any case where a person owning an interest in land agrees in writing (whether when agreeing to the right as occupier or for the purposes of sub-paragraph (3)(b) above or otherwise) that his interest should be bound by a right falling within sub-paragraph (1) above, that right shall (except in so far as the contrary intention appears) bind the owner from time to time of that interest and also-*
>
> *(a) the owner from time to time of any other interest in the land, being an interest created after the right is conferred and not having priority over the interest to which the agreement relates; and*
>
> *(b) any other person who is at any time in occupation of the land and whose right to occupation of the land derives (by contract or otherwise) from a person who at the time the right to occupation was granted was bound by virtue of this sub-paragraph."*

201. The effect of these provisions was that a successor in title of the relevant landowner and grantor of the relevant code rights would be bound by the grantor's obligations in the relevant code agreement. By paragraph 2(5) such a successor in title would also have the benefit of grantor's rights under the relevant code agreement, independent of any assignment of the benefit of those rights.

202. Pausing at this point, and before coming to the arguments of Mr Radley-Gardner, the legal position would appear to have been as follows, in terms of the transmission of the benefit and burden of the obligations in the Agreements, at the time when each of the Agreements was entered into:
    (1) The benefit of each Agreement was capable of assignment.
    (2) The burden of each Agreement was not, as a matter of general law, capable of assignment.
    (3) The burden of each Agreement was capable of passing to a successor in title of the Owner, together with the benefit of the Agreement, by virtue of the provisions of paragraph 2(3) and (4) of the Old Code.
    (4) On the face of it, the burden of each Agreement was not capable of passing to a successor in title of Orange.

203. This brings me to Mr Radley-Gardner's arguments on this particular question.

204. Mr Radley-Gardner's first argument was that the presence of Clause 10.1 did not point either way. As he pointed out in his skeleton argument, if anything the need to state that successors in title were bound by the provisions of each Agreement was more consonant with a licence agreement, on the basis that if the Agreements had been intended to be leases, it would not have been considered necessary to spell this out. I will come back to this argument. At this stage I confine myself to the observation that this point seems to me to have some merit. I say this for two reasons. First, I can see something in the argument that, in the case of a lease, it is not normally necessary to spell out that successors in title are bound. Such is the nature of a lease. Second, Mr Radley-Gardner's first argument was a useful reminder that the question with which I am concerned, in the context of Clause 10.1 as in the context of all the other provisions of the Agreements, is whether Clause 10.1 is indicative of a lease or a licence. I am not, at least directly, concerned with the question of whether the benefit and burden of each Agreement was fully capable of transmission. It was easy to lose sight of this point, in the complex arguments of counsel over the transmissibility or otherwise of benefit and burden of the Agreements.

205. Mr Radley-Gardner's second argument was that Clause 10.1 has to be considered in the context of the Old Code and, now, the Code. As I have already noted, code rights can be conferred by a number of different types of legal relationship, including leases and licences. Mr Radley-Gardner submitted that the Old Code and the Code cannot have the effect of giving agreements within the Code, which are identical in substance, different legal effects. I accept this argument, so far as it goes. I accept that Clause 10.1 should be construed against the background of the Old Code, which was in force when the Agreements were entered into. Indeed, I have adopted this approach in my analysis of the Agreements. I therefore accept that the provisions of the Old Code are relevant, so far as they affected the transmissibility of the benefit and burden of the Agreements. I also accept the point of principle that the Old Code and the Code should not have had the effect of giving agreements, identical in substance, different legal effects. The question which remains, to which I shall return, is the extent to which these points impact upon the question of whether and, if so, to what extent Clause 10.1 points to the Agreements being leases or licences.

206. Mr Radley-Gardner's third argument, or more accurately set of arguments, engaged directly with the question of the transmissibility of the benefit and burden of the Agreements. Mr Radley-Gardner argued, on various bases, that it was legally possible for the burden of Orange's obligations under the Agreements to have passed to assignees of Orange. As such, the parties could easily be understood to have thought that the Agreements had the effect set out in Clause 10.1, notwithstanding that they were intended to be licences.

207. In this context Mr Radley-Gardner made reference to the principle of mutual benefit and burden. His argument was that a party could not have taken an assignment of the benefit of the Agreement from Orange without also accepting the burden of the Agreement. The benefit and the burden comprised mutual sets of rights and obligations which could not be separated in this way. This doctrine of mutual benefit and burden has been explained by the courts in a number of cases. The following restatement of the doctrine, by Sir Andrew Morritt C in *Davies v Jones* [2009] EWCA Civ 1164 [2010] 1 P&CR 22, at [23], is particularly helpful:

> *"23. In **Rhone v Stephens** [1994] 2 A.C. 310 a successor in title to the original covenantee sought to enforce a covenant to repair a roof against the successor in title to the original covenantor. Lord Templeman, with whom the other four members of the Appellate Committee agreed, noted that equity cannot, any more than the law, compel an owner to comply with a positive covenant entered into by his predecessor in title. He then referred to the 'pure principle of benefit and burden' enunciated by Sir Robert Megarry V-C and continued:*
>
> > *"I am not prepared to recognise the "pure principle" that any party deriving any benefit from a conveyance must accept any burden in the same conveyance. Sir Robert Megarry V.-C. relied on the decision of Upjohn J. in Halsall v. Brizell [1957] Ch. 169. In that case the defendant's predecessor in title had been granted the right to use the estate roads and sewers and had covenanted to pay a due proportion for the maintenance of these facilities. It was held that the defendant could not exercise the rights without paying his costs of ensuring that they could be exercised. Conditions can be attached to the exercise of a power in express terms or by implication. Halsall v. Brizell was just such a case and I have no difficulty in wholeheartedly agreeing with the decision. It does not follow that any condition can be rendered enforceable by attaching it to a right nor does it follow that every burden imposed by a conveyance may be enforced by depriving the covenantor's successor in title of every benefit which he enjoyed thereunder. The condition must be relevant to the exercise of the right. In Halsall v. Brizell there were reciprocal benefits and burdens enjoyed by the users of the roads and sewers. In the present case clause 2 of the 1960 conveyance imposes reciprocal benefits and burdens of support but clause 3 which imposed an obligation to repair the roof is an independent provision. In Halsall v. Brizell the defendant could, at least in theory, choose between enjoying the right and paying his proportion of the cost or alternatively giving up the right and saving his money. In the present case the owners of Walford House could not in theory or in practice be deprived of the benefit of the mutual rights of support if they failed to repair the roof."*
>
> *Thus Lord Templeman stressed that conditions may be attached to the exercise of a right or power by express terms or by implication, thereby recognising that, as Sir Robert Megarry had considered, the question is one of construction of the relevant instrument or transaction. Even so, as Lord Templeman pointed out, the condition must be relevant or reciprocal to the exercise of the right."*

208. In this part of his judgment in *Davies v Jones* the Chancellor went on to refer to further authorities in which the doctrine of mutual benefit and burden has been considered. In particular, the Chancellor cited *Thamesmead Town Ltd v Allotey* (1998) 30 HLR 1052, in which Peter Gibson LJ stressed the need for (i) a correlation between the relevant burden

and the benefit the successor in title has chosen to take and (ii) the ability of the successor in title to choose whether or not to take the benefit. The Chancellor summarised the conditions to be satisfied, if the doctrine of mutual benefit and burden was to be applied, in the following terms at [27]:

> *"27.* ***Rhone v Stephens*** *and* ***Thamesmead Town Ltd v Allotey*** *are binding on us. They establish a number of propositions the application of which are exemplified in the other cases to which I have referred, namely* ***Halsall v Brizell,*** *that part of* ***Tito v Waddell*** *which was not disapproved in* ***Rhone v Stephens****,* ***Jenkins v Young Bros Transport Ltd*** *and* ***Baybut v Eccle Riggs Country Park Ltd****. In my view those propositions are:*
>
> *(1) The benefit and burden must be conferred in or by the same transaction. In the case of benefits and burdens in relation to land it is almost inevitable that the transaction in question will be effected by one or more deeds or other documents.*
>
> *(2) The receipt or enjoyment of the benefit must be relevant to the imposition of the burden in the sense that the former must be conditional on or reciprocal to the latter. Whether that requirement is satisfied is a question of construction of the deeds or other documents where the question arises in the case of land or the terms of the transaction, if not reduced to writing, in other cases. In each case it will depend on the express terms of the transaction and any implications to be derived from them.*
>
> *(3) The person on whom the burden is alleged to have been imposed must have or have had the opportunity of rejecting or disclaiming the benefit, not merely the right to receive the benefit."*

209. In my view the doctrine of mutual benefit and burden could not have been relied upon in the present case for the purposes of ensuring that the burden of Orange's obligations under the Agreements passed to an assignee, from Orange, of the benefit of the Agreements. It seems to me that it is impossible to shoehorn the entire network of rights and obligations in the Agreements into a close relationship of the kind required to engage the doctrine of mutual benefit and burden. While I appreciate that Mr Radley-Gardner's argument was that the parties could easily be understood to have thought that the transmissibility of the burden of the Agreements from Orange to an assignee could have been effected by the application of the doctrine of mutual benefit and burden, I am not able to accept this argument. It seems to me unrealistic to think that the parties could have had this understanding. If the burden of the Agreements was to be capable of transmission to assignees of Orange, I do not see how the parties to the Agreements or those advising the parties could have understood that this result would be achieved by the operation of the doctrine of mutual benefit and burden.

210. Mr Radley-Gardner also sought to rely upon the provisions of the Old Code and the Code to fill the apparent gap in the transmissibility of the burden of Orange's obligations under the Agreement.

211. For this purpose Mr Radley-Gardner relied upon paragraph 2(5) of the Old Code, which provided as follows:

> *"(5) A right falling within sub-paragraph (1) above shall not be exercisable except in accordance with the terms (whether as to payment or otherwise) subject to which it is conferred; and, accordingly, every person for the time being bound by such a right shall have the benefit of those terms."*

212. In relation to this argument Mr Radley-Gardner also relied upon paragraph 12(1) of the Code:

> *"(1) A code right is exercisable only in accordance with the terms subject to which it is conferred."*

213. Mr Radley-Gardner sought to rely on paragraph 2(5) and paragraph 12(1) of the Code, to argue that code rights granted to an operator are, in any event, imprinted with the obligations subject to which those rights have been granted. As such, an assignee of Orange would not have been able to take the benefit of Orange's rights under the Agreements without also taking the burden of Orange's obligations under the Agreements.

214. There are however two considerable difficulties with this argument. The first of these difficulties is that this interpretation seems to me to read too much into paragraph 2(5) of the Old Code, and for that matter into paragraph 12(1) of the Code. It seems to me that where paragraph 2(5) refers to a person, for the time being bound by a code right, having the benefit of the terms upon which that code right was granted, it proceeds on the basis that a situation exists where a person is bound by a code right. In other words, Paragraph 2(5) does not create, by statute, a transmission of the burden of the relevant code right. Rather, in a situation where a person is bound by a code right, for whatever reason, that person has the benefit of the terms on which the code right was granted. Paragraph 12(1) of the Code is not in the same terms as paragraph 2(5) of the Old Code but, so far as paragraph 12(1) reflects paragraph 2(5), it seems to me that it is similarly limited, in relation to the transmission of the burden of a code right. In summary, I agree with Mr Holland that the purpose of paragraph 2(5) was to emphasize the primacy of the terms of the relevant code agreement over the terms of the Old Code, save where the Old Code provides otherwise. An example of the Code providing otherwise can be found in paragraph 20(1), which provides that the right of alteration in paragraph 20 can be exercised by the landowner, notwithstanding the terms of any agreement binding the landowner; see my discussion of this point earlier in this decision, in the context of rights of relocation and redevelopment, and see the analysis of Recorder Sharp KC in *PG Lewins* at paragraphs 27 - 43, in particular at paragraph 33.

215. The second difficulty is that the assignment of code rights is now dealt with by paragraph 16 of the Code. Paragraph 16(4) of the Code provides as follows:

> *"(4) From the time when the assignment of an agreement under Part 2 of this code takes effect, the assignee is bound by the terms of the agreement."*

216. The operation of paragraph 16(4) of the Code was explained by Nugee LJ in the following terms, in his judgment in the *Potting Shed* case, at [60]:

> *"60. Suppose therefore that B duly assigns its code agreement to C. In order to ensure that C "comes to stand in the shoes of" B, one would expect C to enjoy the same position under the Code that B did. So far as the contractual position is concerned this is indeed the case. It is to be noted that code agreements may take the form of the grant of property rights (either in the form of a lease or an easement), but may take the form of merely contractual arrangements. The Law Commission Report refers to the latter as "wayleaves": see eg §1.27 fn 30 ("A wayleave is an agreement which does not amount to a property right (that is, it is a licence or permission), in contrast with an easement or a lease") and §2.16 ("in legal terms a right to keep equipment on land might be conferred by a lease or an easement (both of which are property*

rights) or a licence (a personal permission, often known in this context as a wayleave, and generally arising as a matter of contract…)"). Under the general law the assignment of a contract is effective to confer the benefit of the contract on an assignee but not normally the burden of the contract. But paragraph 16(4) provides that from the time when the assignment of an agreement under Part 2 takes effect, the assignee is bound by the terms of the agreement. In this way the assignee takes both the benefit and the burden of the agreement."

217. So far as I am aware, paragraph 16(4) of the Code has no equivalent in the Old Code. Instead, there was paragraph 2(5) of the Old Code which is succeeded, at least in part, by paragraph 12(1) of the Code, which appears to be directed to the same task as paragraph 2(5) of the Old Code. The obvious point which arises is that if paragraph 2(5) of the Old Code had the effect contended for by Mr Radley-Gardner, there would have been no need for a new provision of the kind to be found in paragraph 16(4) of the Code. There would have been no gap in the transmission of the benefit and burden of code rights in the Old Code, which paragraph 16(4) was required to fill in the Code. If however there was such a gap, the introduction of paragraph 16(4) makes sense.

218. It is also to be noted that paragraph 16(4) is disapplied in the case of subsisting agreements as defined in the transitional provisions in Schedule 2 to the Digital Economy Act 2017. Paragraph 5(1) of Schedule 2 provides that paragraph 16 of the Code does not apply to subsisting agreements. If however the burden of code rights under the Old Code was capable of assignment by telecommunications operators, paragraph 5(1) of Schedule 2 appears also to be redundant. On this hypothesis there would have been no point in disapplying paragraph 16(4) of the Code because there was no gap in the ability to transmit the benefit and burden of code rights under the Old Code.

219. Although I do not think that it is necessary to go this far, APW's counsel also referred me to two Law Commission documents which contain discussions of the meaning and effect of paragraph 2 of the Old Code. The relevant discussions are to be found in the Law Commission Consultation Paper No. 205 (paragraphs 3.32 – 3.39 and 3.89 – 3.91) and the Law Commission Report No. 336 (paragraphs 2.82 – 2.92, 3.4 – 3.8, and 3.21 – 3.23). The point which was made is that there is no suggestion, in any of these discussions, that paragraph 2(5) of the Old Code enabled the burden of code rights under the Old Code to be assigned by one operator to another operator. Indeed, paragraph 3.22 of the Law Commission Report made the following recommendation:

> *"3.22 The revised Code will need to make specific provisions as regards the assignment of other agreements conferring Code Rights, in order effectively to pass on the burden to the assignee. For example, the Code Operator to whom a wayleave is assigned should be responsible for the payment of rent for the period after the assignment, not the assignor."*

220. This recommendation is clearly inconsistent with the suggestion that the burden of code rights was fully capable of assignment by an operator under the Old Code.

221. In summary, it seems to me that there was nothing in the Old Code which enabled the burden of code rights under the Old Code to be assigned by one operator to another operator. This gap has now been filled by paragraph 16(4) of the Code, in the case of agreements which are subject to the Code and are not caught by the transitional provisions in paragraph 5(1) of Schedule 2 to the Digital Economy Act 2017. The gap did however exist when the Agreements were entered into. It follows that I do not accept Mr Radley-Gardner's

argument that paragraph 2(5) of the Old Code had the effect of transmitting the burden of the obligations of an operator under a code agreement to an assignee of the operator. Nor do I accept that paragraph 12(1) of the Code has this effect.

222. In this context my attention was drawn to the decision of the Judge on further preliminary issues in the References and in three other references. The decision in question, which was referred to by APW's counsel as *"the Second Decision"* (I shall use the same expression), is a decision dated 9th January 2024 (LC-2023-000322, 323, 332, 348 and 365).

223. In paragraphs 25-28 of the Second Decision, the Judge records an argument of Mr Radley-Gardner, again as counsel for OT, to the effect that paragraph 12(1) of the Code does have the effect of imprinting a code right with the terms on which it was conferred. I take this to be the same argument which was advanced by Mr Radley-Gardner in the Appeal, in relation to both paragraph 12(1) of the Code and paragraph 2(5) of the Old Code. At paragraph 28 of the Second Decision the Judge said this:

> *"28. I find the submissions of Mr Radley-Gardner in relation to Paragraph 12(1) to be persuasive and, in the event that I am wrong in my own analysis of* ***Gencomp*** *and Paragraph 33, I adopt his analysis."*

224. As is apparent from paragraph 28 of the Second Decision, the argument on paragraph 12(1) of the Code was put as an alternative to the principal argument of OT. In this part of the Second Decision the Judge was concerned with the second preliminary issue, which was whether OT could claim to be a party to a code agreement, in circumstances where the relevant agreements (which included the Agreements) were licences and where OT had not been an original party to any of the agreements. The Agreements were, on the basis of the Decision, licences. The other agreement under consideration was agreed by the parties to be a licence. The Judge decided that OT could be treated as a party to a code agreement, in relation to the three agreements, on the basis of the provisions of paragraph 33(1) of the Code. This was sufficient to decide the point, but the Judge did go on to accept the alternative argument of Mr Radley Gardner, that OT was a party to a code agreement, in relation to the three agreements, on the basis that OT was, by virtue of paragraph 12(1) of the Code, subject to the burden of the operator's obligations in the three agreements.

225. It follows that the Judge's acceptance of Mr Radley-Gardner's alternative argument based on paragraph 12(1) of the Code was strictly obiter to his decision on the second preliminary issue. I was also told that the Second Decision is under appeal. Nevertheless it seems to me, on the basis of my analysis of paragraph 2(5) of the Old Code and paragraph 12(1) of the Code, that the Judge was wrong to accept the alternative argument of Mr Radley-Gardner.

226. Mr Radley-Gardner also made reference to what he referred as the principle of qualified rights. In the case of each of the Agreements the code rights granted were qualified by reference to the conditions and obligations in each Agreement. I do not follow this argument. At the time when the Agreements were entered into Orange assumed the obligations which it assumed under each Agreement. Thereafter, and if the Agreements took effect as licences, Orange could have assigned the benefit of the Agreements to a third party operator, but would have remained liable under its obligations in the Agreements. I cannot see how the terms of the Agreements could have rendered the third party operator subject to the burden of Orange's obligations in the Agreements, if this result could not be achieved either by the common law or by statute.

227. In conclusion, in relation to Mr Radley-Gardner's third set of arguments on Clause 10.1, I am not able to accept the arguments of Mr Radley-Gardner to the effect that, at the time when the Agreements were entered into, the burden of the obligations assumed by Orange in the Agreements either was or might have been capable of assignment to a third party operator, either by the common law or by statute or by the terms of the Agreements. I am also unable to accept the arguments of Mr Radley-Gardner to the effect that the parties could easily be understood to have thought that the Agreement had this effect. In my view the appropriate assumption to make is that the parties would have been aware of the legal position at the time when they entered into the Agreements; namely that the burden of the obligations of Orange in the Agreements was not capable of assignment to a third party operator, either by the common law or by statute or by the terms of the Agreements.

228. I indicated that I would come back to Mr Radley-Gardner's first and second arguments on Clause 10.1.

229. So far as the first argument is concerned, I have taken the point that the parties to a lease would not normally be expected to have stated in terms that the provisions of the lease would bind successors in title. The fact is however that the parties did choose to include Clause 10.1 in each of the Agreements, in circumstances where, in my view, the parties can be assumed to have understood that the burden of Orange's obligations under the Agreements was not capable of assignment and to have understood, if the Agreements were intended to be licences, that there would no successors in title, at least on Orange's side, and (in the case of the 2002 Agreement) no persons deriving title from Orange or from an assignee from Orange of the benefit of the 2002 Agreement. In these circumstances I do not think that Mr Radley-Gardner's first argument carries any real weight.

230. Turning to the second argument, it seems to me that the fact that the Agreements were made against the background of the Old Code does not assist OT. My analysis of the Old Code is that it did not fill the gap which I have identified in the transmissibility of the benefit and burden of the obligations in the Agreements. Accordingly, it seems to me that considering Clause 10.1 in the context of the code rights which it engaged points against rather than towards a licence.

231. Returning to the specific question which I am considering in this part of this decision, where does all this leave Clause 10.1, in terms of its effect on the question of whether the Agreements took effect as leases or licences? Drawing together all of the above analysis, my conclusions are as follows:
    (1) At the time when each of the Agreements was entered into the burden of Orange's obligations under the Agreements was not capable of assignment to a third party, if the Agreements took effect as licences.
    (2) In these circumstances the provisions of Clause 10.1 were not capable of being fully effective, if the Agreements took effect as licences. If Orange assigned the benefit of either Agreement to a third party, that third party would not be bound by Orange's obligations under the Agreement.
    (3) It seems to me reasonable to assume that the parties, when they entered into the Agreements, would have been aware that this was the position.
    (4) Beyond this, the reference to successors in title in Clause 10.1 was not an apt reference, at least on Orange's side, if the Agreements were intended to take effect as licences. If the Agreements did take effect as licences, there would be no title to which an assignee of Orange could succeed and (in the case of the 2002 Agreement) no person who could derive title from Orange or from an assignee from Orange of the benefit of the 2002 Agreement.

(5) In the above circumstances, it seems to me that the provisions of Clause 10.1 point strongly towards the Agreements being intended to take effect as leases and not licences.

(6) APW's counsel submitted that Clause 10.1 was decisive against the Agreements being licences, and that the Judge should so have decided. So far as the 1997 Agreement is concerned, this submission does not take account of the Term Issue, which remains to be determined. Even if however the Term Issue is put to one side, I do not consider that it is appropriate to go this far. In my judgment Clause 10.1 is a strong pointer to the Agreements being intended to take effect as leases and not licences. How this affects my final decision on the status of the Agreements, putting the Term Issue to one side for this purpose, must await my overall review of the Agreements.

(ix) Paragraphs 8-10 of the Grounds of Appeal – the absence of deeds

232. Neither of the Agreements was made by deed. If the Agreements did take effect as leases rather than licences, each of the Agreements needed to be made by deed in order to take effect at law; see Section 52(1) of the Law of Property Act 1925. The exemption in Section 54(2) of the Law of Property Act 1925 would not have been available, given that both Agreements were entered into for terms which exceeded three years. The Judge considered the fact that the Agreements were not made by deed to be a strong indicator that the parties did not intend to create leases; see Paragraph 28.

233. I can see some merit in this point. If the parties had intended to create leases, it seems reasonable to assume that the parties would have appreciated that deeds were required. I would not go so far as the Judge in describing it as inevitable that the Agreements would have been made by deed if the parties had intended to create leases, but it seems to me that the absence of deeds is an indication against the parties having had the intention to create leases.

234. As against this, it is important to keep in mind that the fact that the Agreements were made by deed does not prevent the Agreements from taking effect as leases or, in the alternative, giving rise to leases. A lease which is void, because it was not granted by deed, can still take effect in equity, as an agreement for the grant of a lease, provided that the agreement can be enforced by specific performance. Beyond this, if the tenant enters into possession of the premises intended to be demised by a void lease, the tenant becomes a yearly tenant of the premises, upon the terms of the void lease, so far as the same are applicable to and not inconsistent with a yearly tenancy; see Woodfall, Volume 1, at 5.004 and 5.005.

235. In the present case therefore, the fact that the Agreements were not made by deed does not prevent their taking effect as leases, if they otherwise would have taken effect as leases. For present purposes, and as I have said, the relevant point is that the absence of deeds is an indication against the parties having had the intention to create leases.

236. I should make it clear, for the avoidance of doubt, that the arguments in the Appeal did not, to any material degree, engage with precisely what kind of lease OT has of each of the Sites, if the Agreements are assumed to have taken effect as leases. Nor does this question appear to have been brought out in the terms of the preliminary issues in the References which were the subject of the Decision. It follows that, in the Appeal and subject to my decision on the Term Issue, I am confining myself to the same question of whether the Agreements took effect as leases or licences. If I conclude that the Judge was wrong, and that the Agreements

or either of them took effect as leases, the issue of how these leases or the relevant lease are to be categorised, if it is an issue, will be for separate resolution.

(x) Paragraphs 8-10 of the Grounds of Appeal – the absence of reference to the 1954 Act

237. At Paragraphs 29 and 30 the Judge made reference to the length of the terms of the Agreements, which he saw as suggestive of leases, and to the absence of any reference to the 1954 Act. The Judge attached considerable importance to the absence of reference to the 1954 Act. As he explained, at Paragraph 30:

> *"30. I am satisfied that Orange would have had access to the very best legal advice available at the time the agreements were entered into. It was entering into a long-term commercial contract involving very substantial capital outlay. If it was intended that Orange was to have the benefit of the 1954 Act it would have said so. A licence is not protected under the 1954* [Act]*. If Orange were indeed trying "to have their cake and eat it" there would be a real risk that either agreement might be construed as a licence and 1954 Act protection lost. Why would Orange take that risk jeopardising coverage? The site providers should not be left out of consideration either. Surely Messrs Pinkerton and Thornhill would have wanted clarity – would they be able to obtain possession at the end of the term or would they be left with a 1954 Act protected tenant? There are considerable risks of "unintended consequences" for both parties. The complete absence of any reference to the 1954 Act or indeed to any contracting out, points strongly to the intention of the parties to enter into an agreement for installation of telecommunications equipment rather than a lease subject to the 1954 Act. Orange would, of course, have been well aware of its rights to apply under paras. 5 and 21 of the Old Code on expiry of the term."*

238. I do not agree with this reasoning. A business lease has the protection of the 1954 Act, assuming that it is not contracted out of this protection and assuming that it does not, for some other reason fail to qualify for such protection, whether the lease has a statement to this effect or not. As a general rule parties do not record in a business lease that the lease is subject to the protection of the 1954 Act. The 1954 Act simply applies to the business lease, unless excluded for some reason.

239. It seems to me that the absence of reference to the 1954 Act in the Agreements is a neutral factor. It does not point in the direction of a lease or a licence.

240. As it happens there is a reference to the 1954 Act in Clause 7.4 of the 2002 Agreement. I have already made reference to Clause 7.4, which permitted Orange to share the use of the Lubbards Site with third parties. Reference is made in Clause 7.4 to Section 42 of the 1954 Act for the purposes of identifying group companies which were outside the scope of this right to share the use of the Lubbards Site. Given this purpose it seems to me that this reference to the 1954 Act is also neutral, in terms of the question of whether the Agreements took effect as leases or licences.

(xi) Paragraphs 8-10 of the Grounds of Appeal – other provisions of the Agreements

241. The Judge in the Decision and counsel in their submissions made reference to various other provisions of the Agreements. I do not regard any of these other provisions as pointing, particularly, either towards a lease or a licence. I will however deal briefly with these other provisions for the sake of completeness.

242. There is no clause providing for Orange's quiet enjoyment of the respective Sites in either Agreement. I agree with the Judge (Paragraph 44) that this is a neutral factor. If the Agreements did take effect as leases, a covenant for quiet enjoyment would be implied.

243. Each of the Agreements contains provisions relating to the upkeep of, respectively, the PCN Equipment and the Telecommunications Equipment. There is no general obligation to keep either of the Sites in repair. I agree with the Judge (Paragraphs 52 and 53) that none of this is significant. The Sites themselves were and are sites located in open land, on which is located only the telecommunications equipment. There is nothing to repair or maintain save for the telecommunications equipment itself. The obligations in the Agreements to maintain the telecommunications equipment seem to me to be equally consistent with the Agreements being leases or licences.

244. The Agreements contain warranties of title on the part of the Owner, in Clause 6.1 of each of the Agreements. I agree with the Judge (Paragraph 48) that these warranties are not significant. It seems to me that they are equally consistent with the Agreements being leases or licences.

245. Each of the Agreements contains a provision requiring Orange to maintain public liability insurance in respect of the Sites. The need for this is obvious, given the nature of the equipment on the Sites and the use of the Sites. I agree with the Judge (Paragraph 59) that these provisions do not point towards either Agreement being a lease. These provisions seem to me to be a neutral factor.

246. Each Agreement contains, at Clause 9.1, a provision giving the Owner the right to terminate the Agreement in the event of breach of the Agreement on the part of Orange. At Paragraph 61 the Judge rejected the argument of Mr Holland that Clause 9.1 of each Agreement was a forfeiture clause in all but name. The Judge took the view that the termination by written notice provided for by Clause 9.1 was *"wholly different from a landlord's right of re-entry under lease"*. In my view Clause 9.1 is neutral. It can be characterised as a forfeiture clause, although I would agree with the Judge that it is not framed in the usual terms of a forfeiture clause in a lease. Equally it can be characterised as a right of termination applicable to a licence. I do not see Clause 9.1 as being inconsistent with the Agreements being leases. I do not see Clause 9.1 as being inconsistent with the Agreements being licences.

247. There is an obligation on the part of Orange, in each of the Agreements, to pay any rates levied by reason of Orange's use of the telecommunications equipment on each of the Sites. I agree with the Judge (Paragraph 63) that this is a neutral factor.

(xii) Paragraphs 8-10 of the Grounds of Appeal – the 2000 Supplemental Agreement

248. Paragraphs 9 and 10 of the Grounds of Appeal concentrate upon the 2000 Supplemental Agreement. I do not regard it as necessary to deal in detail with these grounds of appeal, for two reasons.

249. First, it seems to me that the real significance of the 2000 Supplemental Agreement lies in the plans annexed thereto; that is to say the 2000 Sandbach Plans. It seems to me that the 2000 Sandbach Plans contain a good deal of evidence which, for the reasons which I have already explained, (i) throws light on the content of the missing 1997 Sandbach Plan, (ii) is relevant to understanding the nature of the Sandbach Site when the 1997 Agreement was

originally made, and (iii) is relevant to the question of whether the 1997 Agreement took effect as a lease or a licence. I do not need to repeat my earlier analysis of the 2000 Sandbach Plans and their relevance in the Appeal. Beyond this, I do not regard the 2000 Supplemental Agreement as having much relevance to the lease/licence question, principally because the 2000 Supplemental Agreement, with the exception of the enlargement of the Sandbach Site, made only minor variations to the 1997 Agreement. I also continue to bear in mind Mr Radley-Gardner's point that, as a general rule, the conduct of parties subsequent to the making of an agreement is not admissible as an aid to the construction of that agreement.

250. Second, it is contended in paragraph 10 of the Grounds of Appeal that if the 1997 Agreement took effect as a licence in relation to the Sandbach Site, the 2000 Supplemental Agreement was effective to grant a lease of the Sandbach Site, as enlarged by the 2000 Supplemental Agreement. I find it difficult to see how the 2000 Supplemental Agreement could have created a lease of the Sandbach Site, as enlarged, if the 1997 Agreement took effect as a licence. In particular, if the obstacle to the 1997 Agreement having taken effect as a lease was that it was not entered into for a term certain (the question which I have yet to decide), I cannot see that the 2000 Supplemental Agreement did anything to remove that obstacle.

251. Putting the Term Issue to one side, the correct analysis seems to me to be as follows. If the 1997 Agreement took effect as a licence, it seems to me that the 2000 Supplemental Agreement did no more than vary that licence and enlarge the premises (the Sandbach Site) in respect of which the licence existed. I cannot see a basis, on this hypothesis, why the 2000 Supplemental Agreement would have taken effect as a lease if the 1997 Agreement only took effect as a licence. If, by contrast the 1997 Agreement took effect as a lease, then it seems to me that the 2000 Supplemental Agreement, by reason of the fact that it enlarged the premises (the Sandbach Site) demised by that lease, would have worked a surrender by operation of law of the lease created by the 1997 Agreement and the regrant of that lease on the terms of the 1997 Agreement as varied by the 2000 Supplemental Agreement. I do not think that the need for such a surrender by operation of law and regrant, on the hypothesis that the 1997 Agreement took effect as a lease, is a matter which counts against the argument that the 1997 Agreement took effect as a lease. Equally, I do not think that APW can fall back on the 2000 Supplemental Agreement, if the 1997 Agreement did not take effect as a lease.

(xiii) Paragraphs 8-10 of the Grounds of Appeal – the overall analysis

252. I now come to my overall analysis of the position, in relation to the question of whether the Judge was right to decide, for the reasons which he gave, that each of the Agreements took effect as a licence rather than as a lease. For this purpose I consider the provisions of each of the Agreements as a whole. In the case of the 1997 Agreement I should repeat the point, for the avoidance of any doubt, that this overall analysis is subject to my decision on the Term Issue.

253. The Judge set out his final reasoning and conclusion in Paragraphs 80 and 81. I have already quoted these Paragraphs, but I repeat them for ease of reference:

> *"80. My decision is finely balanced. There are clearly clauses to be found in "Terms and Conditions" attached and incorporated into the 1997 Agreement and contained in Schedule 1 to the 2002 Agreement which are resonant of a lease. However, those terms and conditions are, in my judgment, outweighed by clause B to both Agreements. The intention of the parties was that the operator would be granted a bundle of rights in connection with the installation and*

operation of PCN/Telecommunications Equipment. There is no grant of exclusive possession with a corresponding interest in land. The "lift and shift" provisions provide a qualified right for the site owner, in consultation with Orange, to more the Site to another location within the Premises (of which the Site forms a part). The Plans attached to the agreement do not demarcate the site. The Plans are in fact technical drawings of the PCN/Telecommunications Equipment. The quite extraordinary fencing and the almost "Orwellian" security observed by Mr Powell are not intended to demarcate the site or keep the landlord out. Fencing and security is present to protect the PCN/Telecommunications Equipment in both the 1997 and 2002 Agreements. The Site is secondary.

81. I find that neither the 1997 nor the 2002 Agreement grant exclusive possession. That does not mean that they grant purely personal contractual rights either. Both are telecommunications agreements. Such agreements are not leases to which Part 2 of the Landlord and Tenant Act 1954 applies."

254. Standing back and carrying out my own overall review of the position, I find myself in respectful disagreement with the Judge's analysis. I do not see the position as finely balanced. It seems to me to be clear, on an overall analysis, that the 2002 Agreement took effect as a lease rather than as a licence, and that the 1997 Agreement would have taken effect as a lease rather than a licence, on the assumption that it was entered into for a term certain; in other words subject to the Term Issue.

255. I say this for the following reasons, which I can state relatively briefly, given that the underlying reasoning has already been stated in my analysis of individual provisions and sets of provisions in each Agreement. These reasons fall into two parts. I should add that although it is necessary to consider the Agreements separately, and although I accept Mr Radley-Gardner's point that one Agreement cannot be used as an aid to the construction of the other, my reasons are common to both Agreements because they rely on identical or similar provisions in each Agreement.

256. First, there are the provisions of each Agreement, including the plans attached to the Agreements, which I have considered in sections (ii) – (vi) of my analysis of paragraphs 8-10 of the Grounds of Appeal. I have summarised, earlier in this decision, the correct approach to the determination of the question of whether an agreement for the occupation and/or use of land constitutes a lease or a licence. I have also summarised the legal principles which govern the concept of exclusive possession. Applying this approach and these legal principles it seems to me that each Agreement did have the effect of granting to Orange exclusive possession of the relevant Site. As I have already noted, Clause B of each Agreement granted to Orange a bundle of rights in respect of a defined area of land; namely the relevant Site. The relevant Site was intended to be enclosed and was enclosed, with Orange being responsible for that enclosure. The relevant Site was to be occupied and was occupied solely by Orange's telecommunications equipment, which remained the property of Orange. In the case of each Site, Orange was granted what were effectively exclusive rights of use, which Orange could share with other occupiers, if it so chose. The Owner did not have any such rights, and the Owner's rights to come on to the Site were substantially restricted. Putting all of this together, it seems to me, in the case each Agreement, that there was a grant of exclusive possession of the relevant Site to Orange.

257. The provisions for relocation of the telecommunications equipment which can be found in each Agreement have given me pause for thought, in reaching this conclusion. In this

context I repeat my earlier analysis of the relocation and redevelopment provisions in each Agreement. For the reasons which I have set out in my earlier analysis, I do not consider that these provisions are sufficient to undermine or contradict my conclusion that each Agreement did grant exclusive possession of the relevant Site to Orange.

258. Second, there is Clause 10.1 of each Agreement. Again, I repeat my earlier analysis of Clause 10.1. For the reasons which I have set out in my earlier analysis, it seems to me that Clause 10.1 is inconsistent with either of the Agreements having taken effect as a licence. Clause 10.1 seems to me to point strongly to each Agreement being intended to take effect as a lease.

259. The remainder of the provisions of the Agreements, with the exception of Clause 2.1 of the 1997 Agreement which I have yet to consider in relation to the Term Issue, seem to me to be neutral, in terms of whether the Agreements took effect as leases or licences.

260. In Paragraph 80 the Judge concluded that neither of the Agreements granted exclusive possession of the relevant Site. In reaching this conclusion the Judge principally relied upon Clause B, the plans attached to the Agreements and what the Judge referred to as the lift and shift provisions; being the provisions I have referred to as the rights of relocation and redevelopment. The Judge also reasoned that the enclosure and security of the Sites was attributable to the need to protect the telecommunications equipment on the Sites, and was not intended to demarcate the Sites or keep the Owner out. I have analysed the relevant provisions of the Agreements and the plans attached to the Agreements in a different way to the Judge. I also disagree with the Judge that any of the matters which I have relied upon, in order to reach the conclusion that each of the Agreements did make an effective grant of exclusive possession of the relevant Site to Orange, can be disregarded on the basis that the intention was to protect the telecommunications equipment. Applying the legal principles which I have summarised earlier in this decision, it seems to me that what matters is the actual effect of the relevant provisions in each Agreement. The actual effect of the relevant provisions, in my judgment, was that Orange was granted exclusive possession of each Site. The intention may have been to protect the telecommunications equipment, but the effect was a grant of exclusive possession.

(xiv) Paragraphs 8-10 of the Grounds of Appeal – the outcome of the overall analysis

261. The result of the differences between my own analysis and the analysis of the Judge is, as I have said, that I find myself in respectful disagreement with the Judge.

262. I therefore conclude that the Judge was wrong to decide that the 2002 Agreement took effect as a licence rather than a lease. It is not in dispute that the 2002 Agreement was entered into for a term certain, at the equivalent of a rent. On the basis of my analysis, the 2002 Agreement was also effective to grant Orange exclusive possession of the Lubbards Site. In my judgment, and for the reasons which I have given, the correct conclusion is that the 2002 Agreement took effect as a lease.

263. The same conclusion does not necessarily follow in the case of the 1997 Agreement. The Judge was not necessarily wrong in his actual decision that the 1997 Agreement took effect as a licence. In the case of the 1997 Agreement, and notwithstanding my decision on the question of exclusive possession, there remains the Term Issue, to which I now turn.

Analysis – the Term Issue

264. If the Judge was wrong on the Term Issue, the 1997 Agreement could not, in itself, have taken effect as a lease, regardless of whether the Judge was right in the remainder of his analysis of the 1997 Agreement. Nor, as it seems to me, could the position have been cured by the 2000 Supplemental Agreement, given that the 2000 Supplemental Agreement made no change to the expressed term of the 1997 Agreement.

265. As the case law in this area tends to refer to tenancies rather than leases, I will do the same in this section of this decision, when referring generally to fixed term and periodic tenancies. As I have explained, the expressions are used interchangeably in this decision. Similarly, there is no distinction between these two expressions in the case law.

266. By way of reminder, the term of the 1997 Agreement was expressed to be the Minimum Term, which was defined to mean 10 years from the date of the 1997 Agreement (11th March 1997). Clause 2 of the terms and conditions dealt the rights of termination. Clauses 2.2 and 2.3 dealt with specific rights of termination if certain conditions arose, and are not directly relevant for present purposes. The relevant part of clause 2 is clause 2.1, which I repeat for ease of reference:

> *"2.1 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."*

267. For APW, Mr Holland contended that the 1997 Agreement satisfied the requirements for a term certain. As Mr Holland developed his case in oral submissions, there were three reasons for this. Mr Holland's primary argument was that the 1997 Agreement created a lease for a minimum term of 10 years, which could thereafter be terminated by either party giving the required period of 12 months' notice. On the authorities, so Mr Holland contended, a lease granted for a term of this kind satisfied the requirements for a term certain. The fact that the notice did not have to expire on any particular date did not render the term uncertain. Mr Holland's second, and alternative argument, if his primary argument was not accepted, was that the 1997 Agreement created a lease for an initial fixed term of 10 years followed by a periodic tenancy.

268. In oral submissions Mr Holland put forward a third argument on the Term Issue, in the further alternative, which was that if the term of the 1997 Agreement was uncertain, the consequences were as follows. Assuming that the 1997 Agreement otherwise satisfied the requirements for a lease, in the sense that it constituted an agreement for the grant of exclusive possession of the Sandbach Site to Orange, at an annual rent, the 1997 Agreement would have been void as a lease, by reason of its term being uncertain. Nevertheless, in these circumstances the possession of the Sandbach Site by Orange, coupled with payment of an annual rent, would have given rise to an implied annual periodic tenancy, on the terms of the 1997 Agreement so far as compatible with an annual periodic tenancy.

269. For OT, Mr Radley-Gardner contended that there was no term certain because there was no fixed periodic tenancy, following the expiration of the term of 10 years. Following the expiration of this fixed term the 1997 Agreement did not run from year to year or on any other fixed periodic basis. Instead, the 1997 Agreement simply ran on, with each party having the ability to give not less than 12 months' notice of termination of the 1997 Agreement, *"at any time"*, subject to the requirement that such notice could not expire before the last day of the 10 year term. As such, the 1997 Agreement could not have taken effect as a lease, independent of OT's other arguments, because these provisions did not

satisfy the requirements for a term certain, either on Mr Holland's primary argument or on his secondary argument. The 1997 Agreement could only have satisfied these requirements if it had been entered into for a fixed term followed by a fixed periodic tenancy. So far as an implied annual periodic tenancy was concerned, Mr Radley-Gardner submitted that no such tenancy could be implied for essentially the same reason. The implication of such a tenancy was equally inconsistent with the terms of clause 2.1 of the 1997 Agreement, which gave the parties the right to terminate the 1997 Agreement *"at any time"* on or after the expiration of the Minimum Term, on not less than 12 months prior notice in writing.

270. It will be seen that Mr Holland (on his primary argument) and Mr Radley-Gardner analysed the term created by the 1997 Agreement in the same way; namely as a term of 10 years which thereafter continued until terminated by not less than 12 months' notice given by either party. Where counsel disagreed, on this analysis of the 1997 Agreement, was whether such a term constituted a term certain.

271. The leading case on the requirements for a term certain in relation to tenancies is the decision of the Supreme Court in *Mexfield Housing Co-operative Ltd v Berrisford*. One of the various issues which the Supreme Court had to consider in this case was whether the relevant occupancy agreement had been entered into for a term certain. Pursuant to this occupancy agreement the claimant had agreed to let and the defendant had agreed to take the relevant property from month to month at a weekly rent. By clause 5 of the agreement the defendant could bring the agreement to an end by giving one month's notice. By clause 6 the claimant could bring the agreement to an end only if certain conditions were satisfied. The claimant sought to bring the agreement to an end by serving a notice to quit on the defendant. The claimant argued that what the agreement had created was a monthly periodic tenancy. This argument failed, on the basis that the agreement could only be brought to an end pursuant to the rights of termination in clause 5 or clause 6. This then raised the question of whether an agreement of this kind was capable, as a matter of law, of constituting a tenancy. The defendant accepted that it was not so capable, because the term was uncertain. This paved the way for the defendant's argument, which was successful, that the overall result was that the defendant had what would, prior to 1926, have been a tenancy for life but was, by virtue of Section 149(6) of the Law of Property Act 1925, a tenancy for a term of 90 years.

272. For present purposes the relevance of *Mexfield* lies in the consideration by the Supreme Court of the law on certainty of term in tenancies. Although it was conceded that the agreement in *Mexfield* had not been entered into for a term certain, the law was subjected to a considerable degree of scrutiny, principally by Lord Neuberger MR (as he then was). Lord Neuberger summarised the state of the law in his judgment, at [33], in the following terms:

> *"33 Following the decision of the House of Lords in the Prudential case [1992] 2 AC 386, the law appeared clear in its effect, intellectually coherent in its analysis, and, in part, unsatisfactory in its practical consequences. The position appears to have been as follows: (i) an agreement for a term, whose maximum duration can be identified from the inception can give rise to a valid tenancy; (ii) an agreement which gives rise to a periodic arrangement determinable by either party can also give rise to a valid tenancy; (iii) an agreement could not give rise to a tenancy as a matter of law if it was for a term whose maximum duration was uncertain at the inception; (iv) (a) a fetter on a right to serve notice to determine a periodic tenancy was ineffective if the fetter is to endure for an uncertain period, but (b) a fetter for a specified period could be valid."*

273. Lord Neuberger went on to express dissatisfaction with the state of the law but, for reasons which he explained, did not feel able to change the law and dispense with the requirement for certainty of term, both in the case of tenancies granted for a fixed term and in the case of periodic tenancies. As Lord Neuberger explained, at [35] and in the first part of [36]:

> *"35 However, I would not support jettisoning the certainty requirement, at any rate in this case. First, as the discussion earlier in this judgment shows, it does appear that for many centuries it has been regarded as fundamental to the concept of a term of years that it had a certain duration when it was created. It seems logical that the subsequent development of a term from year to year (i e a periodic tenancy) should carry with it a similar requirement, and the case law also seems to support this.*
> *36 Secondly, the 1925 Act appears to support this conclusion. Having stated in section 1(1) that only two estates can exist in land, a fee simple and a term of years, it then defines a term of years in section 205(1)(xxvii) as meaning "a term of years ... either certain or liable to determination by notice [or] re-entry"; as Lord Templeman said in the Prudential case [1992] 2 AC 386, 391B, this seems to underwrite the established common law position."*

274. Also of particular relevance to the present case is the analysis by Baroness Hale JSC (as she then was), in her judgment at [87], of the requirement for certainty as it applies to periodic tenancies:

> *"87 Periodic tenancies obviously pose something of a puzzle if the law insists that the maximum term of any leasehold estate be certain. The rule was invented long before periodic tenancies were invented and it has always been a problem how the rule is to apply to them. In one sense the term is certain, as it comes to an end when the week, the month, the quarter or the year for which it has been granted comes to an end. But that is not the practical reality, as the law assumes a re-letting (or the extension of the term) at the end of each period, unless one or other of the parties gives notice to quit. So the actual maximum term is completely uncertain. But the theory is that, as long as each party is free to give that notice whenever they want, the legal maximum remains certain. Uncertainty is introduced if either party is forbidden to give that notice except in circumstances which may never arise. Then no one knows how long the term may last and indeed it may last for ever."*

275. Baroness Hale went on to confirm, at [88], the possibility of a tenancy comprising a fixed term, followed by a periodic tenancy:

> *"88 These rules have an Alice in Wonderland quality which makes it unsurprising that distinguished judges have sometimes had difficulty with them. It is intriguing to read, in Doe d Warner v Browne (1807) 8 East 165, 167, that Lord Mansfield had once "thrown out" (obviously meaning "suggested") the "notion of a tenancy from year to year, the lessor binding himself not to give notice to quit". By that date the notion cannot have been "exploded" for very long. More recently, in Breams Property Investment Co Ltd v Stroulger [1948] 2 KB 1, the Court of Appeal held that it was not repugnant to the notion of a quarterly tenancy when the landlords promised that they would not terminate it within the first three years unless they required the premises for their own occupation, so the purchasers of the reversion could not give notice to quit until the three years were up. The Breams Property case can, however, be explained on the basis that although phrased as a*

quarterly tenancy with a restriction on the landlord's right to serve notice to quit, in effect it simply turned the quarterly tenancy into a three-year term terminable by the tenant on notice before that, to be followed by a normal quarterly tenancy after that."

276. Confirmation to the same effect can be found in the decision of the Court of Appeal in *Leeds City Council v Broadley* [2016] EWCA Civ 1213 [2017] 1 WLR 738. In that case it was argued that a tenancy for a fixed term and a periodic tenancy could not be amalgamated into a single tenancy with a term certain. Each would be valid on its own, but the two could not be combined to create a single interest with a term certain. This argument was rejected by McCombe LJ, with whose judgment the other members of the Court of Appeal agreed. As McCombe LJ explained, at [17] and [18]:

> *"17 I would have concerns therefore that, at this late stage, the 1925 Act should be thought to render invalid leases such as those construed and considered in the earlier cases, of which I have cited three examples. Quite to the contrary, it seems to me that a term such as that granted (for a fixed period of months and then from month to month) falls clearly within the genus of the statutory descriptions in section 205(1)(xxvii), either as expressly covered by the words of the paragraph itself or because the paragraph envisages the possibility of creating terms of years, including a term for less than a year and a term from year to year (i e a periodic tenancy). I see no good reason why the statute should be taken to have rendered impossible the creation of an amalgam of the two, as had been familiar to the common law for centuries.*
> *18 Again, in the Mexfield case [2012] 1 AC 955, para 55, Lord Neuberger MR said that in Breams Property Investment Co Ltd v Stroulger [1948] 2 KB 1 the grant of a periodic tenancy with a fetter on the landlord's right to determine for three years had been found by this court to have been valid and was the equivalent of a fixed term of three years followed by a periodic tenancy: see also Megarry & Wade, The Law of Real Property, 8th ed (2012), p 775."*

277. I should also make reference to the decision of the Court of Appeal in *Ashburn Anstalt v Arnold* [1989] Ch 1. Both counsel referred me to the following extract from the judgment of Fox LJ, at 11E-F:

> *"In the present case there was an initial term from the date of the agreement of 28 February 1973 until 29 September 1973, the Michaelmas Quarter Day. Thereafter, the term would continue until (a certificate of readiness to proceed having been given) Matlodge should give not less than one quarter's notice to give up possession. It may be that the notice has to take effect on a quarter day calculated from the date of the commencement of the term rather than on one of the usual quarter days: see Kemp v. Derrett (1814) 3 Camp. 510 and King v. Eversfield [1897] 2 Q.B. 475; but, as Cotton L.J. said in In re Threlfall (1880) 16 Ch.D. 274, 281:*
>
> > *"I know of no law or principle to prevent two persons agreeing that a yearly tenancy may be determined on whatever notice they like."*
>
> *We see no reason to limit that approach to yearly tenancies."*

278. Mr Holland relied upon this extract for the proposition that a term is not rendered uncertain simply because a notice to terminate the relevant tenancy did not have to expire on any particular date. Mr Radley-Gardner relied upon this extract in order to distinguish *Ashburn*

Anstalt from the present case. Mr Radley-Gardner's point was that in *Ashburn Anstalt* it was established that a quarterly periodic tenancy had arisen. Fox LJ was therefore only concerned, in the extract cited above, with the question of what notice was required to terminate the periodic tenancy. Mr Radley-Gardner drew my attention, in particular, to the quotation from Cotton LJ in *Re Threlfall*, where, again, it was established that a yearly tenancy existed. In the present case, so Mr Radley-Gardner submitted, the question of whether the term of the 1997 Agreement continued as a periodic tenancy was in issue and the answer to that question was governed by the terms of clause 2.1 of the 1997 Agreement. In the absence of a specified period for a periodic tenancy in the present case, so Mr Radley-Gardner submitted, there was no such periodic tenancy created by clause 2.1 of the 1997 Agreement. The term of the 1997 Agreement was therefore uncertain.

279. I should mention that the House of Lords decided, in *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386, that *Ashburn Anstalt* had been wrongly decided. Lord Templeman explained why this was so in his speech at 395C-G:

> *"The decision of the Court of Appeal in In re Midland Railway Co.'s Agreement [1971] Ch. 725 was taken a little further in Ashburn Anstalt v. Arnold [1989] Ch. 1. That case, if it was correct, would make it unnecessary for a lease to be of a certain duration. In an agreement for the sale of land the vendor reserved the right to remain at the property after completion as licensee and to trade therefrom without payment of rent*
>
> > *"save that it can be required by Matlodge [the purchaser] to give possession on not less than one quarter's notice in writing upon Matlodge certifying that it is ready at the expiration of such notice forthwith to proceed with the development of the property and the neighbouring property involving, inter alia, the demolition of the property."*
>
> *The Court of Appeal held that this reservation created a tenancy. The tenancy was not from year to year but for a term which would continue until Matlodge certified that it was ready to proceed with the development of the property. The Court of Appeal held that the term was not uncertain because the vendor could either give a quarter's notice or vacate the property without giving notice. But of course the same could be said of the situation in Lace v. Chantler [1944] K.B. 368. The cumulative result of the two Court of Appeal authorities In re Midland Railway Co.'s Agreement [1971] Ch. 725 and Ashburn's case [1989] Ch. 1 would therefore destroy the need for any term to be certain.*
>
> *In the present case the Court of Appeal were bound by the decisions in In re Midland Railway Co.'s Agreement and Ashburn's case. In my opinion both these cases were wrongly decided. A grant for an uncertain term does not create a lease. A grant for an uncertain term which takes the form of a yearly tenancy which cannot be determined by the landlord does not create a lease. I would allow the appeal."*

280. It seems to me that what was said by Lord Templeman in *Prudential* does not necessarily affect what was said by Fox LJ in the extract from his judgment in *Ashburn Anstalt* which I have quoted above. It seems to me, on the reasoning of Lord Templeman, that the Court of Appeal went wrong in *Ashburn Anstalt* in holding that the term in that case was certain, in circumstances where Matlodge could only give notice to determine if the development condition was satisfied. Whether and, if so, when the development condition might be satisfied were uncertain. This constituted a fetter on Matlodge's right to terminate which rendered the term of the tenancy uncertain. It does not seem to me necessarily to follow that Fox LJ was wrong in what he said about the timing of a notice to determine a tenancy,

assuming no fetter upon the service of such a notice of the kind which in fact existed in *Ashburn Anstalt*.

281. Returning to the arguments of the parties on the Term Issue, I am bound to say that I found the primary argument of Mr Holland somewhat odd. I say this for the following reason. Mr Holland's primary argument assumed that there is nothing objectionable in a tenancy which is granted for a minimum fixed period, and then continues until determined by a notice of termination given by either party. Provided that there is no fetter on the ability of the parties to give such notice, the term of the tenancy satisfies the requirements of certainty. Leaving aside special cases however, such as a tenancy for life caught by Section 149(6) of the Law of Property Act 1925, the case law which I have cited above seems to me to confirm that the requirements for a term certain are satisfied where the relevant tenancy falls into one of three categories. The first category comprises tenancies granted for a single fixed term. The second category comprises tenancies granted as periodic tenancies. The third category comprises tenancies which are an amalgamation of the first two categories; that is say tenancies granted for an initial fixed term which are then continued as periodic tenancies.

282. I am doubtful that there exists a fourth category of tenancies where the term is expressed as a minimum term and the tenancy thereafter continues until either party serves a notice, pursuant an unfettered contractual right in the tenancy agreement, to terminate the tenancy. I am equally doubtful that Fox LJ was recognising any such category of tenancies in *Ashburn Anstalt*.

283. Mr Holland argued that a term of this kind, that is to say a minimum fixed term which then continued until terminated by notice, did not infringe either of the *"invalidating features"* (to use Mr Holland's expression) identified by Baroness Hale in *Mexfield*. For this purpose Mr Holland relied upon what was said by Baroness Hale at [93] in her judgment:

> *"93 So we have now reached a position which is curiouser and curiouser. There is a rule against uncertainty which applies both to single terms of uncertain duration and to periodic tenancies with a curb on the power of either party to serve a notice to quit unless and until uncertain events occur. But this rule does not matter if the tenant is an individual, because the common law would have automatically turned the uncertain term into a tenancy for life, provided that the necessary formalities were complied with, before the Law of Property Act 1925. A tenancy for life was permissible at common law, although of course it was quite uncertain when the event would happen, but it was certain that it would. I suppose at the time of the Hundred Years' War there was uncertainty both as to the "when" and the "whether" it would ever end. Be that as it may, a tenancy for life is converted into a 90-year lease by the 1925 Act."*

284. I do not accept this argument. It does not seem to me that Baroness Hale, or any of the other members of the Supreme Court in *Mexfield* for that matter, had in mind a term of the kind contemplated by Mr Holland. It seems to me that Baroness Hale was, both at [93] and elsewhere in her judgment, identifying the requirement for certainty in relation to a tenancy granted for a single term and a periodic tenancy. In the former case the term could not be of uncertain length. In the latter case there could not be a fetter on the right to terminate the periodic tenancy.

285. Pausing the analysis at this point it seems to me that Mr Radley-Gardner was right to submit that if the 1997 Agreement is treated as having been entered into for a term which had a minimum length of 10 years and then continued until either party served the requisite notice

of termination of not less than 12 months, this would not have constituted a term certain. On this basis, if the 1997 Agreement would otherwise have qualified as a lease, it could not have been a lease because it did not satisfy the requirements for a term certain.

286. I therefore conclude that the primary argument advanced by Mr Holland on the Term Issue fails. This renders it necessary to consider Mr Holland's secondary argument, which was that the 1997 Agreement took effect as a lease for an initial term of 10 years, following by a fixed periodic tenancy. Is this the correct analysis of the 1997 Agreement and, specifically, clause 2.1 of the 1997 Agreement?

287. In *Mexfield*, Lord Neuberger approved, at [55] in his judgment, the decision of the Court of Appeal in *Breams Property Investment Co Ltd v Stroulger* [1948] 2 KB 1. He considered that the correct analysis of the decision was that a term had been created equivalent to a fixed term of three years, followed by a periodic tenancy:

> *"55 I indicated earlier in this judgment that this conclusion would apply irrespective of whether the purported tenancy created by the agreement was simply for an indeterminate term or was a periodic tenancy with a fetter on the landlord's right to determine. There is no difficulty if the former is the right analysis. If the latter is correct, then there is a monthly tenancy which the landlord is unable to determine unless he can rely on one or more of the grounds in clause 6. In the Breams case [1948] 2 KB 1, the court concluded that a periodic tenancy with a fetter on the landlord's right to determine for three years was valid. It seems to me that the term thereby created was equivalent to a fixed term of three years (subject to a restricted right of determination in the landlord and an unrestricted right of determination by the tenant) followed by a periodic tenancy."*

288. Baroness Hale also referred to the *Breams* case in her judgment, at [88]. Lord Neuberger did not find it necessary to enter into an analysis of the case, but he did not suggest that the case was wrongly decided. Baroness Hale also approved the decision in the *Breams* case. Her analysis of the case was the same as that of Lord Neuberger. I have quoted [88] above, but I repeat the relevant part of [88] for ease of reference:

> *"The Breams Property case can, however, be explained on the basis that although phrased as a quarterly tenancy with a restriction on the landlord's right to serve notice to quit, in effect it simply turned the quarterly tenancy into a three-year term terminable by the tenant on notice before that, to be followed by a normal quarterly tenancy after that."*

289. The decision in *Broadley* is further evidence of the willingness of courts to construe agreements of the kind which were under consideration in the *Breams* case and *Broadley* as tenancies granted for an initial fixed term, followed by a periodic tenancy.

290. The question is whether the same analysis can be applied to the 1997 Agreement. It seems to me that this is problematic. Both *Mexfield* and *Broadley* serve to confirm that there is nothing objectionable in a tenancy granted for a fixed term followed by a periodic tenancy. Such a tenancy qualifies as a tenancy granted for a term certain because the two, as it were, elements of the term (fixed term and periodic term) can be combined in one tenancy. This assumes however that, in any particular such case, what follows the fixed term is an arrangement capable of qualifying as a periodic tenancy.

291. In the *Breams* case this was not a problem. In that case the Court of Appeal were concerned with a series of agreements, all of which had been entered into as agreements for quarterly tenancies. The problem was that there was a fetter on the landlords' ability to serve a notice to quit during the first three years of each agreement, except in the event of the landlords requiring the premises for their own occupation and use. The Court of Appeal did not consider this fetter to be repugnant to a quarterly tenancy. Whether they were right to take that view seems doubtful, in the light of subsequent authority. The decision can however be justified, as was explained in *Mexfield*, on the basis that the relevant agreements were correctly analysed as having been granted for fixed terms of three years followed by quarterly periodic tenancies. There was no doubt that there were quarterly periodic tenancies, once the initial period of three years had expired, because the agreements had been entered into expressly on the basis that they were quarterly tenancies.

292. Nor was this a problem in *Broadley*, where the relevant tenancies were granted for initial terms of six (and in one case) twelve months, and thereafter on a monthly basis. There was therefore no difficulty in the Court of Appeal deciding that the tenancies functioned as tenancies granted for an initial fixed term followed by, in each case, a monthly periodic tenancy.

293. In the present case however the position is different. Clause 2.1 of the 1997 Agreement can be said to have defined the initial term of the 1997 Agreement, if it otherwise qualified as a lease, as the Minimum Term; that is to say 10 years from 11th March 1997. Clause 2.1 did not however provide that the 1997 Agreement would thereafter continue on a periodic basis. Instead, it was open to either party to terminate the 1997 Agreement on not less than 12 months in writing. The notice could expire at any time on or after the date of expiration of the Minimum Term. By my calculations this meant that a notice of termination, provided that it gave the required period of notice, could expire on 10th March 2007 (assuming that 11th March 1997 was included in the Minimum Term) or on any date thereafter.

294. If however the Minimum Term was to be followed by a periodic tenancy, such a periodic tenancy could only have been terminated by a notice expiring at the end of a period of the tenancy (strictly the anniversary of the commencement of a period of the tenancy or the day before this anniversary). This would be so whether one sought to construe such a periodic tenancy, following the Minimum Term as an annual tenancy or (by reference to the quarterly dates for payments due under the 1997 Agreement) as a quarterly tenancy. Clause 2.1 is however incompatible with this analysis. By clause 2.1 the relevant notice could expire at any time on or after the expiration of the Minimum Term. This contractual provision seems to me to be incompatible with the argument that clause 2.1 can be construed as having created a periodic tenancy, arising on the expiration of the Minimum Term.

295. The position would be different if it was possible to construe clause 2.1 as meaning, on the hypothesis of an annual periodic tenancy, that any notice to terminate had to expire on an anniversary of the date of expiration of the Minimum Term (or the day after), or as meaning, on the hypothesis of a quarterly tenancy, that any notice to terminate had to expire on a Payment Day, as defined in the 1997 Agreement, or on the day falling prior to a Payment Day. Any such construction seems to me to be ruled out by the wording of clause 2.1, which makes it quite clear that a notice to terminate can expire at any time on or after the expiration of the Minimum Term.

296. As I have noted, this particular problem did not arise in *Breams* or in *Broadley*. Nor did it arise in *Ashburn Anstalt*, where the relevant agreement provided for one quarter's notice to be given. There was a fetter on the ability of the landlord to give this notice. The Court of

Appeal, wrongly as it turned out, did not consider that this fetter prevented the term of the agreement from being certain. For present purposes however, the relevant point is that the Court of Appeal were not considering, in *Ashburn Anstalt*, a termination provision of the kind to be found in clause 2.1. The same point can be made in relation to *Mexfield*, where the relevant agreement provided for the defendant to occupy the relevant property on a monthly basis. There would therefore have been no difficulty in treating the agreement in *Mexfield* as a monthly periodic tenancy, but for the fetter on the claimant's right of termination which, so the Supreme Court decided, had the consequence that the agreement had not been entered into for a term certain.

297. I therefore conclude that the terms of clause 2.1 of the 1997 Agreement are incompatible with the argument that the 1997 Agreement took effect as a lease granted for a fixed term of ten years, following by a periodic tenancy. In my judgment it is not possible, by virtue of clause 2.1, to treat the 1997 Agreement as having been entered into for a term of this kind. I therefore conclude that Mr Holland's secondary argument fails.

298. It follows from the above analysis that I consider that the Judge was wrong to decide, at Paragraphs 24 and 25, that the 1997 Agreement, if it otherwise satisfied the requirements for a lease, was granted for a term certain. The Judge concluded that the 1997 Agreement was granted for an initial term of 10 years, followed by a periodic tenancy and, as such, was entered into for a term certain. For the reasons which I have given I do not agree with this analysis. The 1997 Agreement was entered into for an initial term of 10 years, which was certain. Thereafter however, it seems to me that the effect of clause 2.1 of the 1997 Agreement was that the term of the 1997 Agreement continued on a basis which was not a periodic tenancy and did not qualify as a term certain.

299. This leaves Mr Holland's third argument, raised in his oral submissions, that if the 1997 Agreement did not take effect as a lease, because its term was uncertain, a yearly implied tenancy would still have arisen by virtue of Orange's exclusive possession of the Sandbach Site, coupled with the payment of the equivalent of an annual rent.

300. Assuming, for present purposes, such exclusive possession, support for this argument can be found in *Prudential Assurance Co Ltd v London Residuary Body*. The problem in that case was that the relevant agreement, which was identified as a tenancy, had been entered for a term which was to continue until the relevant land was required for road widening works by the landlord, the London County Council, which was the highway authority. The agreement was entered into on 19th December 1930. By the time the London Residuary Body, as successor in title to the London County Council, sought to serve a notice to quit on the occupier, there was no prospect of the road being widened. The House of Lords decided that the agreement could not have taken effect as a tenancy because the term, which was expressed to continue until the land was required for road widening purposes was uncertain. The consequences of the failure of the agreement to take effect as a tenancy were identified in the following terms by Lord Templeman in his speech in *Prudential*, at 392B-C:

> *"When the agreement in the present case was made, it failed to grant an estate in the land. The tenant however entered into possession and paid the yearly rent of £30 reserved by the agreement. The tenant entering under a void lease became by virtue of possession and the payment of a yearly rent, a yearly tenant holding on the terms of the agreement so far as those terms were consistent with the yearly tenancy. A yearly tenancy is determinable by the landlord or the tenant at the end*

of the first or any subsequent year of the tenancy by six months' notice unless the agreement between the parties provides otherwise."

301. I have decided the 1997 Agreement did have the effect of granting Orange exclusive possession of the Sandbach Site, at the equivalent of an annual rent. It therefore follows, from my analysis above, that the 1997 Agreement only failed to take effect as a lease because its term was uncertain. As I understand the position it is not in dispute that Orange did occupy the Sandbach Site and paid the annual fee due under the 1997 Agreement. On the analysis of what Lord Templeman said in *Prudential* I can see the argument, in the present case, that Orange's occupation of the Sandbach Site, paying the annual fee, would have given rise to an implied periodic tenancy, specifically an annual tenancy, on the same terms as the 1997 Agreement so far as those terms were consistent with an annual tenancy.

302. Mr Radley-Gardner argued that this was the wrong analysis. He argued that if the 1997 Agreement would otherwise have qualified as a lease, but was rendered void by the absence of a term certain, there was still a contract in place, in the form of the 1997 Agreement, which took effect as a licence. He also argued that, on this hypothesis, the 1997 Agreement would have failed as a Code agreement, both under the Old Code and the Code, because it was not in writing.

303. I am not convinced by the second of these arguments. The question of what effect the 1997 Agreement had, so far as the Old Code was concerned, seems to me to be beside the point. On the hypothesis of the 1997 Agreement having taken effect as a void lease, the question of what interest arose by reason of Orange's occupation of the Sandbach Site pursuant to a void lease is one which, it seems to me, falls to be answered by reference to principles of landlord and tenant law. The question of whether, on that hypothesis, the 1997 Agreement could still function as an agreement in writing, such that it was subject to the Old Code, seems to me to be a separate question, which was not properly addressed in the arguments and which I do not need to answer.

304. The first of these arguments is however more formidable. Orange's occupation of the Sandbach Site could only have given rise to an annual periodic tenancy, or indeed any other kind of periodic tenancy, if it is possible to imply such a tenancy from Orange's occupation of the Sandbach Site paying the equivalent of an annual rent. At first sight it is difficult to see how such a periodic tenancy could be implied in circumstances where the termination provisions in clause 2.1 of the 1997 Agreement are, for the reasons which I have explained, incompatible with a periodic tenancy.

305. The answer to this might be thought to lie in Lord Templeman's reference, in the extract from his speech in *Prudential* which I have quoted above, to the effect that the tenant entering under a void lease becomes a yearly tenant *"holding on the terms of the agreement so far as those terms were consistent with the yearly tenancy"*. So, in the present case, the argument would be that the implied yearly periodic tenancy would not have included clause 2.1 of the 1997 Agreement or, for that matter, any other provision of the 1997 Agreement incompatible with a periodic tenancy.

306. The difficulty with this answer is that this issue of consistency was considered in *Mexfield*. In the last part of his judgment Lord Neuberger did consider what he described as the defendant's alternative case in contract, which was to the effect that the defendant was still, as a matter of contract, entitled to rely on the fetter on the claimant's right of termination, on the hypothesis that the agreement did not take effect as a tenancy by reason of the fetter. The alternative case did not strictly arise for decision, because the defendant had been found

to have a tenancy of 90 years. Lord Neuberger did however analyse the alternative case in some detail. In particular, Lord Neuberger considered whether an implied periodic tenancy could have arisen, on the hypothesis that the agreement itself could not have given rise to a tenancy. Lord Neuberger did not consider that an implied periodic tenancy could have arisen, for the reasons which he expressed at [66]-[68]:

> *"66 If the agreement cannot give rise to a tenancy, then, if it is not a contractual licence, the only right that Ms Berrisford could claim would be that of a periodic tenant on the terms of the written agreement in so far as they are consistent with a periodic tenancy, because she has been in possession purportedly under the agreement, paying a weekly rent to Mexfield. It is worth briefly considering why she would be a periodic tenant on this basis, not least because it is Mexfield's contention that this is the right analysis.*
> *67 It would be because the law will infer a contract on these terms from the actions of the parties, namely the terms they purported to agree in the agreement, and Ms Berrisford's enjoyment of possession and payment of rent. But the ultimate basis for inferring a tenancy (and its terms) is the same as the basis for inferring any contract (and its terms) between two parties, namely what a reasonable observer, knowing what they have communicated to each other, considers that they are likely to have intended. Given that no question of statutory protection could arise, it seems to me far less likely that the parties would have intended a weekly tenancy determinable at any time on one month's notice than a licence which could only be determined pursuant to clauses 5 and 6.*
> *68 Since writing this, I have read what Lord Mance and Lord Clarke of Stone-cum-Ebony JJSC have written in connection with this point, and I respectfully agree with them. It is also interesting to read Lord Hope of Craighead DPSC's judgment, which demonstrates that the Scottish courts have also encountered difficulty when grappling with interests of uncertain duration, and seem to have come up with a similar answer."*

307. Lord Mance JSC (as he then was) expressed the same views in his judgment, at [102]-[103]:

> *"102 On the hypothesis I am presently considering, those three characteristics were not all present. The basis for asserting that there was a contractual tenancy therefore falls away. But the contract was valid as such. There is no reason not to give it effect according to its terms. As a matter of legal categorisation, because it was not a tenancy, it can only involve a licence. Its terms precluded the giving by Mexfield of notice to terminate, except in circumstances falling within clause 6 of the agreement.*
> *103 To force the contract into the category of tenancy, by rewriting its essential terms to provide for a periodic monthly tenancy terminable on a month's notice, would be to substitute for the agreement that the parties have made a wholly different contract. It would be to treat the first two of the three characteristics of a tenancy mentioned above as sufficient by themselves and as displacing any need to satisfy the third. It would be to insist on terminology (such as the agreement's references to letting and taking possession "from month to month" and "this tenancy") over substance (the parties' express limitation of the right to terminate and the consequent absence of an essential characteristic of a tenancy)."*

308. Lord Clarke JSC also expressed the same views in his judgment, at [109]:

"109 In this regard I agree with the views of Lord Neuberger MR expressed at paras 57—64 above. Ms Berrisford has been living in the property for a considerable time and, except for a short period referred to by Lord Neuberger MR at para 7, has been paying rent at the rate provided for in the contract. It would to my mind be bizarre for the law to imply or infer a contract between the parties to the effect that there was a periodic tenancy between them at the contractual rate. That would mean that Mexfield can bring the contract to an end by giving one month's notice to quit. I see no basis for such an inference or implication. It would be contrary to the express terms of the agreement, namely that the only way that Mexfield can determine it is under clause 6. There is no need for any process of implication or inference because the parties have expressly agreed the position. In particular, Ms Berrisford at no time agreed that Mexfield could give her a month's notice to quit. If, as a matter of law, the parties have created a licence and not a tenancy, so be it."

309. The views expressed by Lord Neuberger, Lord Mance and Lord Clarke in *Mexfield*, on the implication of a periodic tenancy, may be said to have been obiter to the actual decision of the Supreme Court in that case. It seems to me however that I should follow the reasoning of their Lordships, in the present case. In particular, I am not convinced that this reasoning was necessarily in conflict with what was said by Lord Templeman in *Prudential*, in the extract from his speech which I have quoted above. The note of the arguments of counsel in the Appeal Cases report of *Prudential* discloses that the argument between the parties was as to whether the restriction on the right to terminate the agreement in that case was repugnant to a tenancy. It is not clear, from the record of the arguments on behalf of the owners of the relevant land, that the result of an implied periodic tenancy, if the agreement itself was void as a tenancy, was in issue. Even if it was in issue, the relevant provision in the agreement before the House of Lords in *Prudential* was not in the same terms as the fetter on termination which was being considered in *Mexfield*.

310. Applying the reasoning of their Lordships in *Mexfield*, which I have quoted above, I cannot see that it is possible to imply a periodic tenancy in the present case, brought about by Orange's possession of the Sandbach Site and payment of the equivalent of an annual rent. Orange's possession of the Sandbach Site was clearly intended by the parties to be on the terms of the 1997 Agreement, including the termination provisions in clause 2.1. If, as I have decided, those termination provisions were incompatible with a periodic tenancy it seems to me, on the basis of the relevant reasoning in *Mexfield*, that it is not possible to imply a periodic tenancy, in place of the void lease constituted by the 1997 Agreement. To adopt the language of Lord Clarke, such a result would be contrary to the express terms of the relevant contract; namely the 1997 Agreement. Instead, it seems to me that Mr Radley-Gardner is correct in his argument that, on the hypothesis that the 1997 Agreement was incapable of taking effect as a lease because its term was uncertain, the position defaults to one where the 1997 Agreement took effect as a licence, notwithstanding that, on this hypothesis, the 1997 Agreement did grant exclusive possession of the Sandbach Site to Orange at the equivalent of an annual rent.

311. I therefore conclude that Mr Holland's third and final argument on the Term Issue must also fail. On the hypothesis that the 1997 Agreement took effect as a void lease only by reason of the absence of a term certain, it does not seem to me that an implied periodic tenancy would have come into existence in relation to the Sandbach Site, on the same terms as the 1997 Agreement so far as consistent with the 1997 Agreement. Instead it seems to me that the position defaults to the result contended for by Mr Radley-Gardner; namely that the 1997 Agreement took effect as a licence, with no implied periodic tenancy coming into

existence by reason of Orange's possession of the Sandbach Site and payment of the equivalent of an annual rent.

312. On the basis of my analysis of the Term Issue I conclude that the Judge was wrong to decide that the 1997 Agreement was entered into for a term certain. I have also decided that the position cannot be retrieved, from APW's point of view, by the implication of an annual periodic tenancy. In my judgment, and for the reasons which I have set out, the absence of a term certain meant that the 1997 Agreement took effect as a licence. It therefore follows that the Judge was not wrong in his actual decision that the 1997 Agreement took effect as a licence, notwithstanding the differences between my reasoning and that of the Judge. It also follows that the Appeal fails, so far as the 1997 Agreement is concerned, on the basis of the Term Issue.

The outcome of the Appeal

313. For the reasons set out in this decision, the Appeal is allowed in part. I have concluded that the Judge was wrong to decide that the 2002 Agreement took effect as a licence. For the avoidance of doubt, the Appeal is allowed, in part, on the grounds set out in paragraphs 8 and 9 of the Grounds of Appeal.

314. For the reasons set out in this decision the Appeal is dismissed in relation to the 1997 Agreement. While I do not agree with the reasoning of the Judge in relation to the 1997 Agreement, my decision on the Term Issue results in a situation where I come to the same final conclusion as the Judge; namely that the 1997 Agreement took effect as a licence.

315. In relation to the 2002 Agreement I will set aside the Decision, and re-make the Decision as a decision returning the following answer to the preliminary issue concerning the 2002 Agreement:

> *"The 2002 Agreement took effect as a lease to which Part II of the Landlord and Tenant Act 1954 applies."*

316. In case this point matters, I should make one other thing clear, in relation to the above answer to the preliminary issue concerning the 2002 Agreement. For the reasons which I have explained earlier in this decision (neither Agreement having been made by deed), I have made a decision that the 2002 Agreement took effect as a lease. I have not made a decision on precisely what category of lease was created by the 2002 Agreement. That question will be for separate resolution, if it is in issue.

Postscript

317. The decision which I have reached, namely to allow the Appeal in part, seems to me to be an unsatisfactory one. I have devoted a considerable part of this decision to considering the question of whether each of the Agreements granted exclusive possession of the relevant Site to Orange. For the reasons which I have set out, I have concluded that each Agreement did indeed grant such exclusive possession. One might have expected this to produce the result that both Agreements took effect as leases. The 1997 Agreement is however disqualified from this result because of the particular terms of clause 2.1 of the 1997 Agreement. This seems a very odd outcome which, for the reasons which I have also explained, I have concluded cannot be avoided by the implication of an annual periodic tenancy.

318. The answer to what I have just said can be found in *Mexfield*, in the judgment of Lord Neuberger MR (as he then was), at [33]:

> *"Following the decision of the House of Lords in the Prudential case [1992] 2 AC 386, the law appeared clear in its effect, intellectually coherent in its analysis, and, in part, unsatisfactory in its practical consequences."*

The Chamber President

Mr Justice Edwin Johnson

9th September 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.