Neutral Citation Number: [2025] UKUT 00058 (LC)

Case Number: LC-2023-000734

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
IN THE MATTER OF A NOTICE OF REFERENCE

20 February 2025

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE – NEW AGREEMENT – renewal proceedings – termination proceedings – preliminary issues – whether substantial breaches – whether intention to redevelop – public benefit test - paras 31(4)(a), (c) and (d), Sch.3A, Communications Act 2003

BETWEEN:

VODAFONE LIMITED

Claimant

-and-

(1) ICON TOWER INFRASTRUCTURE LIMITED
(2) AP WIRELESS II (UK) LIMITED

Respondents

Land at Steppes Hill Farm (also referred to as land at Steps Hill Farm/Steps Hill Wood), South Street Road, Stockbury, Sittingbourne, ME9 7RB

The Chamber President, Mr Justice Edwin Johnson and Mrs Diane Martin TD MRICS FAAV
13th, 14th, 15th, 18th, 19th, 21st and 22nd November 2024

Oliver Radley-Gardner KC and Emer Murphy, instructed by Osborne Clarke LLP, for the Claimant
Toby Watkin KC, Wayne Clark and Matthew Henderson, instructed by Eversheds Sutherland (International) LLP, for the Respondents

The following cases are referred to in this decision:

Dellneed v Chin (1986) 53 P&CR 172
Teeside Indoor Bowls Ltd v Stockton-on-Tees Borough Council [1990] 2 EGLR 87
Brumwell v Powys CC [2011] EWCA Civ 1613 [2012] L.&T.R. 14
EE Ltd v Chichester [2019] UKUT 164 (LC) [2019] L.&T.R. 21
Palisade Investments Ltd v Collin Estates Ltd [1992] 2 EGLR 94
Dolgellau Golf Club v Hett [1998] L.&T.R. 217
Northampton BC v Lovatt (1998) 30 HLR 875.
London Hilton Jewellers Ltd v Hilton International Hotels Ltd [1990] 1 EGLR 112
Cunliffe v Goodman [1950] 2 KB 237
Betty's Cafes Ltd v Phillips Furnishing Stores Ltd [1959] AC 20
Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd [2022] UKSC 18 [2022] 1 WLR 3360
R (on the application of Save Britain's Heritage) v Secretary of State for Communities and Local Government [2010] EWHC 979 (Admin) [2011] Env. L.R. 6
S Franses Ltd v Cavendish Hotel (London) Ltd [2018] UKSC 62 [2019] AC 249
Humber Oil Terminals Trustee Ltd v Associated British Ports [2011] EWHC 20243 (Ch)
Heath v Drown [1973] 498
Evans v Marshall v Bertola [1973] 1 WLR 349
Shelfer v City of London Electric Lighting Co [1895] 1 Ch 287
Sunrise Brokers LLP v Rodgers [2014] EWCA Civ 1373 [2015] ICR 272
Software Cellular Network Ltd v T-Mobile UK Ltd [2007] EWHC 1790 (Ch)
Cornerstone Telecommunications Infrastructure Limited v University of the Arts of London [2020] UKUT 248 (LC)
Cornerstone Telecommunications Infrastructure Limited v University of London [2018] UKUT 356 (LC)

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Introduction

1. In this case the Claimant, Vodafone Limited, is seeking the renewal of a code agreement under the Electronic Communications Code. The code agreement relates to a mobile communications site (**"the Vodafone Site"**) located in an agricultural field at Steppes Hill Farm, South Street Road, Stockbury, Sittingbourne, Kent ME9 7RB. By a reference issued in the Tribunal on 17th March 2023, the Claimant has sought the renewal of the code agreement pursuant to paragraphs 33 and 20 of the Code.

2. The First Respondent, Icon Tower Infrastructure Limited, acquired the registered freehold title to the Vodafone Site from the Second Respondent, AP Wireless II (UK) Limited, by a transfer executed on 18th May 2023. The First Respondent, in succession to the Second Respondent, resists the renewal of the code agreement. Following the service by the First Respondent of notices to terminate the code agreement, and the service of counter-notices in response by the Claimant, the Claimant issued the present reference in the Tribunal, on 7th November 2023, seeking a new code agreement pursuant to paragraph 34(6) of the Code.

3. By an order made at a case management hearing on 12th January 2024, as subsequently amended, the Tribunal ordered the determination, by way of preliminary issues, of the three grounds relied upon by the First Respondent for bringing the code agreement to an end.

4. The preliminary issues came on for trial before us on 13th November 2024. The trial lasted 7 days, excluding pre-reading days. The Claimant was represented by Oliver Radley-Gardner KC and Emer Murphy. The Respondents were represented by Toby Watkin KC,

Wayne Clark and Matthew Henderson. We are grateful to all counsel for their assistance, by their written and oral submissions, in our determination of the preliminary issues.

5. This is our decision on the preliminary issues in this reference.

The conventions of this decision

6. For ease of reference, we shall refer to the parties by their names, rather than using their titles in these proceedings. We shall refer to the Claimant as **"Vodafone"**, to the First Respondent as **"Icon"**, and to the Second Respondent as **"APW"**. References to **"the Code"** mean the Electronic Communications Code, contained within Schedule 3A to the Communications Act 2003 (**"the 2003 Act"**), as inserted by Section 4(2) of the Digital Economy Act 2017, and Schedule 1 thereto. References to **"the Old Code"** mean the predecessor of the Code; namely the Telecommunications Code contained in Schedule 2 to the Telecommunications Act 1984, which was repealed by Section 4(1) of the Digital Economy Act 2017 with effect from 28th December 2017.

7. All references to Paragraphs in this decision are, unless otherwise indicated, references to the paragraphs of the Code. References to **"the Tribunal"** mean the Upper Tribunal Lands Chamber. Other definitions are as established in the course of this decision. Italics have been added to quotations. Unless otherwise indicated, the words *"lease"* and *"tenancy"* are used interchangeably in this decision.

8. It is convenient to refer to the current reference (LC-2023-000734) issued by Vodafone on 7th November 2023, in which the preliminary issues have been directed, as **"the Termination Proceedings"**. We will refer to the earlier reference in respect of the Vodafone Site (LC-2023-000151), issued by Vodafone on 17th March 2023, as **"the Renewal Proceedings"**.

9. We had the benefit of a transcript of the trial of the preliminary issues (**"the Trial"**). References to extracts from the transcript are given by day/page number/line number, in square brackets and bold print. **[T1/1/4-5]** thus refers to lines 4-5 on page 1 of the transcript of the first day of the Trial.

The parties

10. Vodafone is an operator, within the meaning of Paragraph 2. Specifically, Vodafone is an entity to which the Code has been applied by means of a direction made by Ofcom pursuant to Section 106 of the 2003 Act. Such directions may be made for one or other of two purposes:
    (1) The Code may be applied to an entity, as in Vodafone's case, for the purposes of that entity providing an electronic communications network. Entities which are designated as an operator for these purposes are commonly referred to as mobile network operators (**"MNOs"**). They are the entities which actually provide mobile communications services to the public. They include the entities which currently trade as EE, H3G and Virgin Media O2 (the trading name under which, as we understand the position, Virgin Media and Telefonica operate as a joint venture).
    (2) The Code may be applied to an entity for the purposes of that entity providing a system of infrastructure for use by MNOs in the provision of their networks. Such entities supply the various types of infrastructure which MNOs make use of in the provision of their networks. Such entities are commonly known as wholesale infrastructure providers (**"WIPs"**) or tower companies. The latter expression is used

because WIPs commonly own mobile phone masts or towers to which MNOs attach the equipment, such as aerials, which MNOs use to transmit and receive their signal. WIPs thus provide mobile communications infrastructure to their customers, who are the MNOs or other WIPs.

11. Both Icon and APW have the same parent company; AP Wireless (UK) Limited (**"AP Wireless"**) and are part of the AP Wireless Group. The ultimate owner of the AP Wireless Group is Radius Global Infrastructure Inc (**"Radius"**). Through its subsidiaries, Radius holds thousands of mobile communications sites in Europe, Australia and North and South America. In the UK two of the asset owning entities of the AP Wireless Group are Icon and APW. APW, which is not a Code operator, holds freehold or leasehold interests in around 1,950 sites in the UK. Icon owns the freehold or leasehold interests in around 50 sites including, now, the freehold interest in the Vodafone Site. Icon has been designated a Code operator, as a tower company or WIP. Icon's business is the provision of mobile communications sites and, in some cases, the infrastructure for such sites.

Electronic communications apparatus

12. Electronic communications apparatus is widely defined in Paragraph 5, in the following terms:

> *"(1) In this code "electronic communications apparatus" means—*
> *(a) apparatus designed or adapted for use in connection with the provision of an electronic communications network,*
> *(b) apparatus designed or adapted for a use which consists of or includes the sending or receiving of communications or other signals that are transmitted by means of an electronic communications network,*
> *(c) lines, and*
> *(d) other structures or things designed or adapted for use in connection with the provision of an electronic communications network.*
> *(2) References to the installation of electronic communications apparatus are to be construed accordingly.*
> *(3) In this code—*
> *"line" means any wire, cable, tube, pipe or similar thing (including its casing or coating) which is designed or adapted for use in connection with the provision of any electronic communications network or electronic communications service;*
> *"structure" includes a building only if the sole purpose of that building is to enclose other electronic communications apparatus."*

13. It is convenient at this point to identify a distinction between two different types of electronic communications apparatus. We will use the expression **"ECA"** to refer generally to electronic communications apparatus, as defined in Paragraph 5. There is however a distinction to be drawn between what were referred to, in the evidence, as Passive ECA and Active ECA. We will adopt the same expressions.

14. Passive ECA refers to the physical infrastructure on a mobile communications site, on to which radio transmission equipment is fixed. Putting the matter another way, Passive ECA refers to the infrastructure or equipment on the relevant site which does not itself transmit or receive signals or is not directly involved in the transmission or reception of signals. Passive ECA includes items such as masts, towers, head frames, plinths, and external cabinet casings. Active ECA refers to the actual radio transmission equipment on the

relevant site, which is used by a mobile network operator to transmit and receive their signal or is directly involved in the transmission and reception of the signal. Active ECA includes items such as antennas, dishes, fibre and internal cabinet components.

The Vodafone Site

15. The Vodafone Site is, as we have identified, located in a field at Steppes Hill Farm (also referred to as Steps Hill Farm) to the south west of Stockbury. The Vodafone Site is adjacent to the southern perimeter of this field (**"the Field"**), close to woodland known as Steps Hill Wood (also known as Stockbury Hill Wood). Steps Hill Wood is designated as ancient woodland and as a local nature reserve. The Vodafone Site and the surrounding land lie within the Kent Downs National Landscape. National Landscape is the new form of designation for an area of land which would previously have been referred to by its designation as an Area of Outstanding Natural Beauty (**"AONB"**).

16. Access to the Vodafone Site is obtained from South Street Road, to the north of the Field, around the perimeter of the Field. The Vodafone Site itself comprises a relatively small area, of approximately 40 square metres and roughly rectangular in shape, enclosed by a wooden fence. Internal access is obtained through a gate or door in the wooden fence, which is kept padlocked.

17. In terms of ECA on the Vodafone Site, there is currently situated a 15m high monopole (a mast comprising a single pole), three antennas and a microwave dish, with related ground-level infrastructure. We will refer to the mast itself as **"the Vodafone Mast"**. The Active ECA on the Vodafone Site is owned by Telefonica (trading as Virgin Media O2 or VMO2 pursuant to its joint venture with Virgin Media), and is used by Telefonica and Vodafone.

18. So far as the freehold title to the Vodafone Site is concerned, the position is as follows. The Vodafone Site originally formed part of a larger area of land at Steppes Hill Farm, owned by William Buck and Patricia Buck. By a transfer dated 25th September 2018, the Bucks transferred the freehold title to the Vodafone Site and to two other mobile communications sites, also located in the Field, to APW. The freehold title to the three sites, including the Vodafone Site, was and remains registered under title number TT87683. By a transfer dated 18th May 2023 APW transferred to the freehold title to Icon. It is therefore now Icon which is, effectively, the active Respondent in the Renewal Proceedings and the Termination Proceedings.

The 2003 Agreement

19. The code agreement to which we have referred above, by which Vodafone was granted a set of rights in respect of the Vodafone Site, is a deed of agreement dated 31st July 2003. This agreement was entered into between William Buck and Patricia Buck, as freehold owners of the Vodafone Site, and Vodafone, as user of the Vodafone Site, for a term of 15 years from 31st July 2003.

20. It is common ground that this agreement (**"the 2003 Agreement"**) constituted a code agreement under the Old Code. The contractual term of the 2003 Agreement expired on 30th July 2018, shortly after the Code came into force. As such, the 2003 Agreement is treated as a subsisting agreement, within the meaning of paragraph 1(4) of the transitional provisions in Schedule 2 to the Digital Economy Act 2017, and is thus treated, at least so far as the principal matters relevant to this decision are concerned, as a code agreement under the Code. One consequence of this was that the 2003 Agreement was continued

beyond its contractual expiration date by Paragraph 30(2). Another consequence is that the provisions for termination and modification (and renewal) contained in the Part 5 of the Code apply to the 2003 Agreement.

21. The rights granted to Vodafone in respect of the Vodafone Site were set out in the Second Schedule to the 2003 Agreement, in the following terms:

> *"The right:-*
> 1. *to erect install use operate maintain repair alter add to redevelop replace and renew (and when desired to remove any of) the Apparatus on the Site (and any cables under the Land) using all machinery necessary to undertake the Works*
> 2. *to install within the Equipment Cabin such telecommunications equipment as the Company requires for the Permitted Use*
> 3. *to install maintain repair replace and use electricity and communications cables across or under the Land leading to and from the Apparatus either in the position shown on the Drawing or as otherwise approved by the Owner and (where agreed) to connect into the Owner's electricity supply*
> 4. *at all times of full and free access both with and without vehicles over and along the Land and any other land owned or controlled by the Owner to and from the Site by the most convenient and direct route(s) from the nearest public highway to carry out the Works and to exercise the rights granted by this Agreement PROVIDED that all persons using such access route(s) comply with such reasonable security procedures as are required by the Owner*
> 5. *while the Works are being carried out to occupy a reasonable working space surrounding the Site and to park vehicles and to temporarily store equipment in places reasonably convenient to the Site and thereafter to park a vehicle adjacent to the Site during maintenance visits but not so as to obstruct reasonable access by the Owner to other parts of the Land*
> 6. *to enter onto the Land to undertake a planting scheme on the Land around the perimeter of the Site in order to allow the Company to comply with the planning permission granted (or to be granted) to it in connection with the Site and thereafter to maintain renew and replace any plants"*

22. By the Third Schedule to the 2003 Agreement Vodafone entered into a series of obligations in relation to the Vodafone Site. For present purposes the relevant obligation is contained in paragraph 1.11 of the Third Schedule, relating to alienation. The obligation is in the following terms:

> *"1.11 <u>Alienation</u>*
> *1.11.1 the Company will not transfer or share its rights under this Agreement or part with possession of the Site to a third party without the Owner's consent save that the Company may (without the Owner's consent being required) transfer the benefits of the rights granted by this Agreement or share such rights with any company which is a member of the same group of companies (within the meaning of Section 42 of the Landlord and Tenant Act 1954) ("group company")*
> *1.11.2 notwithstanding the provisions of paragraph 1.11.1 the Company may share the Site with third parties wishing to install telecommunications equipment on the Site PROVIDED that the Owner is notified in advance of such installation and that the Company will pay to the Owner 30% of any rental income actually received by the Company from any third party (other than a group company) in respect of such arrangement"*

23. Paragraph 8.4 of the Fifth Schedule to the 2003 Agreement provided as follows, in relation to the rights granted by the 2003 Agreement:

> *"8.4 The rights granted to the Company by this Agreement shall extend to the exercise of those rights by its agents contractors personnel telecommunication link providers and others authorised by the Company from time to time but in all other respects the Contracts (Rights of Third Parties) Act 1999 shall not apply to this Agreement"*

24. The question of whether the 2003 Agreement took effect as a lease or a licence is not one which has been addressed by the parties. We were not invited to go into this question, and we are not in a position to decide this question. Accordingly, nothing in this decision should be taken as expressing any view on this question, which we leave open. If the 2003 Agreement did take effect as a lease, we note that paragraph 9 of the Fifth Schedule thereto records an order of the court authorising the agreement of the parties that Sections 24-28 of Part II of the Landlord and Tenant Act 1954 (**"the 1954 Act"**) should be excluded from the 2003 Agreement. Putting the matter more simply, if the 2003 Agreement did take effect as a lease, it was contracted out of the protection of the 1954 Act, as a business tenancy. We note, in passing, that the provisions of Part 5 of the Code do not apply to a subsisting agreement, within the meaning of paragraph 1(4) of Schedule 2 to the Digital Economy Act 2017, where the relevant agreement is a lease to which the 1954 Act applies, which has not been contracted out of the protection of the 1954 Act; see the transitional provisions in paragraph 6 of Schedule 2. We assume that the lease/licence question is not important, in terms of what we have to decide, because the 2003 Agreement, if it did take effect as a lease, was contracted out of the protection of the 1954 Act, and would thus not be caught by the transitional provisions in paragraph 6 of Schedule 2.

25. The 2003 Agreement contains an arbitration clause, at paragraph 6 of the Fifth Schedule. None of the parties have sought to invoke the arbitration clause, either in the Renewal Proceedings or in the Termination Proceedings.

26. The 2003 Agreement was varied by a deed of variation, entered into between the same parties, on 15th July 2010 (**"the Deed of Variation"**). The variations were set out in clause 1 of the Deed of Variation. For present purposes, the relevant variation is that effected by clause 1(v) of the Deed of Variation, which was in the following terms:

> *"(v) the following shall be added as a new paragraph 1.11.3 of the Third Schedule to the Agreement:*
>
> *"notwithstanding the other provisions of paragraph 1.11 the Company may share the whole or any part of the Site and the rights contained in this Agreement with Telefonica O2 UK Limited (company number 01743099) whose current registered office is at 260 Bath Road, Slough, Berkshire, SL1 4DX ("O2") for no additional payment and without the Owner's consent being required"*

27. In the remainder of this decision references to the 2003 Agreement mean, unless otherwise indicated, the 2003 Agreement as varied by the Deed of Variation. References to **"the Alienation Clause"** mean paragraph 1.11 of the Third Schedule to the 2003 Agreement, as varied by the Deed of Variation. References to **"the Rights"** mean the rights granted

to Vodafone in respect of the Vodafone Site by the Second Schedule to the 2003 Agreement.

The Steps Hill Sites

28. As we have explained, the registered freehold title to the Vodafone Site, now vested in Icon, includes two other mobile communications sites, located in the same field as the Vodafone Site; that is to say the Field.

29. The first of these two additional sites (**"the MBNL Site"**) is also located on the southern perimeter of the Field, close to Steps Hill Wood and approximately 85 metres to the west of the Vodafone Site. The MBNL Site is similar in size and shape to the Vodafone Site and is enclosed by a wooden post and rail fence. In terms of ECA on the MBNL Site, there is a 15 metre monopole (**"the MBNL Mast"**), three antennas and a microwave dish, and related ground-level equipment. The MBNL Site is managed by Mobile Broadband Network Limited (**"MBNL"**). The MBNL Site is subject to a code agreement dated 24th September 2002, which was originally made with Hutchison 3G UK Limited. We understand MBNL to be a joint venture company which manages sites, including the MBNL Site for the mobile communications operators trading as H3G and EE.

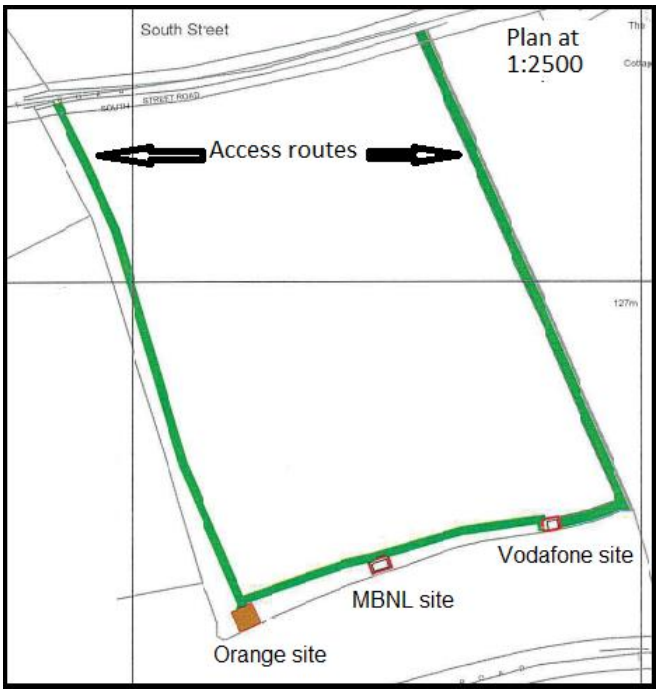
30. The second of these two additional sites (**"the Orange Site"**) is located at the south-western corner of the Field, also close to Steps Hill Wood, and approximately 75 metres to the west of the MBNL Site. The Orange Site is therefore approximately 160 metres distant from the Vodafone Site.

31. The Orange Site previously housed a mobile communications mast used by Orange. This was however decommissioned and removed at some point, it is believed, between 2015 and 2018. Icon has now constructed on the Orange Site a new 25 metre lattice tower; identified in the evidence as a Swann 5SH tower. This tower (**"the New Tower"**) has a single circular head frame at a height to match the top of the structure. The New Tower has been constructed on a large reinforced concrete raft foundation within a fenced and gravelled compound. As matters stand, no Active ECA has been installed on the New Tower.

32. We will use the collective expression **"the Masts"** to refer to the Vodafone Mast and the MBNL Mast, and the collective expression **"the Steps Hill Sites"** to refer to the Vodafone Site, the MBNL Site and the Orange Site.

33. While it is convenient to refer to the Vodafone Site, in order to distinguish it from the other Steps Hill Sites, we should make it clear, for the avoidance of doubt, that this expression is used for the sake of convenience only, and carries no implications for the issues which we have to determine concerning the Vodafone Site and its use and control. So far as this is a relevant consideration, the same applies to our use of the expressions the MBNL Site and the Orange Site.

34. For the assistance of those reading this decision we include, at this point, a plan showing the location of the Steps Hill Sites.



The Contribution Agreements

35. On 17th October 2012 Vodafone Mobile Network Limited, Vodafone and Cornerstone Telecommunications Infrastructure Limited (**"CTIL"**) entered into an agreement which was described as a contribution agreement. This contribution agreement (**"the 2012 Contribution Agreement"**) came about as the product of a collaboration between Vodafone and Telefonica UK Limited (**"Telefonica"**) which was known as Project Beacon. This collaboration involved network and site sharing arrangements. In very broad terms, as we understand the position, Vodafone assumed the responsibility for providing a network for the shared use of Vodafone and Telefonica in the west of the country, while Telefonica assumed the responsibility for providing a network for the shared use of Vodafone and Telefonica in the east of the country. The Vodafone Site, being located in the eastern part of the country, fell and falls within Telefonica's area of responsibility. In the evidence and the documents at the Trial, Telefonica was frequently referred to as VMO2 (Virgin Media O2). We understand VMO2 to be the trading name used in the joint venture between Telefonica and Virgin Media, to which we have referred above. We will continue to refer to Telefonica, as the party with responsibility for the Vodafone Site pursuant to the collaboration (Project Beacon) between Telefonica and Vodafone.

36. As part of Project Beacon, Vodafone and Telefonica agreed to transfer mobile communications sites and network assets to a joint venture company, described as *"JVCo"* in the 2012 Contribution Agreement. This joint venture company, established in 2012, was CTIL.

37. Pursuant to this collaboration Vodafone entered into the 2012 Contribution Agreement with CTIL. The 2012 Contribution Agreement was amended and restated in 2017, 2019 and 2021. It was common ground between the parties that it was only necessary, for the purposes of the preliminary issues, to consider the 2012 Contribution Agreement and the Contribution Agreement as amended and restated in 2021 (**"the 2021 Contribution Agreement"**).

38. The meaning and effect of the 2012 Contribution Agreement and the 2021 Contribution Agreement (**"the Contribution Agreements"**), in terms of the relationship thereby created between Vodafone and CTIL, were substantially in dispute between the parties. We will need to return to the Contribution Agreements in detail later in this decision. For present purposes it is sufficient to make reference to Recitals (R) and (S) to the 2012 Contribution Agreement, which stated the intentions of the parties in the following terms:

> *"**The single grid sites and the Passive sharing element***
> *(R) It is intended that the telecoms site management business of each of the operators (including the single grid of sites and the passive radio access network assets on such sites) shall be transferred to and carried on by JVCo, which shall acquire real estate interests in the single grid of sites over a period of time and in a structured manner so as to achieve the single grid as efficiently and quickly as possible.*
> *(S) It is intended that JVCo shall, once it is operationally ready to do so, as agent of Telefónica and Vodafone, take over the management of all of the sites belonging to Telefónica and Vodafone, pending the transfer of the sites selected for the single grid to JVCo and take decisions to decommission sites that are no longer required. Each of Telefónica and Vodafone shall appoint JVCo as its agent and grant JVCo the rights it needs to undertake such management activities under its contribution agreement."*

39. It is common ground between the parties that the Contribution Agreements applied to the Vodafone Site.

40. Recital (T) to the 2012 Contribution Agreement provided that Telefonica and Vodafone should each source, exclusively from CTIL, services in respect of use of and access to sites in the single grid of sites and sites required to service unilateral demand, as well as the passive radio access network infrastructure assets on such sites *"on the terms of a separate Master Services Agreement between JVCo and such operator (each to be on identical terms)"*.

41. Vodafone and CTIL entered into a separate Master Services Agreement in 2012 (**"the 2012 MSA"**). The copy of the 2012 MSA which we have seen is undated, but there was evidence that it was entered into with effect from 12th November 2012. The 2012 MSA was amended and restated with effect from 22nd March 2017 (**"the 2017 MSA"**) and 23rd July 2019 (**"the 2019 MSA"**), and was then terminated and replaced by a new MSA with effect from 7th January 2021 (**"the 2021 MSA"**). It was common ground between the parties that the 2012 MSA applied to the Vodafone Site. It was accepted by the Respondents, in the course of the Trial, that the 2021 MSA does not apply to the Vodafone Site. We were also not required to consider the terms of the 2017 and 2019 MSAs.

42. The subsequent sharing of mobile communications sites between Vodafone and Telefonica explains why the Alienation Clause was varied, by the Deed of Variation, to permit Vodafone to share the Vodafone Site and the Rights (the rights contained in the 2003 Agreement) with Telefonica. As we have noted above, the Vodafone Site, being located in the east of the country, falls within Telefonica's area of responsibility. As we understood the evidence, CTIL provides services to Telefonica pursuant to a master services agreement which is said to mirror the terms of the 2021 MSA and applies to the Vodafone Site. We assume that this is because Telefonica has assumed responsibility for the Vodafone Site. We also assume that this is why it is accepted that the 2021 MSA does not apply to the Vodafone Site. As Ms Murphy explained the position, in closing

submissions, the 2021 MSA does not apply to the Vodafone Site because it is classified as an Other Operator MORAN Site, as defined in the 2021 MSA.

43. As with the Contribution Agreements, the meaning and effect of the 2012 MSA was in dispute between the parties. We will also need to return to the 2012 MSA, later in this decision.

44. CTIL was itself designated as a Code operator in 2017, as a WIP or tower company. As explained above, CTIL was originally established in 2012 as a joint venture company by Vodafone and Telefonica. Vodafone and Telefonica originally held equal shares in CTIL. The evidence was that Vodafone sold its shareholding in CTIL to a company within the Vantage Towers group (a major European tower company group) in 2021, and Telefonica also sold some of its shareholding to a third party in 2023. The consequence of this is that CTIL is no longer under the control of Vodafone and/or Telefonica, but stands as an independent WIP company and, effectively, a competitor of Icon.

45. In Vodafone's submissions at the Trial it was suggested that Vodafone retained some form of shareholding in CTIL. A document to which some reference was made in the course of the Trial was CTIL's annual report for the year ended 31st March 2022. We noted, from the information contained in this report, that the parent company of Vantage Towers AG was described as Vodafone GmbH. The overall picture in this respect was somewhat opaque, and was not investigated in the course of the Trial. If it is the case that Vodafone retains, directly or indirectly, some shareholding in CTIL, it was not suggested that this interest gives Vodafone control over CTIL. We therefore proceed on the basis that CTIL now stands as an independent WIP, as opposed to its former role as the joint venture company of Vodafone and Telefonica.

The background to the Renewal Proceedings and the Termination Proceedings

46. As noted above, the contractual term of the 2003 Agreement expired on 30th July 2018, shortly after the Code came into force. Thereafter the 2003 Agreement was continued by Paragraph 30(2). On 25th September 2018 the Bucks transferred the freehold title to the Steps Hill Sites to APW. On 31st March 2020 Vodafone served notices on APW seeking the agreement of APW that the 2003 Agreement should be terminated and that a new agreement should have effect between Vodafone and APW, pursuant to Paragraphs 33(1) and 20(2).

47. On 14th December 2022 Entrust Environmental Limited (**"Entrust"**), acting as planning consultants on behalf of AP Wireless, made an application to Maidstone BC for the purposes of determining whether prior approval was required for the carrying out of certain works. The works in question were described in the following terms:

> *"The removal of 2no. telecommunication base stations on 2no. masts (1no.15m and 1no.18m in height) and the consolidation of equipment on to 1no. 25m lattice tower. The new tower will include the relocation of 6no. antenna to 1no. new ring frames which will be attached to 1no. proposed 25m tower. In addition, to the extension of the perimeter fence and ancillary development thereto."*

48. The proposed new tower referred to in this description was what is now the New Tower, as constructed on the Orange Site. The reason for the application (**"the Prior Approval Application"**) was that, so far as planning permission for the works was concerned, AP Wireless was relying on permitted development rights in the Town and Country Planning

(General Permitted Development) (England) Order 2015, as amended (**"the GPDO"**). Specifically, AP Wireless was relying upon the following permitted development rights in Class A of Part 16 of Schedule 2 to the GPDO:

> *"A. Development by or on behalf of an electronic communications code operator for the purpose of the operator's electronic communications network in, on, over or under land controlled by that operator or in accordance with the electronic communications code, consisting of—*
> (a) *the installation, alteration or replacement of any electronic communications apparatus,"*

49. By reason of the location of the Steps Hill Masts in an AONB, AP Wireless was required to apply to Maidstone BC, as the local planning authority (**"LPA"**), for a determination as to whether the prior approval of Maidstone would be required in respect of the proposed works.

50. By a decision notice dated 14th February 2023 Maidstone BC granted prior approval for the siting and appearance of the proposed works (**"the Prior Approval"**). So far as the description of the proposed works was concerned, the decision notice was expressed to grant prior approval for *"the above"*. This was a reference to the proposal for the proposed works, as set out in the Prior Approval. The proposal for the proposed works adopted the description of the proposed works in the Prior Approval Application, in the following terms (bold print not added):

> **"PROPOSAL: Prior Notification for Electronic Communications for the removal of 2no. telecommunication base stations on 2no. masts (1no.15m and 1no.18m in height) and the consolidation of equipment on to 1no. 25m lattice tower. The new tower will include the relocation of 6no. antenna to 1no. new ring frames which will be attached to 1no. proposed 25m tower. In addition, to the extension of the perimeter fence and ancillary development thereto. For its prior approval to: siting and appearance."**

51. There was considerable dispute between the parties as to the meaning and effect of the above description of the proposed works, and as to the meaning and effect of the Prior Approval Application, the Prior Approval and various other associated planning documents. We will need to come back to these areas of dispute in detail, when we consider the planning issues. For present purposes, what is most relevant is that it is the Respondents' case that the proposed works, in respect of which the Prior Approval was granted, included and were understood by Maidstone BC to include, in addition to the construction of the New Tower, the removal of the Masts, that is to say the removal of the Vodafone Mast from the Vodafone Site and the removal of MBNL Mast from the MBNL Site.

52. On 17th March 2023 Vodafone issued the reference in the Tribunal which we are referring to as the Renewal Proceedings. The Renewal Proceedings were transferred to the First-tier Tribunal Property Chamber (**"the FTT"**) on 20th March 2023, but were subsequently transferred back to the Tribunal. In its statement of case in the Renewal Proceedings, as originally served on 28th April 2023, APW indicated its intention to serve notices of termination of the 2003 Agreement, pursuant to Paragraph 31, if what was referred to as *"the Negotiation"* failed. The Negotiation referred to a letter to Vodafone's solicitors from APW's solicitors dated 27th April 2023. In that letter APW's solicitors advised that

planning permission had been obtained for the construction of the New Tower and, on behalf of APW and Icon (to which the Steps Hill Sites were about to be transferred), offered terms for a new agreement, subject to a landlord's break clause on Code grounds, capable of exercise between the second and third anniversaries of the new agreement. The reasoning behind this offer was stated in the following terms by APW's solicitors:

> *"APW and Icon believe that the replacement site* [the Orange Site] *to be installed by Icon will offer an improved coverage solution on commercial terms.*
> *In order to allow as smooth a handover as possible between sites, APW believes it is in the interests of both parties to avoid protracted legal proceedings, which would include the service of termination notices in respect of the Site* [the Vodafone Site] *to protect the development to be undertaken by Icon. We therefore suggest that our clients enter into a new lease for the Site, which allows for the Site to be transferred to Icon, the Development Site* [the Orange Site] *to be built and thereafter for the Site to be decommissioned, all outside of proceedings and without unnecessary costs being incurred by the parties."*

53. This offer was not acceptable to Vodafone. On 4th September 2023 Icon, which by then had become the owner of the freehold title to the Steps Hill Sites, served notices of termination of the 2003 Agreement on Vodafone, pursuant to Paragraph 31(1). The notices of termination stated that Icon wished to bring the 2003 Agreement to an end, on 10th March 2025.

54. Paragraph 31(2)(c) stipulates that a notice of termination served pursuant to Paragraph 31(1) must *"state the ground on which the site provider proposes to bring the code agreement to an end"*. Paragraph 31(4) sets out the grounds which may be relied upon for this purpose, in the following terms:

> *"(4) The ground stated under sub-paragraph (2)(c) must be one of the following—*
> *(a) that the code agreement ought to come to an end as a result of substantial breaches by the operator of its obligations under the agreement;*
> *(b) that the code agreement ought to come to an end because of persistent delays by the operator in making payments to the site provider under the agreement;*
> *(c) that the site provider intends to redevelop all or part of the land to which the code agreement relates, or any neighbouring land, and could not reasonably do so unless the code agreement comes to an end;*
> *(d) that the operator is not entitled to the code agreement because the test under paragraph 21 for the imposition of the agreement on the site provider is not met."*

55. The termination notices specified sub-paragraphs (a), (c) and (d) of Paragraph 31(4) as the grounds of termination relied upon by Icon. We will refer to these sub-paragraphs, respectively, as **"Paragraph (a)"**, **"Paragraph (c)"**, and **"Paragraph (d)"**.

56. On 2nd November 2023 Vodafone served counter-notices to the termination notices, pursuant to Paragraphs 32(1)(a) and 32(3). The counter-notices stated that Vodafone wanted Icon to agree to confer or be otherwise bound by a new code right in place of the existing code right, and attached a draft form of the new code rights sought by Vodafone.

57. On 7th November 2023 Vodafone issued (against Icon) the current reference in the Tribunal, which we are referring to as the Termination Proceedings. In the Termination Proceedings Vodafone is seeking a new code agreement in respect of the Vodafone Site pursuant to Paragraph 34(6). Paragraph 34(6) provides as follows:

> *"(6) The court may order the termination of the code agreement relating to the existing code right and order the operator and the site provider to enter into a new agreement which—*
> *(a) confers a code right on the operator, or*
> *(b) provides for a code right to bind the site provider."*

58. By its statement of case in response to the Termination Proceedings, Icon relied upon Paragraphs (a), (c) and (d) as the grounds upon which the 2003 Agreement should be terminated, without entry into a new code agreement. Icon also contended that these grounds of termination should be determined by way of preliminary issue.

The Preliminary Issues

59. On 12th January 2024 a case management hearing was held in the Tribunal, before Martin Rodger KC (the Deputy Chamber President), in the Termination Proceedings and the Renewal Proceedings. By his order made on the case management hearing, as that order was subsequently amended on 29th January 2024, the Deputy Chamber President gave a number of directions. As mentioned above, this amended order (**"the Directions Order"**) included directions for the determination of the preliminary issues which have now come before us for the Trial. These preliminary issues (**"the Preliminary Issues"**), as stated in the Directions Order, are as follows (the underlining is not added and shows the amendment to the Directions Order):

> *"(a) whether the claimant's Code agreement ought to come to an end as a result of substantial breaches by the claimant of its obligations under the agreement (paragraph 31(4)(a) of the Code);*
> *(b) whether the first respondent intends to redevelop all or part of the land to which the claimant's Code agreement relates, or any neighbouring land, and could not reasonably do so unless the claimant's Code agreement comes to an end (paragraph 31(4)(c) of the Code); and*
> *(b) whether the claimant is not entitled to a Code agreement because the test under paragraph 21 of the Code for the imposition of an agreement on the respondents is not met (paragraph 31(4)(d) of the Code)."*

60. The question in the Preliminary Issues is therefore whether Icon can terminate the 2003 Agreement upon all or any of the grounds set out in Paragraphs (a), (c) or (d). We will refer to the Preliminary Issues, using the relevant sub-paragraph letter of Paragraph 31(4), as **"Preliminary Issue (a)"**, **"Preliminary Issue (c)"** and **"Preliminary Issue (d)"**.

61. By the Directions Order the Deputy Chamber President also added APW as Second Respondent to the Termination Proceedings, but only for the purpose of compliance with directions relating to disclosure. The Renewal Proceedings were also stayed until further order.

Summary of the issues to be determined within the Preliminary Issues

62. At this point we set out a brief summary of the issues to be determined within the Preliminary Issues. This brief summary is an essential introduction to the matters we have to determine in relation to each of the Preliminary Issues. At the outset of the Trial we asked counsel to provide us with an agreed list of issues or, in the absence of an agreed list of issues, rival lists of issues. We were provided with an agreed list of the planning issues; that is to say the issues arising in relation to the meaning and effect of the Prior Approval. So far as the overall list of issues was concerned, agreement could not be reached, and we were provided with rival lists of issues. While it was unfortunate that agreement could not be reached, the rival lists of issues were helpful. We have framed our analysis of the Preliminary Issues by reference to these rival lists of issues, and by reference to the agreed list of planning issues. We stress that what follows is a brief summary of the issues, which is not intended to enumerate everything which appears in the lists of issues. All of the issues identified in the lists of issues are dealt with, as necessary, in our analysis of the Preliminary Issues.

63. So far as Preliminary Issue (a) is concerned, the Respondents' case is that the arrangements between Vodafone and CTIL in relation to the Vodafone Site constituted a sharing of its rights under the 2003 Agreement (the Rights) with CTIL, without the consent of the owners of the Vodafone Site, in breach of the Alienation Clause. As pleaded in the Termination Proceedings, the Respondents' case was that Vodafone had transferred or shared its rights in relation to the Vodafone Site with CTIL. In closing submissions the Respondents accepted that there had been no transfer of rights, but maintained their case on the sharing of rights such that, so it is alleged, the correct analysis is that CTIL is the party in occupation of the Vodafone Site, making use of the Vodafone Site for its own business, with Vodafone and Telefonica as its effective customers.

64. The Respondents' case is that these breaches of the Alienation Clause constituted substantial breaches by Vodafone of its obligations under the 2003 Agreement, within the meaning of Paragraph (a), by virtue of which the 2003 Agreement, as a code agreement, ought to come to an end.

65. This case has given rise to the following broad issues between the parties:
    (1) Has there been a breach or have there been breaches of the Alienation Clause?
    (2) If the Alienation Clause has been breached, and if the breach is only a single breach, is a single breach sufficient to engage Paragraph (a)? The Respondents' case is that the sharing of rights constituted a series of breaches as opposed to a single breach but, if they are wrong in this, they contend that a single breach is sufficient to engage Paragraph (a).
    (3) If the Alienation Clause has been breached, and if Paragraph (a) is engaged, was the breach or were the breaches substantial?
    (4) If Paragraph (a) is engaged, and if there has been substantial breach of the Alienation Clause, ought the 2003 Agreement to come to an end?

66. Turning to Preliminary Issue (c), the Respondents' case is that Icon intends to redevelop the Steps Hill Sites, and cannot reasonably do so unless the 2003 Agreement comes to an end.

67. The works relied upon by the Respondents, as the intended redevelopment within the meaning of Paragraph (c), were identified in the following terms in the Respondents' closing submissions:
    (i) Decommissioning works on the Orange Site, comprising the removal of concrete bases and a redundant meter cabinet.

(ii) The construction of the New Tower and associated works comprising the construction of a new concrete base for the New Tower and cabinets and the erection of a new metal mesh fence with access gates.
(iii) The removal of topsoil within the compound on the Orange Site and the laying of an anti-weed membrane and gravel backfill.
(iv) Groundworks on adjacent land for power and (if necessary) fibre connections to the Orange Site for the use of MNOs coming on to the Orange Site.
(v) The construction of a headframe on the New Tower.
(vi) The removal of the Vodafone Mast and infrastructure from the Vodafone Site and the removal of the MBNL Mast and infrastructure from the MBNL Site.
(vii) The installation of new infrastructure of Telefonica and MBNL on the Orange Site.

68. We will refer to these works as **"the Claimed Works"**. It will be noted that, of the Claimed Works, it is accepted by the Respondents that items (i), (ii), (iii) and (v) have already been carried out. It will also be noted that the Claimed Works extend across the Steps Hill Sites, and include the removal of the Masts from the Vodafone Site and the MBNL Site and the migration of the Active ECA from the Vodafone Site and the MBNL Site to the Orange Site (or the installation of new Active ECA by those migrating to the Orange Site).

69. This case has given rise to the following broad issues:
(i) The planning issues. It is not necessary to set out the agreed list of planning issues at this stage. The essential dispute between the parties is whether the Prior Approval has the effect of requiring the removal of the Masts and antennas from the Vodafone Site and the MBNL Site.
(ii) What constitutes neighbouring land within the meaning of Paragraph (c)?
(iii) Do the Claimed Works constitute redevelopment of the land to which the code agreement relates or any neighbouring land, within the meaning of Paragraph (c)?
(iv) Is there a time limit within which Icon must intend to carry out the Claimed Works?
(v) Can Icon intend to do works, within the meaning of Paragraph (c), which it has already carried out?
(vi) What intention does Icon have?
(vii) Is Icon's intention impermissibly conditional?
(viii) Can Icon satisfy Paragraph (c)?

70. Turning to Preliminary Issue (d), the Respondents' case is that Vodafone is not entitled to the code agreement because the test under Paragraph 21 for the imposition of the code agreement on the site provider is not met. This takes one back to the notices served by Vodafone on APW on 31st March 2020, seeking the agreement of APW that the 2003 Agreement should be terminated and that a new agreement should have effect between Vodafone and APW, pursuant to Paragraphs 33(1) and 20(2). In the Renewal Proceedings Vodafone seeks an order pursuant to Paragraph 20(4), so far as necessary, for the imposition of a new code agreement between itself and Icon.

71. Paragraph 21 sets out the test which must be satisfied before an order can be made under Paragraph 20, in the following terms:

> *"(1) Subject to sub-paragraph (5) and paragraph 27ZA, the court may make an order under paragraph 20 if (and only if) the court thinks that both of the following conditions are met.*
> *(2) The first condition is that the prejudice caused to the relevant person by the order is capable of being adequately compensated by money.*

(3) The second condition is that the public benefit likely to result from the making of the order outweighs the prejudice to the relevant person.

(4) In deciding whether the second condition is met, the court must have regard to the public interest in access to a choice of high quality electronic communications services.

(5) The court may not make an order under paragraph 20 if it thinks that the relevant person intends to redevelop all or part of the land to which the code right would relate, or any neighbouring land, and could not reasonably do so if the order were made."

72. The Respondents take the preliminary point that CTIL is the occupier of the Vodafone Site for the purposes of Parts 2 and 4 of the Code and that, as such, Vodafone is unable to satisfy the public benefit test in Paragraph 21 because it could not seek a code agreement in respect of the Vodafone Site against Icon, but only against CTIL. If the Respondents are wrong on this preliminary point, their case is that the conditions in Paragraph 20(2) and (3) are not met. The Respondents' case thus gives rise to the following broad issues:
    (i) Is CTIL the occupier of the Vodafone Site for the purposes of Parts 2 and 4 of the Code?
    (ii) If so, is Vodafone unable to satisfy the public benefit test in Paragraph 21 because it could not seek a code agreement in respect of the Vodafone Site against Icon, but only against CTIL?
    (iii) Are the conditions in Paragraph 20(2) and (3) met?

The Pound Hill Site Proceedings

73. There is a further preliminary issue, in separate proceedings in the Cardiff County Court, which was listed for determination at the Trial.

74. This further preliminary issue concerns a mobile communications site at Pound Hill, Nr Coedkernew, Newport, Gwent. The site is variously referred to in the documents as Pound Hill or Myrtle House. We will refer to this site as **"the Pound Hill Site"**.

75. By an agreement dated 12th September 2001 Raymond Frederick Allen and Teresa Allen, who were described as the owners of the Pound Hill Site, granted Vodafone rights to install and use ECA, comprising a 15 metre lattice tower and other telecommunications apparatus, on the Pound Hill Site. APW acquired the freehold interest in the Pound Hill Site from Teresa Allen by a transfer dated 21st January 2022. It is common ground between Vodafone and APW that the agreement of 12th September 2001 took effect as a lease, which was not contracted out of the 1954 Act and which is capable of qualifying for the protection of the 1954 Act, as a business tenancy, if Vodafone is in business occupation of the Pound Hill Site, within the meaning of Section 23(1) of the 1954 Act.

76. By proceedings (**"the Pound Hill Site Proceedings"**) commenced by claim form issued on 22nd March 2023 Vodafone made an application for the grant of new lease of the Pound Hill Site pursuant to Section 24 of the 1954 Act. In its amended acknowledgment of service, in response to the claim, APW put Vodafone to strict proof that it was in business occupation of the Pound Hill Site, within the meaning of Section 23 of the 1954 Act. On this basis APW contested Vodafone's right to a new lease of the Pound Hill Site.

77. On 19th February 2024 the Pound Hill Site Proceedings came before His Honour Judge Jarman KC for a hearing. The Judge made an order giving directions in terms agreed between the parties (Vodafone and APW). The order included a direction that the Pound

Hill Site Proceedings be stayed so that the Tribunal could be invited to sit as the County Court in order to hear the Pound Hill Site Proceedings. The reason behind this and the associated directions in the Judge's order was that there was an overlap between the issue of whether Vodafone was in business occupation of the Pound Hill Site and the issues in Preliminary Issue (a).

78. The Tribunal accepted the invitation to hear the Pound Hill Site Proceedings and, by an order made on 23rd May 2024, the Deputy Chamber President directed that the Tribunal determine the following preliminary issue:

> *"In light of the provisions of s23(1) of the Landlord and Tenant Act 1954 is the Claimant entitled, pursuant to s24 of the Act, to a new tenancy?"*

79. The Deputy Chamber President also directed that this preliminary issue be heard with the Preliminary Issues. As we understand the position, this direction was given with the agreement of the parties and pursuant to that agreement. As a result the preliminary issue in the Pound Hill Site Proceedings was heard with the Preliminary Issues at the Trial. This produced the following rather unusual situation. This decision, on the Preliminary Issues, is the decision of the Chamber President and Mrs Martin, sitting as the Tribunal. The determination of the preliminary issue in the Pound Hill Site Proceedings is set out in a separate judgment. This separate judgment is the judgment of the Chamber President, sitting alone as a judge of the County Court. It is stressed that this separate judgment is the judgment of the Chamber President, containing his determination of the preliminary issue in the Pound Hill Site Proceedings. Nevertheless, by reason of the overlap in issues, an inevitable by-product of hearing the Preliminary Issues and the preliminary issue in the Pound Hill Site Proceedings in one hearing (the Trial) is that the findings, reasoning and conclusions of the Tribunal in relation to the Preliminary Issues will necessarily have had some influence upon the findings, reasoning and conclusions of the Chamber President in relation to the preliminary issue in the Pound Hill Site Proceedings. For the same reason, substantial parts of this decision are in identical or similar terms to the judgment in the Pound Hill Site Proceedings.

80. We canvassed this matter with counsel at the outset of the Trial. Both Mr Radley-Gardner and Mr Watkin confirmed that they were content to proceed on the basis set out in our previous paragraph. As we have said, the determination of the preliminary issue in the Pound Hill Site Proceedings is set out in a separate judgment of the Chamber President, sitting as a judge of the County Court.

Confidentiality

81. Vodafone's case was that the various contribution agreements and master services agreements entered into between Vodafone and CTIL were confidential documents, containing information of competitive, business and/or commercial sensitivity.

82. As part of the directions for disclosure in the Directions Order, the Deputy Chamber President ordered Vodafone to file a witness statement from a senior officer or employee explaining the relationship between Vodafone and CTIL with respect to the Vodafone Site, supported by documents which were sufficient to give the Tribunal a clear understanding of that relationship. In response to this direction Vodafone provided a first witness statement of Clare Daniels, Lead Counsel of Vodafone, dated 8th March 2024. In that witness statement Ms Daniels disclosed the existence of the contribution agreements and exhibited a redacted version of the 2021 Contribution Agreement, together with two tables

showing differences between the 2021 Contribution Agreement and the 2012 Contribution Agreement. The redactions, which were said by Ms Daniels to be justified on the grounds of non-relevance, confidentiality and competitive, business and/or commercial sensitivity were very extensive, blanking out the bulk of the 2021 Contribution Agreement. In the same witness statement Ms Daniels also disclosed the existence of a master services agreement, but did not exhibit this unspecified master services agreement. In taking this stance Ms Daniels asserted that the nature of the relationship between Vodafone and CTIL, in relation to the Vodafone Site, *"being one of agency"*, was governed by the 2021 Contribution Agreement. Ms Daniels also relied on the same grounds of alleged non-relevance, confidentiality and business and commercial sensitivity as she had relied upon in relation to the 2021 Contribution Agreement.

83. The categories of documents which were to be disclosed were set out in paragraph 7 of the Directions Order. On the service of Ms Daniels' witness statement, Vodafone made an application in the Termination Proceedings, on 8th March 2024, for a direction confirming that it was not required, by paragraph 7 of the Directions Order, to disclose documents other than those exhibited to Ms Daniels' witness statement. Perhaps not surprisingly, this attempt to pre-empt the disclosure process was firmly rejected by the Deputy Chamber President who, by an order made on 15th March 2024, dismissed the application without a hearing. As the Deputy Chamber President pointed out, it was not for the Tribunal pre-emptively to rule on the adequacy of Vodafone's disclosure, and there was no reason to think that the production of Ms Daniels' witness statement entitled Vodafone to a dispensation from the requirement to comply with paragraph 7 of the Directions Order.

84. For its part, Icon was not satisfied with the level of disclosure provided by Ms Daniels' witness statement, and issued an application in the Termination Proceedings for an order that unless Vodafone made full disclosure of its agreements with CTIL, its case should be struck out.

85. It is not necessary to go further into the detail of the dispute over disclosure, or its procedural history. What is relevant for present purposes is that the application for an unless order and the dispute over disclosure were dealt with by an order of the Deputy Chamber President, made on 5th June 2024, the terms of which were agreed between the parties. By this consent order (**"the First Confidentiality Order"**) a confidentiality ring was established. The effect of the First Confidentiality Order was that disclosure of Confidential Information (as defined) by Vodafone was made only to the Relevant Advisers (as defined).

86. The definitions and terms of the First Confidentiality Order are somewhat complex. For present purposes what is relevant is that the First Confidentiality Order provided for the contribution agreements and the master services agreements to be disclosed to the Relevant Advisers, subject to the redaction of certain figures and percentages (defined as Pricing Information) and certain other permitted redactions, subject to undertakings by the Relevant Advisers to maintain the confidentiality of the agreements. The Relevant Advisers comprised identified solicitors within Eversheds Sutherland (International) LLP (the Respondents' solicitors) and counsel on the Respondents' side. The Relevant Advisers included Mr Watkin. The Relevant Advisers did not include, as we understand the position, any members of the legal team within Eversheds Sutherland (International) LLP acting for the Respondents in these proceedings. To complicate matters further, there was an inner confidential ring, established for the purposes of allowing the Respondents' solicitors who were Relevant Advisers to police redactions made by Vodafone which were

not redactions of Pricing Information. There was also an outer confidential ring, which included all the Relevant Advisers; that is to say the specified solicitors and counsel.

87. A further confidentiality order, the terms of which were also agreed by the parties, was made by Mrs Martin on 31st October 2024. By this second consent order (**"the Second Confidentiality Order"**) the outer confidentiality ring was extended to include Mr Clark, as counsel for the Respondents. The Second Confidentiality Order also contained detailed directions for the conduct of the Trial, in order to maintain the confidentiality of the Confidential Information.

88. The practical effects of the directions in the Second Confidentiality Order were, in summary, as follows:
    (1) Certain documents, including the contribution agreements and master services agreements, were organised into a confidential bundle, to which only the Relevant Advisers on the Respondents' side had access.
    (2) Counsel on each side submitted separate skeleton arguments dealing with those issues which engaged the Confidential Information, which in practice meant the contribution agreements and the master services agreements.
    (3) We were required to go into private session at various points in the course of the Trial, during the opening and closing submissions and in the evidence. At these points, the bulk of the Respondents' legal team were obliged to leave the court room, with only the Relevant Advisers remaining in place.

89. As the Trial progressed, and the issues (both legal and evidential) became clearer, we began to entertain some doubt as to whether the confidentiality arrangements, which constituted a substantial inroad into the principle of open justice, were strictly justified or necessary. We concluded however, so far as the Trial was concerned, that it would not have been appropriate or sensible to raise, on our own initiative, the question of whether the confidentiality arrangements should be disrupted. We reached this conclusion principally for the following reasons. First, the confidentiality arrangements were the product of agreement between the parties. Second, we were not asked by either party to amend or terminate the confidentiality arrangements, so far as the Trial itself was concerned. Third, although there was complaint made by the Respondents' counsel that the confidentiality arrangements were to the material prejudice of the Respondents, this was not our view. The confidentiality arrangements did not, in our view, generate a material unfairness in the Trial or material prejudice to the Respondents, particularly given that the cross examination and submissions in the relevant parts of the Trial were left in the capable hands of Mr Watkin and Mr Clark. Fourth, raising the question of amendment or termination of the confidentiality arrangements, on our own initiative, would have disrupted the progress of the Trial, not least because it would have required us to give the parties an opportunity to make submissions on the question of whether confidentiality should be maintained.

90. The same does not apply to this decision. We have not regarded it as necessary, in our references to the Contribution Agreements and the 2012 MSA in this decision, to make any redactions or to keep any part of this decision private. In our view the parts of the Contribution Agreements and the 2012 MSA to which we make reference and which we analyse in this decision do not require or justify any confidentiality restrictions. In the event, and on circulation of the draft version of this decision for corrections, the parties have not sought any confidentiality restrictions in relation to the content of this decision. We have also given directions in relation to the circulation of the draft version of this

decision. Those directions include a direction, which now has effect, that the First and Second Confidentiality Orders, as referred to above, do not apply to this decision.

The factual evidence

91. We heard evidence from eight witnesses of fact; of whom four were called by Vodafone and four by the Respondents. Although this evidence was extensive, and all of the witnesses were cross examined, this is not a case where we are called upon to resolve any substantial or direct conflicts of evidence between the witnesses. Some of Vodafone's witnesses were the subject of criticism by the Respondents. This criticism was directed to the reliability of their evidence and to the previous alleged conduct of Vodafone. Subject to these criticisms the present case appeared to us to be one where issues as to the credibility of the witnesses were limited. Equally, and subject to the criticisms made of individual witnesses, our overall impression was that none of the witnesses were dishonest or deliberately evasive in their evidence. Where we make specific reference to the evidence of a witness in this decision, we accept that evidence, unless otherwise indicated.

92. Subject to what we have said in our previous paragraph, we provide the following summary of the witnesses of fact, with some brief introductory comments on their evidence. Unless otherwise indicated, the written evidence of each witness was set out in a single witness statement.

93. Vodafone called the following witnesses:
    (1) Clare Daniels has already been mentioned, as the person who made the witness statement required by the Directions Order. As explained above, Ms Daniels is employed by Vodafone as Lead Counsel. She has been employed by Vodafone, in its legal team, since 2012. Ms Daniels is a qualified solicitor, with some 20 years post-qualification experience. In addition to the witness statement mentioned above, Ms Daniels also provided an equivalent witness statement in the Pound Hill Site Proceedings, dated 12th April 2024, addressing the relationship between Vodafone and CTIL in relation to the Pound Hill Site. Ms Daniels then made a third witness statement, dated 27th August 2024, giving evidence in the Termination Proceedings and the Pound Hill Site Proceedings. In cross examination Ms Daniels ran into a certain amount of difficulty, in relation to her witness statement made in response to the Directions Order, both in defending the limited disclosure made by that witness statement and in defending the level of redactions which had been made to what was disclosed. This was because it was clear, with the benefit of seeing all the material which was disclosed pursuant to the Confidentiality Orders, both that the original disclosure was seriously inadequate and that the original level of redaction obscured relevant and material parts of the 2021 Contribution Agreement. In addition to this, a substantial part of Ms Daniels' evidence comprised commentary on the relevant agreements. We did not consider however that this rendered Ms Daniels' evidence of no value. As we shall explain later in this decision, Ms Daniels did have relevant evidence to give concerning the relationship between Vodafone and CTIL. So far as Ms Daniels' difficulties with her original witness statement were concerned, we do not consider that these difficulties undermined the relevant evidence which she was able to give. The reality is that, by virtue of the arrangements contained in the Confidentiality Orders, as agreed between the parties, we have been able to examine all the relevant agreements between Vodafone and CTIL. We do not consider that Ms Daniels was being dishonest in her first witness statement. The difficulties which emerged with that first witness statement were, in our view, the result of Ms Daniels

attempting to defend, on behalf of Vodafone, an initial position on disclosure which was unsustainable.

(2) Andrew Yorston is General Counsel and Company Secretary for Vodafone. He has been employed by Vodafone since 2010. Mr Yorston is also a qualified solicitor, with over 20 years post-qualification experience. Mr Yorston made his first witness statement, dated 31st May 2024, in the Termination Proceedings. This witness statement was made in response to Icon's application for an unless order, in the dispute over disclosure which resulted in the First Confidentiality Order. Mr Yorston then made a second witness statement, dated 29th August 2024, giving evidence in the Termination Proceedings and the Pound Hill Site Proceedings. Our assessment of Mr Yorston's evidence is essentially the same as our assessment of Ms Daniel's evidence. In common with Ms Daniels, Mr Yorston ran into a certain amount of difficulty, in cross examination, in relation to his witness statement made in response to Icon's application for an unless order. In common with Ms Daniels, a substantial part of Mr Yorston's evidence comprised commentary on the relevant agreements. We did not consider however that this rendered Ms Yorston's evidence of no value. As we shall explain later in this decision, Mr Yorston also had relevant evidence to give concerning the relationship between Vodafone and CTIL. As with Ms Daniels, the difficulties which emerged with Mr Yorston's first witness statement were, in our view, the result of Mr Yorston attempting to argue Vodafone's case on disclosure, in circumstances where, in our view, that case was unsustainable.

(3) Jonathan Page is employed by Vodafone as a Networks Authority. This is a job title which is used within the Networks Team at Vodafone. The Networks Team manage Vodafone's fixed network and mobile network. Mr Page's role relates to the mobile network. It includes planning and co-ordinating the allocation of financial and operational resources to achieve Vodafone's upgrade demands at portfolio and site-specific levels. He has worked in the telecommunications industry since 2011, was promoted to a Networks Authority in 2019, and assumed his current role within Vodafone in 2020. We found Mr Page to be confident and knowledgeable in his area of work. His evidence on the management of ECA requirements at site level, in order to meet Vodafone's assessed demand, was clear and straightforward.

(4) Helen Main is Head of Delivery and Demand at CTIL. Her role includes setting the strategy, within CTIL, for NTQs (notices to quit served in respect of telecommunications sites, seeking to terminate existing rights at such sites) and New Site Delivery (the acquisition of new telecommunications sites). Mrs Main has been in her current role since May 2024. Prior to that, for a period of over five years, Mrs Main was Senior Acquisition Relationship Lead for CTIL. Mrs Main made two witness statements, in the Termination Proceedings and the Pound Hill Site Proceedings, dated 12th August 2024 and 30th August 2024. Mrs Main has worked in the telecommunications industry for some 30 years. Mrs Main was confident and forthright in her evidence. Her evidence was particularly useful because she was able to give an explanation, from the CTIL side, of the business relationship between Vodafone and CTIL in relation to Vodafone sites.

94. The Respondents called the following witnesses:

(1) David Powell is employed by AP Wireless as a Regional Asset Manager at APW. He provides asset management support for over 350 sites in the APW portfolio. Mr Powell has been employed by AP Wireless or a group company of AP Wireless since 2018. Mr Powell qualified as a chartered surveyor in 2001. Mr Powell's evidence in his witness statement dealt only with the Pound Hill Site but, in common with most of the witness statements of the witnesses, his evidence was adduced as

evidence in the Termination Proceedings and in the Pound Hill Site Proceedings. Although directed to the Pound Hill Site, we found Mr Powell's evidence to be of some assistance in terms of the relationship between Vodafone and CTIL in respect of the Vodafone Site.

(2) Nicholas Ward is employed as a Regional Director of Asset Management by AP Wireless, which includes the management of APW's portfolio in the UK. In 2013 Mr Ward was employed by Cell:cm, a specialist telecommunications surveying and management company, previously within the AP Wireless Group. Mr Ward moved in house (as he put it in his evidence) to AP Wireless in 2020. He qualified as a chartered surveyor in 2016. Mr Ward gave evidence of the review of the APW estate which was undertaken by the APW Asset Management team to identify sites with opportunities for providing better infrastructure and/or consolidation of sites in close proximity. His evidence also covered the review of all CTIL, Vodafone and Telefonica sites to ensure that all contractual site share money due was being received. However, Mr Ward's involvement was at a high level, and not site specific, so his evidence served mainly to provide context for the actions taken by APW and Icon at the Steps Hill Sites.

(3) Roger Kay is employed by AP Wireless as an Acquisition Director at Icon. Mr Kay has worked within the AP Wireless Group since 2020. He was previously employed by Cell:cm Ltd and, prior to that, worked for Mono Consultants Limited, a network infrastructure provider, for some 18 years. Mr Kay commenced his current position with Icon in January 2023 and had previously been involved in the review of sites described by Mr Ward. Mr Kay had been aware that proposals for the Steps Hill Sites were put to Icon's Board at a meeting in November 2022. He had also been aware that in December 2022 instructions were given to the planning consultants, Entrust, to make the Prior Approval Application. However, he was not directly involved on behalf of Icon at that stage, so his evidence was limited to the background and rationale for the selection of sites in general. At a more general level, we did find Mr Kay's evidence helpful in understanding Icon's business model and commercial objectives.

(4) Ralph Freemantle is Head of Structural Design for Icon. Prior to joining Icon Mr Freemantle worked for CTIL for nine years as a Design Engineering Manager. Mr Freemantle has worked in the telecommunications industry since 1997, and has extensive experience in the design and construction of towers, masts and other network infrastructure. Mr Freemantle's experience and engineering expertise in relation to the design and construction of network infrastructure was apparent in his evidence, which was straightforward and clear. We found Mr Freemantle's evidence to be of particular assistance in understanding what work has so far been done on the Orange Site and the purpose behind that work, and in understanding what further work remains or may remain to be done.

The expert evidence

95. By the Directions Order the parties were given permission to call expert evidence in the disciplines of telecommunications and planning, limited to one expert per party in each discipline.

96. Vodafone instructed Rhys Enfield as an expert in telecommunications. The Respondents instructed Brian Collins as an expert in telecommunications. The questions which these experts were asked to address essentially related to the feasibility, in terms of technical requirements, of moving the Active ECA from the Masts (the Vodafone Mast and the MBNL Mast) to the New Tower and in terms of the ability of the operators to provide their

network services from the New Tower as opposed to the Masts. Each expert produced a report and a supplemental report, and the experts combined to produce a joint statement. In the event the parties elected not to call their telecommunications experts to give oral evidence at the Trial, and their evidence was barely referred to in the submissions of the parties. Accordingly, and so far as the evidence of the telecommunications experts is relevant to what we have to decide, we are confined to the written evidence of the experts.

97. The opposite was the case in relation to the planning experts. Vodafone instructed Norman Gillan as an expert in planning. The Respondents instructed Saleem Shamash as an expert in planning. The questions which the planning experts were asked to address essentially related to the issue of whether Icon was, as a condition of the Prior Approval, required to remove the Masts and to migrate the Active ECA on the Masts to the New Tower. Each expert produced a report and a supplemental report, and the experts combined to produce a joint statement. There were considerable differences of expert opinion between Mr Gillan and Mr Shamash. The cross examination of each expert occupied the best part of a day of the Trial, and the planning issues also occupied a substantial part of the closing submissions.

98. Given the differences of expert opinion between Mr Gillan and Mr Shamash, we shall reserve our general observations on their evidence to our determination of the planning issues, at a later stage in this decision.

99. We now turn to our analysis and determination of the Preliminary Issues.

Points preliminary to the Preliminary Issues

100. In their closing submissions, the Respondents' counsel made five preliminary points relating to the policy objectives behind the Code and the need to interpret the provisions of the Code in such a way as to give effect to those policy objectives. These preliminary points were general points, made at a high level. We have kept these points in mind, in our analysis and determination of the Preliminary Issues. We add two points of our own.

101. First, we do not think that these general points, in and of themselves, supply the answers to any of the issues we have to decide. Second, a certain amount of the argument in the case engaged what, for want of a better expression, we refer to as the legitimacy of the Respondents being able to achieve a result where, if the 2003 Agreement was terminated without renewal, Vodafone could effectively be compelled to migrate to the Orange Site paying, we assume, a rent more favourable to Icon than would be the case if Vodafone was able to renew the 2003 Agreement and continue to make use of the Vodafone Site. For their part the Respondents were anxious to stress that, if the 2003 Agreement was renewed, the benefit of the renewed agreement would immediately be assigned to CTIL, by virtue of the ability which now exists to make such an assignment pursuant to Paragraph 16. We did not find general arguments as to the merits, of this kind, to be particularly helpful. Our task is to resolve the particular issues which arise within each of the Preliminary Issues.

102. So far as the Code is concerned, our task is to apply the provisions of the Code, where relevant and engaged, in accordance with the terms of the Code and, subject to respecting those terms and again where relevant, in such a way as to give effect to the general policy objectives behind the Code. In this context, and where we are concerned with particular questions of interpretation of the Code we note and follow the approach identified by Lady Rose JSC in *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd* [2022] UKSC 18 [2022] 1 WLR 3360, at [106]:

> *"106 In light of Lord Nicholls' and Lord Mustill's comments, with which I respectfully agree, the starting point here is not to try to define the word "occupier" and then allow that definition to mandate how the regime established by the code works. The correct approach is to work out how the regime is intended to work and then consider what meaning should be given to the word "occupier" so as best to achieve that goal."*

Preliminary Issue (a) – analysis and determination

(i) Has there been a breach or have there been breaches of the Alienation Clause?

103. We take this question first because, if there has been no breach, the remaining questions do not arise. In answering this question, we are required to address the construction of the 2003 Agreement. We are also required to address the construction of the relevant agreements between Vodafone and CTIL, namely the Contribution Agreements and the 2012 MSA, which are lengthy and complex. There was no dispute over the general principles of construction which we should apply, which are well-known and do not need to be set out here. In particular, Vodafone's counsel drew our attention to the summary of these principles set out by Lord Neuberger PSC in *Arnold v Britton* [2015] UKSC 36 [2015] AC 1619, at [15]:

> *"15 When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn [1971] 1 WLR 1381, 1384—1386; Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995—997, per Lord Wilberforce; Bank of Credit and Commerce International SA v Ali [2002] 1 AC 251, para 8, per Lord Bingham of Cornhill; and the survey of more recent authorities in Rainy Sky [2011] 1 WLR 2900, paras 21—30, per Lord Clarke of Stone-cum-Ebony JSC."*

104. So far as breach is concerned, the starting point is the 2003 Agreement. Following the withdrawal of the allegation that Vodafone has transferred the Rights to CTIL, there remains the allegation that there has been a sharing of the Rights or some of them with CTIL.

105. In particular, and as Mr Watkin explained in closing submissions, the Respondents rely upon the fact that the grant of the Rights included the right to install and use the Passive ECA on the Vodafone Site. The Respondents' case is that it is CTIL which has been and is using the Passive ECA on the Vodafone Site for the purposes of its own business. While, as mentioned above, the Respondents no longer allege a transfer of the Rights to CTIL, they do allege that the beneficial interest in the Passive Assets has been transferred to

CTIL, together with a transfer of the goodwill in the Vodafone Site Management Business (as defined in the Contribution Agreements) and a transfer of the management and exploitation of managed sites and the Passive Assets (as defined in the Contribution Agreements) on those sites.

106. The 2003 Agreement itself contains two qualifications to the restriction on sharing the Rights.

107. First, by the Deed of Variation, Vodafone is permitted to share the Vodafone Site and the Rights with Telefonica, and has done so. We have noted that the company referred to in the Deed of Variation is Telefonica O2 UK Limited, while the company we are referring to as Telefonica, is Telefonica UK Limited. We understand that Telefonica O2 UK Limited is the former name of the company (Telefonica UK Limited) we are referring to as Telefonica. It follows that paragraph 1.11.3 of the Alienation Clause, as incorporated into the Alienation Clause by the Deed of Variation, applies to Telefonica.

108. Second, by paragraph 8.4 of the Fifth Schedule to the 2003 Agreement, the rights granted to Vodafone by the 2003 Agreement are expressed to extend to the exercise of those rights by Vodafone's *"agents contractors personnel telecommunications link providers and others authorised by Vodafone from time to time"*. It is Vodafone's case that this is what has happened in the present case. So far as CTIL has exercised the rights granted by the 2003 Agreement in respect of the Vodafone Site, it has done so as the agent of Vodafone, for the purposes of Vodafone's business. Counsel were agreed that paragraph 8.4 essentially replicated the common law position; namely that exercise of rights in respect of premises, by the agent of the person who has the benefit of those rights, does not, without more and provided that the agent is acting in their capacity as agent, amount to a transfer or sharing of those rights.

109. The material we have to consider and analyse, in relation to the question of whether the Alienation Clause has been breached, falls into two broad categories. First, there are the relevant agreements entered into between Vodafone and CTIL. As agreed between the parties, the agreements we need to analyse in this first category comprise the Contribution Agreements and the 2012 MSA. Second, there is the remainder of the evidence adduced at the Trial, so far as it bears or is said to bear on the question of whether the Alienation Clause has been breached. Although it is convenient to consider these two categories of material in turn, we stress that the factual background is relevant to our analysis of the agreements between Vodafone and CTIL, in two respects. First, the factual background is relevant, in the construction of the relevant agreements, so far as it forms part of the admissible factual matrix at the time when a particular agreement was entered into. Second, the conduct of the parties, subsequent to a particular agreement is capable of being relevant, if and in so far as it casts light on the admissible factual matrix at the time when the relevant agreement was entered into. For these reasons we have kept the factual background in mind, in our analysis of the relevant agreements.

110. Before we come to the first of the above categories, namely the relevant agreements, it is convenient to make express reference to some of the authorities to which we were referred on the question of breach. We were referred, in particular, to a number of cases where the courts have had to consider where the dividing line is to be drawn between (i) occupation of premises by an agent, for the purposes of the business of the principal, and (ii) occupation of premises by a person for the purposes of their own business. We refer, in particular, to three of these cases.

111. In *Dellneed v Chin* (1986) 53 P&CR 172 the question before Millett J (as he then was) was whether what was described as a management agreement, entered into in relation to a Chinese restaurant, had in fact taken effect as a lease. The management agreement had been entered into between Mr Chin, the long leasehold owner of the premises, and Dellneed Limited for the purposes of Dellneed running a restaurant from the premises. The management agreement reflected a traditional arrangement in the Chinese restaurant trade, whereby an established restauranteur would make their premises available to a newcomer to the restaurant business who did not have the capital or experience to start up on their own.

112. In his judgment Millett J analysed the provisions of the management agreement in detail. His conclusion, on the basis of that analysis, was stated in the following terms, at page 185 of the report:

> *"It is plain from what I have already said that the management agreement does not represent the true relationship between the parties and that one of its purposes was to mislead the landlord should he make enquiries of the basis upon which Dellneed was or appeared to be in possession. It is plain that what was paraded as a management agreement was in truth nothing of the kind. Whatever the true relationship of the parties created by the agreement it was not the relationship of owner and manager of a business. The business which Dellneed was "to manage" was its own."*

113. So far as the substance of the transaction was concerned, Millett J stated his conclusion in the following terms, at pages 185-186 of the report:

> *"The substance of the transaction in the present case was abundantly established by the evidence. It was that for a period of three years Dellneed was to have the use of a fully furnished and equipped restaurant, with an established name and reputation on which to carry on its own restaurant business; that Mr. Chin was to make his advice and experience available to Dellneed; and that Dellneed was to pay to Mr. Chin the outgoings of the premises and an additional £400 a week so that Mr. Chin should receive this latter sum clear. I am quite satisfied that this arrangement necessarily involved, did involve and was intended to involve the granting of exclusive possession to Dellneed."*

114. In *Teeside Indoor Bowls Ltd v Stockton-on-Tees Borough Council* [1990] 2 EGLR 87 the question, again, was whether a local authority could demonstrate an intention to occupy certain premises within a leisure complex, which had been used as an indoor bowling club, within the meaning of paragraph (g) of Section 30(1) of the 1954 Act. The tenant of the premises, which had constructed and run the bowling club from the premises, pursuant to a 21 year lease granted by the local authority, argued that the local authority could not prove the intention to occupy because they intended to employ an outside company to operate the bowling club. For this purpose the local authority had entered into a detailed agreement with the company, pursuant to which the company was to operate the bowling club. The judge at first instance decided that this agreement was what it was said to be, namely a management agreement, so that the local authority was able to say, for the purposes of paragraph (g), that it would be occupying the premises through the operating company. The tenant appealed to the Court of Appeal. The appeal was given short shrift. Following a brief review of the terms of the management agreement Lloyd LJ, with whom Ralph Gibson LJ and Sir Denys Buckley agreed, stated his conclusion on the terms of the management agreement in the following terms, at 88L-M:

"Nobody suggests that any of these provisions — and there are many others which point in the same direction — are a sham. They give the council almost complete control over the operation of the company in running the club, as indeed the judge found. Clause 6 of the agreement governs the disposal of surplus income from running the club. Mr Merritt does not suggest that those provisions are in any way inconsistent with agency. It follows that as between the council and the company the council always intended to occupy, and have in fact occupied, the premises for the purposes of a business carried on by them through the company as the council's agents."

115. Coming finally to *Brumwell v Powys CC* [2011] EWCA Civ 1613 [2012] L.&T.R. 14, this case featured prominently in the submissions of the parties. The case was concerned with land owned by the local council and used as a caravan park and as a camping ground. It is convenient simply to refer to this land as a caravan park. The defendant council entered into a set of three agreements with the claimant, an employee of the council who had previously been appointed as warden of the caravan park. The agreements comprised an operator agreement, whereby the claimant was appointed as operator to manage the park, a service occupancy agreement which provided the claimant with accommodation, and a contract of part-time employment to provide security at the site. The claimant commenced proceedings against the council, seeking to establish that, following the operator agreement, he had carried on the business of the caravan park on his own account and had occupied the park for that purpose. On this basis the claimant claimed that he was entitled to a new lease of the caravan park pursuant to the 1954 Act. The council's case was that the claimant had been carrying on the council's business at the park, as agent of the council and, as such, had no right to a new lease under the 1954 Act. The claimant's case failed at first instance, and his appeal to the Court of Appeal was dismissed. In his judgment in the Court of Appeal, with which Pitchford and Laws LJJ agreed, Lloyd Jones J (as he then was) first rejected the argument that the service occupancy agreement and the employment contract were sham agreements. He then went on, at [34] and [35] to identify the task before the court in the following terms:

"34 The three agreements were intended by the parties to be part of the same transaction and accordingly, in ascertaining their effect, they should be read together. The central issue, both below and before us, was whether Mr Brumwell was the agent of the council in running the business on the Site. It was common ground between the parties that if Mr Brumwell ran the business as agent of the council he could not have exclusive possession of the Park. Mr Blohm submitted that Mr Brumwell carried on the business under the agreements in his own right and that therefore he had exclusive possession of the Park, was a tenant of it and was entitled to a new tenancy. On behalf of the council, Mr Graham Walters submitted that under the new arrangements set in place in 1998 Mr Brumwell ran the business on behalf of the council and that therefore he did not have exclusive possession of the land. Alternatively, pursuant to a respondent's notice dated July 1, 2011 he argued that, independently of the conclusion on the issue of agency, there was no lease and no exclusive possession.

35 These issues are to be determined on the construction of the three agreements considered in the light of the surrounding circumstances and the purpose to be served by the agreements but not, as the judge observed, by reference to pre-contract negotiations. In construing the agreements the language and legal terminology employed by the parties are not conclusive

in determining the legal incidents of the relationships; it is the substance of the agreements which matters."

116. In reviewing the terms of the agreements, Lloyd Jones J noted a number of features of the operator agreement which he characterised as pointing strongly to the conclusion that the claimant carried on business on behalf of the council. His conclusions on the overall effect of operator agreement, even without taking into account the two other agreements which also had to be considered, were in the following terms, at [42] and [43]:

> *"42 At each step of the preceding analysis of the terms I have considered whether the fact that it was contemplated that the business would revert to the council might explain the degree of control by the council over the operation of the business by Mr Brumwell. However, to my mind, this cannot explain the remarkable intensity of control retained by the council over the business. Similarly, I have considered whether the council's interest as a public authority in promoting tourism in mid-Wales could provide an explanation for its retention of control in the respects identified. However, I agree with the judge that the terms of the Operator Agreement go considerably beyond what is reasonably explicable by reference to any responsibilities the council may have as a public authority for the promotion of tourism.*
>
> *43 The cumulative effect of these provisions leads me to the clear conclusion that Mr Brumwell undertook to manage the undertaking as the agent of the council."*

117. Keeping in mind the principles established by these and the other authorities to which we were referred on the question of breach, we turn to our analysis of the relevant agreements between Vodafone and CTIL; namely the Contribution Agreements and the 2012 MSA. There is one other preliminary point which we should make before our analysis. The Contribution Agreements and the 2012 MSA are lengthy and complex documents. We have been through the provisions of the agreements in detail, and we have had that detail in mind in our consideration and analysis of the agreements. It is not however feasible to make express reference to all of the provisions to which our attention was drawn in the agreements, nor expressly to go through the detail of all relevant parts of the agreements.

118. We start with the 2012 Contribution Agreement. We have already set out Recitals (R) and (S). They are important for two reasons.

119. First, Recital (R) recorded the intention of the parties that the telecoms site management business of each of the operators, including the single grid of sites and the passive radio access network assets on such sites should be transferred to and carried on by CTIL. CTIL was to acquire *"real estate interests in the single grid of sites over a period of time and in a structured manner so as to achieve the single grid as efficiently and quickly as possible"*. Thus, what was intended was a transfer to CTIL of Vodafone sites, including their management and Passive ECA, over a period of time and in a structured manner.

120. Second, Recital (S) recorded the intention of the parties that CTIL should, once operationally ready to do so, *"as agent of Telefonica and Vodafone"*, take over the management of all the sites belonging to Telefonica and Vodafone, pending the transfer of the sites selected for the single grid to CTIL, and take decisions to decommission sites which were no longer required. Each of Telefonica and Vodafone was to appoint CTIL as its agent and to grant to CTIL the rights it needed to undertake such management activities

under its contribution agreement. Thus, what was intended was that CTIL would manage sites belonging to Telefonica and Vodafone, pending their transfer to CTIL, as agent of, respectively, Telefonica or Vodafone.

121. The intentions stated in these recitals were carried over into the clauses of the 2012 Contribution Agreement. The basic obligation in relation to the intended transfer was set out in clause 2, in the following terms:

> *"2.1 Vodafone shall sell and JVCo shall purchase, with effect from Completion, in accordance with the terms of this Agreement and subject to the provisions of Clause 5 (Third Party Consents) the Vodafone Site Management Business, constituted by the Sale Assets, so far as possible as a going concern.*
> *2.2 The Vodafone Site Management Business to be transferred to JVCo shall comprise the management and exploitation of the Transferred Sites and the Managed Sites and the Passive Assets located on those Sites, including:*
> *2.2.1 site acquisition, design and build;*
> *2.2.2 site installation and commissioning;*
> *2.2.3 site operation and maintenance;*
> *2.2.4 making sites available to mobile network operators for the installation of Active RAN Assets on the sites; and*
> *2.2.5 site decommissioning.*
> *2.3 For the avoidance of doubt, notwithstanding the provisions of Clause 2.1, the transfer to JVCo of legal and/or beneficial ownership of any interest in a Site shall be completed in accordance with the provisions of Clause 5 (Third Party Consents) unless no Third Party Consents are required, in which case the Vodafone Transferring Site will be transferred to JVCo on Completion."*

122. The definitions used in the 2012 Contribution Agreement were located in a separate document, described as the Beacon Glossary, which was attached, as we understand the position, to a separate agreement or agreements relating to Project Beacon. Where we refer to definitions in our analysis of the 2012 Contribution Agreement, we are referring to the definitions in the Beacon Glossary.

123. Clause 2 introduced a number of the key definitions used in the 2012 Contribution Agreement. The Vodafone Site Management Business was defined in the following terms:

> *"Vodafone Site Management Business means the business of managing and exploiting a network of Sites and the Passive Assets located on those Sites, as carried on by Vodafone as at the date of Closing, including the goodwill attaching to that business and the activities of acquiring, designing, building, installing, commissioning and decommissioning Sites"*

124. The Vodafone Site Management Business was expressed to be constituted by the Sale Assets, which were identified in Schedule 2 to the 2012 Contribution Agreement. The Sale Assets listed in Schedule 2 included the Vodafone Transferring Sites and the Passive Assets located on those Sites, and the Vodafone Managed Sites and the Passive Assets located on those Sites (subject to clauses 6.11, 6.12 and 9.9). Passive Assets were defined at some length. The definition corresponds, more or less, to the supporting infrastructure on a mobile communications site which we are referring to as Passive ECA.

125. A Vodafone Managed Site was defined to mean:

"a Site in the Territory owned by, leased or licensed to Vodafone or a member of Vodafone's Group including any Sites identified as Managed Sites in Schedule 3 (Sites) of the CA between Vodafone and JVCo which (i) has not been decommissioned and (ii) is not a Transferred Site), which is none of:

a. a Transferring Site;

b. an Excluded Site (excluding, subject to the demarcation process prescribed in paragraph 3 of Schedule 6 to a Contribution Agreement, the relevant part of such Excluded Site which is demarcated as a Managed Site in accordance with that paragraph);

c Site used exclusively for Excluded Networks; or

d. a Site used exclusively for transmission equipment"

126. This is a complex definition. The evidence of Ms Daniels was that the Vodafone Site falls within this definition. This was not challenged by the Respondents. We understood it to be common ground that the Vodafone Site constituted a Vodafone Managed Site, for the purposes of the Contribution Agreements and the 2012 MSA. We proceed on this basis.

127. The transfer or assignment of rights under or in respect of a Sale Asset was subject to the following important qualifications in, respectively, clauses 5.1 and 5.7:

> *"5.1 Nothing in this Agreement shall (without prejudice to the following provisions under this Clause 5) constitute a transfer or assignment (or attempted transfer or assignment) of rights under or in connection with any Sale Asset, or require JVCo to perform any obligation under a Transferring Contract or Managed Contract in place of Vodafone, if and while a Third Party Consent is required to the transfer or assignment of such Sale Asset to JVCo, or to the performance by JVCo of that obligation."*
>
> *"5.7 When (and only when) a Third Party Consent required under this Clause 5 is given, the relevant Sale Asset shall be transferred to JVCo."*

128. This was supplemented by clause 7.8, which provided as follows:

> *"7.8 Nothing in this Agreement shall oblige either Party to take any action (or omit to take any action) which would result in a breach of any Site Agreement or Third Party Consent. Each Party shall use all reasonable endeavours to obtain any Third Party Consent necessary to enable JVCo to perform its obligations under this Agreement."*

129. As can be seen, the transfer or assignment of rights under or in connection with a Sale Asset was deferred, and CTIL was not required to perform any obligations under a Transferring Contract or a Managed Contract in place of Vodafone, if and while a Third Party Consent was required to the transfer or assignment of the relevant Sale Asset to CTIL. Clause 5.2 stated, amongst other matters, that a Third Party Consent was required for the purposes of clause 5 if, in the absence of that consent, approval or waiver, the assignment in question would result directly or indirectly in the breach of the relevant Site Agreement. A Third Party Consent was defined to mean:

> *"a licence, concession, permit, authorisation, certificate, approval, registrations, agreement, permission and/or consent from a Third Party (including a Regulatory Authority)"*

130. A Third Party was defined to mean a person who was not Telefonica, Vodafone or CTIL. The consent required by the Alienation Clause thus qualified as a Third Party Consent. As such, no transfer or assignment of the Rights was or could be effected by the 2012 Contribution Agreement, in the absence of the consent required by the 2003 Agreement.

131. Clause 4.1 dealt with conduct prior to completion of the transfer of a Sale Asset. Clause 4.1.1 provided as follows:

> *"4.1.1 Pending the transfer of a Sale Asset, and subject to Clause 5.3.1 (Transfer of Sites to JVCo), Clause 5.3.2 (Landlord Negotiations), Clause 7 (Management Services), Clause 9.2 (Termination of Managed Contracts) and Clause 11 (Decommissioning of Sites) Vodafone shall:*
> *(A) continue to carry on its business insofar as it relates to such Sale Asset in the normal course in compliance with all Applicable Laws; and*
> *(B) take all reasonable steps to preserve and protect the Sale Assets and shall notify JVCo in writing promptly of any material adverse change in the Sale Assets."*

132. Clause 6 dealt specifically with the use of Vodafone Managed Sites and Passive Assets. Clause 6.1 provided as follows:

> *"6.1 Pending transfer to JVCo of the Vodafone Managed Sites and the Passive Assets located on the Vodafone Managed Sites (or the decommissioning thereof pursuant to Clause 11 (Decommissioning of Sites), Vodafone hereby appoints JVCo, with effect from JVCo RFB Date, as its agent to manage the arrangements under which:*
> *6.1.1 Vodafone:*
> *(A) is entitled to use each Vodafone Managed Site and the Passive Assets located at each Vodafone Managed Site;*
> *(B) has the benefit of services provided by JVCo in respect of each Vodafone Managed Site; and*
> *(C) accesses each Vodafone Managed Site*
> *in each case for the purposes of providing services to Vodafone in accordance with this Agreement; and*
> *6.1.2 Telefónica and Third Parties:*
> *(A) receive services from, or otherwise use, Passive Assets located at Vodafone Managed Sites; and*
> *(B) are entitled to access Vodafone Managed Sites in order to locate their Active RAN Assets on such Vodafone Managed Sites,*
> *And each Party shall comply with Clause 6.4 in relation to the grant of licences to access and occupy in relation to such Vodafone Managed Sites."*

133. The JVCo RFB Date was defined to mean 12th November 2012, or such other date as the Parties might agree. So far as we are aware, no other date was agreed, so that the JVCo RFB Date fell shortly after the date of the 2012 Contribution Agreement. The Management Services to be provided by CTIL were dealt with in clause 7. It is not necessary to set out the whole of this clause. We note, in particular, clauses 7.1 and 7.3:

> *"7.1 From the JVCo RFB Date, JVCo shall provide to Vodafone the following services:*
> *7.1.1 managing the arrangements referred to in Clause 6.1;*

7.1.2 operation and maintenance services at each Vodafone Managed Site, including:

(A) operation of Passive Assets;

(B) maintenance of Passive Assets;

(C) site access control and management;

(D) management of site security;

(E) management of energy consumption at sites; and

(F) compliance with all obligations on the part of Vodafone under any Site Agreements.

7.1.3 tracking and management of asset registers (including registers of Managed Sites and Passive Assets and Active RAN Assets on the Managed Sites); and

7.1.4 all other activities, functions, responsibilities and obligations that are necessary for, or an inherent part of, the performance of JVCo's obligations under this Agreement,

*(together the **"Management Services"**).”*

“7.3 JVCo shall comply with all reasonable instructions of Vodafone and all processes or procedures, whether legal or operational procedures, which are consistent with this Agreement and reasonably required by Vodafone from time to time in respect of the Management Services.”

134. We also note clause 36.4 of the 2012 Contribution Agreement, which was in the following terms:

> *“Nothing in this Agreement or any documents referred to herein shall create or be deemed to create a partnership or the relationship of principal and agent or employer and employee between the Parties or to constitute a joint venture between the Parties or other jointly undertaken enterprise activities other than as expressly set out in this Agreement or in the a Project Agreement. No party to this Agreement has the authority or power to bind or contract in the name of or to create liability for or pledge the credit of another party to this Agreement in any way for any purpose.”*

135. It seems to us that the intention behind clause 36.4 was clear. Its purpose was to ensure, so far as the clause was needed to achieve this purpose, that the 2012 Contribution Agreement did not confer any status on CTIL beyond that provided by its express terms; namely to act as agent of Vodafone in the various tasks and matters specified in the 2012 Contribution Agreement.

136. Pausing the analysis at this point, we can see nothing in the provisions of the 2012 Contribution Agreement which supports the allegation of breach of the Alienation Clause. The allegation of transfer of the Rights has been abandoned. The allegation of sharing of the Rights seems to us to be contradicted by the provisions of the 2012 Contribution Agreement which we have considered. We highlight the following points, in particular:
    (1) Recitals (R) and (S) make it quite clear that what was intended was the provision of site management services by CTIL, as agent of Vodafone and Telefonica.
    (2) This relationship of agency was confirmed by (amongst other clauses) clause 6.1.
    (3) It was clear that this relationship of agency was to continue, pending the transfer to CTIL of the relevant Vodafone Managed Site and the Passive Assets located thereon; see in particular clause 4.1 and clause 6.1.

(4) Where a Third Party Consent was required, transfer of the relevant Sale Asset was to take place only when the Third Party Consent was obtained; see clause 5.7. Pending transfer, the role of CTIL was to provide management services, as agent of Vodafone and Telefonica.

(5) The parties were at pains to stipulate that nothing in the 2012 Contribution Agreement should have the result of bringing about a breach of a Site Agreement or a Third Party Consent; see in particular clauses 5.1, 5.7 and 7.8. Quite clearly, the parties did not intend that the 2012 Contribution Agreement should have the effect of putting Vodafone in breach of the Alienation Clause, and took pains to spell out that the 2012 Contribution Agreement could not have this effect.

137. In their written and oral closing submissions the Respondents' counsel concentrated their submissions, so far as the 2012 Contribution Agreement was concerned, on the Passive Assets; that is to say the Passive ECA on the Vodafone Site. In his oral closing submissions Mr Watkin drew our attention, in particular, to clause 6.12 which provided that, in relation to the transfer of Passive Assets located on Vodafone Managed Sites, *"legal ownership of Passive Assets"* should only transfer to CTIL upon transfer of the relevant Vodafone Managed Site to CTIL. Mr Watkin's point was that clause 6.12 did not deal with the beneficial interest in the Passive Assets. It dealt only with ownership of the legal title. The beneficial interest in the Passive Assets, so Mr Watkin submitted, was transferred to CTIL by clause 5.5.2, which provided, in its most relevant part, as follows:

> *"5.5.2 while a Third Party Consent is required to the transfer or assignment to JVCo of rights under or in connection with a Sale Asset which is not a Vodafone Transferring Site or a Vodafone Managed Site:*
>
> *(A) Vodafone shall hold these rights and all monies or sums received under a Transferring Asset or Transferring Contract after Completion on trust for JVCo absolutely, to the extent that a Third Party Consent is not required in order for it to do so and (in the case of a Transferring Contract) the Parties shall treat such Transferring Contract as a Managed Contract;"*

138. Mr Watkin's essential submission was that this (as he submitted) transfer of the beneficial interest in the Passive Assets to CTIL was consistent with other evidence which supported his argument that the Vodafone Site Management Business was being carried on by CTIL on the Vodafone Site, for the profit and risk of CTIL. It seems to us that there are two problems with this submission.

139. The first problem is that the submission assumes that clause 5.5.2(A), as a matter of construction, did have the effect of creating a trust of the Passive Assets. As we read the clause, this is not correct, for the following reasons.

140. Clause 5.5.2 is concerned with rights under or in connection with a Sale Asset which is not a Vodafone Transferring Site or a Vodafone Managed Site. The Vodafone Site is, and was a Vodafone Managed Site. The Sale Assets were defined in Schedule 2 to the 2012 Contribution Agreement. Paragraph 2 of the Second Schedule refers to the Vodafone Managed Sites *"and the Passive Assets located on those Sites"*. Mr Watkin's essential point was that the Passive Assets were clearly distinguished from the Vodafone Managed Sites throughout the 2012 Contribution Agreement, and thus qualified as *"a Sale Asset which is not a…..Vodafone Managed Site"*, within the meaning of clause 5.5.2.

141. On its face, there is merit in this argument. There is a separation of the wording in paragraph 2 of the Second Schedule between the Vodafone Managed Sites and the Passive Assets located thereon, which can be carried over into the identification of a Sale Asset which is not a Vodafone Managed Site in clause 5.5.2. This analysis is supported by the reference to legal ownership in clause 6.12. There are however difficulties with this analysis if one looks beyond sub-clause (A) of clause 5.5.2.

142. If one looks at the remainder of the sub-clauses in clause 5.5.2, which set out various obligations on the part of Vodafone in respect of Sale Assets subject to the trust imposed by sub-clause (A), they read very oddly if they were intended to extend to Passive Assets on Vodafone Managed Sites.

143. Looking more widely at the 2012 Contribution Agreement, there are provisions which are inconsistent with the argument that clause 5.5.2(A) created a trust of Passive Assets on Vodafone Managed Sites, pending a subsequent transfer of legal title. We have already set out clause 6.1. By clause 6.1 Vodafone appointed CTIL, as its agent, to manage the arrangements under which Vodafone did the things referred to in sub-clause 6.1.1, *"in each case for the purposes of providing services to Vodafone in accordance with this Agreement and the Master Services Agreements"*. The things referred to in sub-clause 6.1.1 included the use of each Vodafone Managed Site and the Passive Assets located at each Vodafone Managed Site. The scheme of clause 6.1 seems to us to be inconsistent with CTIL already having the beneficial interest in the Passive Assets. On the same theme, we also note clause 33.3.1, which provided that the risk in relation to Passive Assets on Vodafone Managed Sites was to be with Vodafone. Also on the same theme the relevant provisions of the 2012 Contribution Agreement provided for CTIL to collect revenues from the Passive Assets as agent of Vodafone. If however CTIL became the beneficial owner of the Passive Assets on the Vodafone Managed Sites, by virtue of clause 5.5.2, it is difficult to understand why the 2012 Contribution Agreement did not provide for the risk and reward in relation to these Passive Assets to vest in CTIL

144. It is also important to keep in mind that clause 5.5.2(A) does not establish a trust of a Sale Asset as such. The trust is established in relation to *"rights under or in connection with"* a Sale Asset which is not a Vodafone Managed Site. Where Passive Assets were concerned, it is not obvious what these rights might have been. If, by contrast, one treats clause 5.5.2 as directed, at least principally, towards Transferring Assets and Transferring Contracts, as referred to in paragraphs 3 and 4 of Schedule 2 to the 2012 Contribution Agreement, clause 5.5.2 makes much better sense.

145. For these reasons, we conclude that the trust established by clause 5.5.2(A) did not, on its true construction, extend to Passive Assets on Vodafone Managed Sites. Even if we are wrong in this conclusion, it seems to us that, at most, clause 5.5.2(A) established, in relation to Passive Assets on Vodafone Managed Sites, a trust of rights under or in connection with these Passive Assets, as opposed to a trust of the Passive Assets themselves. It seems to us that a trust of this kind falls short of what the Respondents are seeking to establish, in terms of ownership of the Passive ECA on the Vodafone Site.

146. The second problem with the argument that the 2012 Contribution Agreement effected a transfer of the beneficial interest in the Passive Assets to CTIL is more fundamental, and more shortly stated. If it is assumed, contrary to our view, that clause 5.5.2(A) did create a trust of the Passive Assets we cannot see, at least so far as the 2012 Contribution Agreement is concerned, that this comes anywhere near altering what seems to us to have been the plain effect of the 2012 Contribution Agreement; namely to constitute CTIL as

the agent of Vodafone, in respect of Vodafone's use of the Vodafone Site. We do not accept, on this hypothesis, that the 2012 Contribution Agreement had the effect of constituting CTIL the operator of its own business, either in respect of the Passive Assets (the Passive ECA) on the Vodafone Site or otherwise.

147. We therefore conclude that clause 5.5.2 does not assist the Respondents in their case that there was a sharing of the Rights with CTIL in respect of the Vodafone Site, in breach of the Alienation Clause. Beyond this, we do not consider that there are any other provisions in the 2012 Contribution Agreement which support the Respondents' case that there was a sharing of the Rights with CTIL in respect of the Vodafone Site, in breach of the Alienation Clause. In summary therefore, we conclude that the provisions of the 2012 Contribution Agreement did not, in themselves, give rise to any breach of the Alienation Clause.

148. The position might have been altered by the 2012 MSA which was also entered into between Vodafone and CTIL and applied to the Vodafone Site. The 2012 MSA is a lengthy and detailed agreement but, having analysed its terms, we do not consider that it had the effect of sharing any of the Rights with CTIL, in breach of the Alienation Clause. Nor, in our view, did it have the effect of transferring to CTIL the legal or beneficial interest in either the Passive ECA on the Vodafone Site or the business of Vodafone in relation to the Vodafone Site. In our view, there was nothing in the 2012 MSA which converted the relationship of agency between Vodafone and CTIL, as created by the 2012 Contribution Agreement, into a relationship where CTIL ran its own business from the Vodafone Site.

149. It is not necessary to go through the terms of the 2012 MSA in much detail, or at length. We note, in particular, recital (S), which was in very similar terms to recital (S) to the 2012 Contribution Agreement:

> *"(S) It is intended that JVCo shall, once it is operationally ready to do so, as agent of the Telefónica and Vodafone, take over the management of all the sites belonging to Telefónica and Vodafone, pending the transfer of the sites selected for the single grid to JVCo and take decisions to decommission sites that are no longer required. Telefónica and Vodafone have each appointed JVCo as its agent and granted JVCo the rights it needs to undertake such management activities under a Contribution Agreement between JVCo and each operator (each on identical terms). The Contribution Agreement also provides for the transfer of other defined assets as necessary to enable JVCo to provide services to Telefónica and Vodafone."*

150. In very short summary, under the term of the 2012 MSA CTIL agreed to provide the Master Services to Vodafone in respect of the sites specified therein, in return for various fees. The services to be provided were effectively management services, to be provided by CTIL as the agent of Vodafone, not as an independent contractor running its own business from Vodafone Managed Sites. It was also made clear, in terms of the ownership of sites and the ECA thereon, that they remained in the ownership of Vodafone until transfer had taken place pursuant to the terms of the 2012 Contribution Agreement. This was reflected in clause 4.1.1, which provided as follows in relation to the ownership of sites:

> *"4.1.1 As between the Parties, and subject to the transfer of the relevant Managed Sites to JVCo pursuant to the Contribution Agreement between Vodafone and JVCo:*

(A) all Single Grid Sites, Shared Demand Sites and Unilateral Demand Sites, and Passive Assets on those Sites, shall be owned by, leased or licensed to JVCo; and

(B) all Vodafone Differential Demand Sites and Vodafone Right To Build Sites, and Passive Assets on those Sites, shall be owned by, leased or licensed to Vodafone."

151. As can be seen, these provisions were expressed to be subject to the transfer of the relevant Managed Sites to CTIL, pursuant to the 2012 Contribution Agreement. This was further reflected in clause 28.2.1, which provided as follows:

> *"The Parties acknowledge and agree that, as between the Parties:*
> *28.2.1 risk in relation to Vodafone Managed Sites, including any Passive Assets at such Sites, shall remain with Vodafone;"*

152. We also note clause 31.4 of the 2012 MSA, which was in almost identical terms to clause 36.4 of the 2012 Contribution Agreement, as follows:

> *"Nothing in this Agreement or any documents referred to herein shall create or be deemed to create a partnership or the relationship of principal and agent or employer and employee between the Parties or to constitute a joint venture between the Parties or other jointly undertaken enterprise activities in each case other than as expressly set out in this Agreement or in a Project Agreement. Neither Party has the authority or power to bind or contract in the name of or to create liability for or pledge the credit of the other Party in any way for any purpose other than as expressly set out in this Agreement or a Project Agreement."*

153. In conclusion, and so far as the 2012 MSA is concerned, we accept Vodafone's submission that this was a services contract, with CTIL appointed to provide the various services specified therein. As we have said, we do not consider that it had the effect of sharing any of the Rights with CTIL, in breach of the Alienation Clause.

154. In their written closing submissions, and in Mr Watkin's oral closing submissions, the Respondents' counsel relied principally upon the 2021 Contribution Agreement. Their argument was that there were significant differences between the 2012 Contribution Agreement and the 2021 Contribution Agreement which demonstrated that, at least by the time of the 2021 Contribution Agreement, CTIL could not be said to be acting as agent of Vodafone in respect of the Vodafone Site. The evidence of Mr Yorston was that there were master services agreements between Telefonica and CTIL, which mirrored the MSAs between Vodafone and CTIL. As such, so it was submitted, there was the equivalent of the 2021 MSA between Telefonica and CTIL.

155. The effect of all this, so it was memorably submitted by the Respondents' counsel, was that CTIL was not acting as the equivalent of Vodafone's *"plumber"* or *"cleaner"* in relation to the Vodafone Site. Rather, CTIL was acting as *"hotelier"* to Vodafone and Telefonica. Pursuant to the master services agreement with Telefonica, so it was submitted, CTIL was managing and exploiting the Vodafone Site, selling the equivalent of hotel space to Vodafone and Telefonica.

156. The Respondents' counsel referred us to clause 13 of the 2021 Contribution Agreement, which gives CTIL the right to demand and collect revenues, as agent of Vodafone, but also to retain all those revenues, in the following terms:

"13.1 Where lawfully permitted under any Master Site Share Licence. Individual Site Licence or Third Party Licence, with effect from the JVCo RFB Date, Vodafone hereby appoints JVCo as its agent to demand and collect revenues (including, where applicable, all amounts in respect of VAT payable in respect of such sums) arising and accruing from the provision of access to or use of the Passive Assets located at each Vodafone Managed Site to any person.

13.2 JVCo shall provide Vodafone promptly following issue with copies of all VAT invoices issued in Vodafone's name by JVCo pursuant to Clause 13.1 and shall account to Vodafone for all amounts in respect of VAT so collected within thirty (30) days of receipt.

13.3 All revenues (excluding amounts in respect of VAT) collected by JVCo pursuant to Clause 13.1 shall be retained by JVCo in consideration for the provision of the Management Services in respect of such Vodafone Managed Sites pursuant to this Agreement (for which there shall otherwise be no charge save pursuant to Clause 17.5)."

157. We were also referred to clause 14, which deals with expenses. Clause 14.1 confers responsibility upon CTIL for the payment of these expenses, in the following terms:

"14.1 Vodafone appoints JVCo as its agent to be responsible for paying, and JVCo undertakes that it shall pay from its own resources, all costs and expenses which arise on or after the JVCo RFB Date in connection with the setting up, upgrading, operation, maintenance, access to, use of or decommissioning of any Vodafone Managed Site or any of the Passive Assets at any Vodafone Managed Site, including, for the avoidance of doubt:

14.1.1 the payment of rent, licence fees and all and any other costs, fees and expenses, outgoings and taxes and other payments which arise on or after the JVCo RFB Date and which are properly due and payable in accordance with the terms of the relevant Site Agreement;

14.1.2 any expenses in relation to elements of a Managed Contract which arise on or after the JVCo RFB Date and which remain with Vodafone pursuant to Clause 9.2 (Site-Specific elements of Managed Contracts);

14.1.3 any capital expenditure incurred by JVCo on or after the JVCo RFB Date in relation to the Vodafone Managed Sites; and

14.1.4 the costs and expenses incurred by JVCo on or after the JVCo RFB Date in relation to decommissioning of Sites pursuant to Clause 12 (Decommissioning of Sites),

provided that Vodafone shall reimburse JVCo any amount in respect of VAT comprised in any costs, fees and expenses paid by JVCo out of its own pocket for which Vodafone is entitled to credit as input tax within thirty (30) days of provision to Vodafone of an invoice that complies with all requirements imposed by the relevant taxation authorities and meets all conditions necessary to allow Vodafone to obtain credit for such VAT."

158. We were also referred to clause 9.1, which confers the following responsibility upon CTIL:

"9.1.1 For the duration of its appointment pursuant to Clause 6.1 (Use of Vodafone Managed Sites and Passive Assets) and subject to the remainder of this Clause 9, JVCo shall assume sole and exclusive responsibility for, and shall manage, the due performance of all obligations and all liabilities arising or falling due for performance after the JVCo RFB Date under the Managed Contracts in

respect of the Vodafone Managed Sites or the Passive Assets located at the Vodafone Managed Sites.

9.1.2 To the extent that any obligations or liabilities (including payment obligations) under a Managed Contract do not relate to the Vodafone Managed Sites or the Passive Assets located at the Vodafone Managed Sites, such obligations and liabilities shall remain with and be managed Vodafone in accordance with the "split management" principle set out in Clause 9.1.3.

9.1.3 Each Party will provide to the other Party all information, co-operation and assistance reasonably requested by such other Party in relation to the split management arrangements provided for in Clauses 9.1.1 and 9.1.2 for Managed Contracts which relate in part to elements of Vodafone's business which are outside the scope of Project Beacon. Any disagreements in relation to such split management arrangements shall be considered and resolved at a Representatives' Meeting.

9.1.4 Each Party acknowledges that there may be contracts not currently listed in Part 2 of Schedule 4 (Contracts) which relate to activities reasonably required to be performed by JVCo in relation to the Vodafone Managed Sites and/or the Passive Assets located at the Vodafone Managed Sites, and so should be treated as Managed Contracts. If either Party identifies such a contract it shall notify the other Party in writing and such contract shall be deemed to be a Managed Contract."

159. In addition to this we were referred to clause 10, which contains the following provisions of indemnity at 10.1.1:

> *"10.1.1 Subject to Clause 30.3 (Limitations), Vodafone shall indemnify on an after-tax basis and hold harmless JVCo against all Losses which may be suffered or incurred by JVCo as a result of any act, neglect, default or omission on the part of Vodafone to perform or comply with any obligation or discharge any liabilities of Vodafone under the Managed Contracts:*
>
> *(A) arising in respect of the period prior to the JVCo RFB Date; or*
>
> *(B) which do not relate to the Passive Assets or the Vodafone Managed Sites (irrespective of the period to which such obligations or liabilities relate)."*

160. Losses are widely defined, in Schedule 12 to the 2021 Contribution Agreement, to mean *"losses, claims, damages, costs, charges, expenses and liabilities (including reasonable legal fees and disbursements)"*.

161. The essential point being made by the Respondents, by reference to these provisions, was that the 2021 Contribution Agreement had the effect of placing the entire financial risk and reward, in relation to the Vodafone Site and as between Vodafone and CTIL, on to CTIL. So, by way of example, clauses 12.1 and 13.1 of the 2012 Contribution Agreement provided for CTIL to be appointed as agent to collect revenues arising and accruing from the provision of access to or use of the Passive Assets located at each Vodafone Managed Site, and to pay the costs and expenses specified in clause 13.1. The revenues were the revenues of Vodafone, and CTIL was entitled to payment for its services and reimbursement of expenses in accordance with the provisions of the 2012 Contribution Agreement. By contrast, so it was submitted, the 2021 Contribution Agreement provided for CTIL to retain all the revenues and pay all the expenses out of its own resources. The same theme, of CTIL assuming direct responsibility for the management of the Vodafone

Site and the Passive ECA as its own business, was, so it was submitted, to be found in the other provisions of the 2021 Contribution Agreement to which we were referred.

162. We can see the potential significance of this point. In *Brumwell*, Lloyd-Jones J noted the fact that the business was carried on at Mr Brumwell's risk, in the sense that Mr Brumwell was required to pay a fixed sum which was not related in any way to the profitability of the undertaking. There was no profit sharing arrangement, nor was the arrangement one under which Mr Brumwell paid to the council all of the receipts up to a fixed sum. Mr Brumwell was left to make money, if the business was profitable, and to bear the loss, if it was not. As Lloyd-Jones J stated, in his judgment in *Brumwell*, at [38]:

> *"While such an arrangement is not necessarily incompatible with* [the] *status of Mr Brumwell as agent, I accept that the fact that a business is carried on by an individual at his own financial risk is normally indicative of his acting as a principal and not as an agent."*

163. In *Brumwell* however Lloyd-Jones J was not persuaded, for the reasons which we have quoted from his judgment earlier in this decision, that Mr Brumwell was operating the business of the caravan park. The cumulative effect of the provisions in the operator agreement in that case led Lloyd-Jones J to the clear conclusion that Mr Brumwell undertook to manage the undertaking as the agent of the council. In the present case the cumulative effect of the provisions in the 2021 Contribution Agreement leads us to an analogous conclusion. We do not accept the submissions of the Respondents. In our view the 2021 Contribution Agreement did not change the essential nature of the relationship between Vodafone and CTIL, as established by the 2012 Contribution Agreement and as we have analysed that relationship. It seems to us that CTIL remained as agent of Vodafone in relation to the Vodafone Site and the Passive Assets, and was not operating any independent business of its own on the Vodafone Site.

164. This is demonstrated by the clauses of the 2021 Contribution Agreement to which we were taken by the Respondents' counsel. In the case of both clause 13 and clause 14, we note that each clause provides that Vodafone appoints CTIL as its agent. The arrangements in these clauses in relation to revenues and expenses are simply part of the regime which applies to this agency. As clause 13.3 makes clear, CTIL is entitled to retain the revenues *"in consideration of the Management Services"*. The payment provisions may have changed in the 2021 Contribution Agreement, but the relationship has not changed. CTIL is still being paid for the provision of management services to Vodafone, as agent of Vodafone.

165. In the case of clause 9.1 of the 2021 Contribution Agreement, clause 9.1.1 refers to the duration of CTIL's appointment pursuant to clause 6.1, which provides as follows:

> *"6.1 Pending transfer to JVCo of the Vodafone Managed Sites and the Passive Assets located on the Vodafone Managed Sites or the decommissioning thereof pursuant to Clause 12 (Decommissioning of Sites) and subject to JVCo's obligations under the Toronto MSA and the terms of this Agreement, Vodafone hereby appoints JVCo, with effect from the JVCo RFB Date, as its agent to (and JVCo shall) manage the Managed Sites and in particular the arrangements under which Vodafone, Telefónica, each of their respective Affiliates and Third Parties are entitled to use, access and have the benefit of services from or in respect of each Vodafone Managed Site and each Party*

shall comply with Clause 6.4 in relation to the grant of licences to access and occupy in relation to such Vodafone Managed Sites."

166. Clause 6 in the 2021 Contribution Agreement is not in the same terms as clause 6 in the 2012 Contribution Agreement, but clause 6.1 in the 2021 Contribution Agreement retains the reference to CTIL being appointed as agent of Vodafone pending the transfer of the Vodafone Managed Sites and the Passive Assets located thereon. All this remains inconsistent with the submission that CTIL, under the terms of the 2021 Contribution Agreement, was operating its own business from the Vodafone Site and providing services to Vodafone in that *"hotelier"* capacity. Also inconsistent with the Respondents' argument, in the context of clauses 6 and 9, is clause 9.2 of the 2021 Contribution Agreement, which specifically provides for the benefit and burden of Managed Contracts to remain with Vodafone, pending the transfer of the relevant Managed Site to CTIL:

> *"To the extent that a Managed Contract relates to a Managed Site, the benefit and burden of such Managed Contract in relation to such Managed Site (including, for the avoidance of doubt, rights to receive revenue and obligations to pay expenses) shall remain with Vodafone until such Managed Site transfers to JVCo in accordance with this Agreement."*

167. So far as the indemnity provisions in clause 10 of the 2021 Contribution Agreement are concerned, the essential point remains the same. While these provisions may be said to impose material and significant obligations of indemnity upon CTIL, we cannot see that they convert the position of CTIL, in relation to the Vodafone Site, into that of a *"hotelier"*, whether clause 10 is taken in isolation or in concert with the other provisions of the 2021 Contribution Agreement. Nor can we see that this clause is inconsistent with the relationship of Vodafone and CTIL continuing to be one of agency.

168. In this context we should also make reference to clause 36.4 of the 2021 Contribution Agreement, which replicated clause 36.4 of the 2012 Contribution Agreement and (subject to minor variations) clause 31.4 of the 2012 MSA, both as quoted above. It is clear that the intention behind this clause, as continued into the 2021 Contribution Agreement, remained what it had been in relation to the 2012 Contribution Agreement and the 2012 MSA; namely to prevent the 2021 Contribution Agreement conferring any status on CTIL beyond that provided by its express terms, which was to act as agent of Vodafone in the various tasks and matters specified in the 2021 Contribution Agreement.

169. In the context of our analysis of the 2021 Contribution Agreement, there is a further important point to bear in mind. By reason of the collaboration between Vodafone and Telefonica, it is Telefonica which has control of the Vodafone Site, as a site falling within its geographical area of responsibility. Mr Page explained that, since June 2017, Vodafone has transmitted its signal through the Active ECA of Telefonica on the Vodafone Site. There clearly has been a sharing of the Rights with Telefonica in relation to the Vodafone Site, but this is authorised by the Alienation Clause, in its varied form. This seems to us to create further difficulties for the Respondents' case that there has been a sharing of the Rights with CTIL. There has been a sharing of the Rights with Telefonica, but this is authorised. The answer of the Respondents' counsel to this point was that CTIL was providing services, as business occupier of the Vodafone Site, both to Vodafone and to Telefonica. So far as Vodafone is concerned however, we have rejected the argument that the relevant agreements between Vodafone and CTIL had this effect.

170. In these circumstances it was not clear to us whether the Respondents' counsel were arguing that if the relationship between Telefonica and CTIL was one where CTIL was providing services from the Vodafone Site to Telefonica, with CTIL as the operator of its own business on the Vodafone Site, this would place Vodafone in breach of the Alienation Clause, notwithstanding that this was not the position between Vodafone and CTIL. If this argument was being pursued, we do not see how it can succeed, for at least two reasons.

171. First, the evidence we have of the relationship between Telefonica and CTIL is very limited. As we have noted, the evidence of Mr Yorston, in his first witness statement, was that there was a mirror of the 2021 MSA entered into between Telefonica and CTIL. We have not seen the mirror master services agreement, or for that matter any other agreement entered into between Telefonica and CTIL, but in the absence of challenge to this part of Mr Yorston's evidence we proceed on the basis that there is an agreement between Telefonica and CTIL which mirrors the 2021 MSA. We do not see however how this alters the overall position. It has not been necessary for us to set out an analysis of the 2021 MSA in this decision, because it does not apply to the Vodafone Site. The 2021 MSA is however the subject of a fairly lengthy analysis in the judgment in the Pound Hill Site Proceedings. We have also considered the 2021 MSA for the purposes of considering what the effect of a mirror agreement would have been, as between Telefonica and CTIL. Our analysis is the same as that set out in the judgment, which is to the effect that the 2021 MSA did not alter the relationship between Vodafone and CTIL created by the Contribution Agreements and the 2012 MSA. Putting to one side the problem that we have no knowledge what other contribution agreements or management services agreements may have been entered into between Telefonica and CTIL, if we assume that there is a mirror of the 2021 MSA between Telefonica and CTIL, it follows that that agreement could not have created a relationship between Telefonica and CTIL of the kind contended for by the Respondents. On our analysis the provisions of the 2021 MSA, if it had applied to the Vodafone Site, would not have had the effect, any more than the 2012 MSA had this effect, of converting CTIL from agent of Vodafone to a party operating its own business from the Vodafone Site. The same must apply to the master services agreement which exists between Telefonica and CTIL, if it is assumed to be a mirror of the 2021 MSA.

172. Second, we have difficulty in understanding how the relationship between Telefonica and CTIL could, in any event, be of the kind contended for by the Respondents, if the relationship between Vodafone and CTIL is that CTIL's involvement with the Vodafone Site is as agent of Vodafone, effectively providing management services to Vodafone. Nor can we understand how the relationship between Telefonica and CTIL could, in any event, place Vodafone in breach of the Alienation Clause.

173. In summary, returning to the 2021 Contribution Agreement and drawing together all of our analysis of the 2021 Contribution Agreement, we conclude that the 2021 Contribution Agreement did not change the essential nature of the relationship between Vodafone and CTIL, as established by the 2012 Contribution Agreement and as we have analysed that relationship. We conclude that CTIL remained as agent of Vodafone in relation to the Vodafone Site and the Passive Assets, and was not operating any independent business of its own on the Vodafone Site. Put more simply, we reject the argument that CTIL became the *"hotelier"* of the Vodafone Site, either in relation to Vodafone or in relation to Telefonica.

174. This concludes our analysis of the first category of material, namely the agreements entered into between Vodafone and CTIL, which we have to consider in relation to the

question of whether the Alienation Clause has been breached. Drawing together all of the above analysis, we conclude that there is nothing in this material which has given rise to a breach of the Alienation Clause.

175. We now turn to the second category of material which we have had to consider and analyse; that is to say the remainder of the evidence adduced at the Trial, so far as it bears or is said to bear on the question of whether the Alienation Clause has been breached. We can take this second category more shortly. It was not suggested by the Respondents that any of the agreements between Vodafone and CTIL were sham agreements, concealing some other relationship than that created by the relevant agreements. Nor was it suggested that there was anything in the evidence which had had the effect of varying or disapplying any of the provisions of the relevant agreement. We have already made reference to the conduct of the parties, in our analysis of the relevant agreements. We have also accepted the potential relevance of the remainder of the evidence to the factual matrix against which we have construed the relevant agreements. Beyond this, we accept that the conduct of the parties is capable of being relevant on the basis that such conduct might, independent of the meaning and effect of the relevant agreements, give rise itself to a sharing of the Rights in breach of the Alienation Clause.

176. In this context the evidence of Mrs Main was of particular value because, as we have said, she was able to give evidence from CTIL's side of the relationship with Vodafone. In her first witness statement Mrs Main explained the nature of the relationship between CTIL and Vodafone, in relation to a site such as the Vodafone Site. It was clear from this evidence that CTIL could not be described as operating a business of its own from the Vodafone Site, but was rather acting as agent of Vodafone in its dealings with the Vodafone Site which involved Vodafone. Mrs Main was cross examined at some length by Mr Watkin, but she maintained her evidence that CTIL acted as agent of Vodafone in relation to the Vodafone Site, and we do not consider that her evidence was undermined. In particular, Mrs Main emphasized repeatedly, in the course of her cross examination, the control and governance which Vodafone had over sites which were subject to a Vodafone lease. It was clear that, in referring to a Vodafone lease, Mrs Main was including sites subject to agreements such as the 2003 Agreement, the status of which has been left unresolved by the parties in these proceedings.

177. The only material blow landed by Mr Watkin in cross examination related to two rent review memoranda entered into between Mr and Mrs Buck (the previous owners of the Steps Hill Sites) and Vodafone, on 11th May 2017, recording the agreement which had been reached on the reviewed rent payable in relation to the Vodafone Site with effect from, respectively, 31st July 2012 and 31st July 2015. The signature of the person signing on behalf of Vodafone in each of the memoranda was indecipherable, but Mr Watkin made a plausible case for the hypothesis that the two signatures were the same as the signature on another document in the bundle which was identified as that of a Mr Warren. The significance of this was that Mrs Main was adamant in cross examination that a rent review carried out on a CTIL site was signed off by CTIL's Head of Legal, who was Mr Warren, while a rent review on a Vodafone site would be signed off by Vodafone. This prompted the obvious question as to why, if a rent review on a Vodafone site would be signed off by Vodafone, there were two rent reviews in relation to the Vodafone Site which had, apparently, been signed off by Mr Warren, Head of Legal at CTIL. Mrs Main did not concede that the indecipherable signature on the rent review memoranda was that of Mr Warren but, if it was, she speculated that Mr Warren had signed the memoranda with the benefit of a power of attorney given to him by Vodafone.

178. This particular part of the cross examination seemed to us to sum up the difficulties with the Respondent's case on the evidence. While this seems to us strictly to be a matter for a handwriting expert, it looked to us as though Mr Watkin was right to identify the signature on the rent review memoranda as that of Mr Warren. We do not regard it as necessary to make a finding on this question, but if we proceed on the basis that Mr Watkin was right, we do not see where this takes the Respondents' case. The two rent review memoranda are clearly expressed as being entered into between Mr and Mrs Buck and Vodafone. The signature which appears for Vodafone on the memoranda is clearly identified as being *"for and on behalf of"* Vodafone. We heard no evidence from Mr Warren, but if he did sign the memoranda, he clearly did so on behalf of Vodafone with the benefit, it must be inferred, of an express or implied authority to do so on behalf of Vodafone. Put at its highest, this evidence comes nowhere near demonstrating that CTIL was doing anything other than acting as managing agent of Vodafone in relation to the Vodafone Site. Nor does this evidence undermine, let alone contradict the evidence of Mrs Main that CTIL acted as agent of Vodafone in relation to Vodafone Site, with Vodafone rather than CTIL being the party in control.

179. We also note, in the context of the question of whether the beneficial ownership in the Passive Assets on the Vodafone Site had passed to CTIL, the evidence given by Mrs Main in answer to some questions from the Chamber President, at the conclusion of her cross examination. Mrs Main gave evidence that her understanding of the position, in relation to Passive ECA on sites held by Vodafone or CTIL, was that the Passive ECA was owned by the same person who had the interest in the relevant site. Clearly, Mrs Main could not herself, as a witness of fact, assist us with the construction of clause 5.5.2 of the 2012 Contribution Agreement (the provision relied upon by the Respondents in this context), on which we have already expressed our conclusions. Her understanding of the position does however serve to confirm that CTIL did not regard itself as having an actual interest in the Passive ECA on the Vodafone Site.

180. We also consider that we can attach some weight to the evidence of Ms Daniels and Mr Yorston; to the effect that the relationship between Vodafone and CTIL in relation to the Vodafone Site has been and remains one of agency. It is true that much of the evidence of each of these witnesses constituted commentary on the agreements between Vodafone and CTIL, to which we should not and do not attach weight. Aside from this however, both witnesses were able to give some evidence of their own on the relationship between the parties, to the effect we have just set out. The Respondents' counsel pulled no punches in closing submissions, describing Mr Yorston's evidence as his worthless second-hand understanding of the Contribution Agreements. In our view this criticism goes too far. While, as we have said, much of Mr Yorston's evidence did constitute commentary on the agreements, Mr Yorston did have evidence of his own to give on the relationship between Vodafone and CTIL, to which we attach some weight.

181. We also note that both Mr Yorston and Mrs Main confirmed in their evidence that the ultimate commercial objective of both Vodafone and CTIL, in relation to the Vodafone Site and in relation to other sites yet to be transferred to CTIL, was that the relevant site provider should enter into a new code agreement with CTIL. This evidence was not challenged. Indeed, it was relied upon by the Respondents in relation to certain parts of their submissions. This evidence seemed to us further to bring out the point that in relation to sites such as the Vodafone Site, where a transfer is still pending, the relationship between the two parties has yet to move beyond one of agency.

182. In relation to Ms Daniels' evidence the Respondents' counsel emphasized, in their closing submissions, that Ms Daniels had accepted in cross examination that it made no practical financial difference whether sites were transferred to CTIL or not. Again however, the Respondents' problem is the same as that we have identified above, in relation to the rent review memoranda. The concession of no practical financial difference comes nowhere near establishing that CTIL has been running its own business from the Vodafone Site. Concentration on this part of the cross examination also overlooks the important evidence which Ms Daniels did give on the relationship between Vodafone and CTIL. We highlight two extracts from the oral evidence of Ms Daniels. The first of these extracts is taken from Ms Daniels' cross examination, at **[T1/155/5-156/2]**, immediately prior to the extract relied upon by the Respondents:

> *"Q. The inference for that is this, isn't it, Ms Daniels, that it makes no difference in it the operation of Vodafone and CTIL's business whether or not a transfer has actually occurred because actually it's rather difficult even to work that out. Isn't that a reasonable inference?*
> *A. In relation to which part of the operation of Vodafone's business?*
> *Q. Well, point to a part of Vodafone's business in which that isn't true.*
> *A. So, in relation to the way that we interact with Cornerstone in relation to these sites, there is a difference between a Vodafone−managed site and a site that is provided by Cornerstone that it holds in its name.*
> *Q. Which is what?*
> *A. In relation to the way that we operate and interact with other parties who may be on that sharing and using that site and with the landlord, that those interactions are done in Vodafone's name with Cornerstone acting as Vodafone's agent."*

183. The second of these extracts comprises a lengthy passage of evidence taken from Ms Daniels' re-examination, at **[T1/172/17-177/10]**. The passage is too lengthy to quote in full, but we quote the following part of this extract, at **[T1/173/24-174/21]**:

> *"So, the contribution agreement, obviously, as has been explained by both counsel, sets out the basis on which there is a sale of business, which includes the sale assets from Vodafone to Cornerstone and that includes the sites , but in relation to transferring sites, to the extent that they are unable to be transferred, they −− because a third−party consent is needed or another action is needed in order to perfect the transfer of those sites , then in the interim period management services are provided by Cornerstone in relation to those sites and those management services relate mainly to undertaking the sort of activities of the tenant, as it were, on behalf of Vodafone as Vodafone agents, so that is ensuring that, you know, rental is paid, that health and safety liabilities are dealt with and other matters, and also includes managing relationships with other third−party sharers who might happen to be on that site, although I understand in relation to these sites there are no sharers, other than Virgin Media O2 that we have already referred to."*

184. The Respondents sought to argue, by reference to this part of Ms Daniels' evidence, that under the terms of the Contribution Agreements, CTIL was acting as agent of Vodafone in performing tenant functions for Vodafone, but that the basis or predominant basis of CTIL's presence on the Vodafone Site, as provided for and paid for by the MSAs, was for the purposes of the passive infrastructure business sold by Vodafone to CTIL. We cannot accept this argument. It seems to us to be contradicted by the evidence of Ms Daniels in particular, and by the evidence in general. It also depends upon the proposition, which we have already rejected, that Vodafone sold what was referred to as the passive infrastructure

business to CTIL. In relation to the Vodafone Site it is clear, both from the relevant agreements and from the remainder of the evidence, that there has been no such sale.

185. On the Respondents' side Mr Ward made reference to a number of matters in his witness statement which, he suggested, gave rise to uncertainty about which operator was actually in occupation of the Vodafone Site and whether or not there had been a breach of the Alienation Clause. We do not however attach weight to this evidence, for two reasons. First, and as we have already noted, Mr Ward's evidence was given at a high level. He was not able to give direct evidence concerning the relationship between Vodafone and CTIL in relation to the Vodafone Site. Rather, Mr Ward was commenting on documents which he had seen. Second, as was apparent from the terms of Mr Ward's witness statement, and as became further apparent in Mr Ward's cross examination, Mr Ward was not able to refer to any matter which provided any real support for the Respondents' case that CTIL was operating its own business from the Vodafone Site, or that CTIL was acting as other than the agent of Vodafone and Telefonica, respectively, in its dealings with the Vodafone Site.

186. The second reason stated in our previous paragraph applies to the various documents which were relied upon by the Respondents in support of their case that there had been a sharing of the Rights, in breach of the Alienation Clause. For the sake of completeness we will deal briefly with those documents which were highlighted in the Respondents' closing submissions. We were referred to the Director's report and financial statement for CTIL, for the year ending 31st March 2013, which sets out an account of the collaboration between Vodafone and Telefonica and the launch of CTIL as a joint venture company. This account contains the following paragraph:

> *"On commencement of its operation, the parents transferred to the company their respective interests in passive network assets at an agreed independent valuation of £960,000,00 settled by the issuance of 160,020 shares at a premium of £959,840,000 that has been credited to reserves CTIL is responsible for taking over the beneficial ownership and management of all of the cell sites belonging to Telefonica and Vodafone, pending confirmation of the transfer of the sites selected for the single grid and decisions to decommission sites that are no longer required CTIL also exclusively provides services to Telefonica and Vodafone in relation to use and access to sites and infrastructure assets on those sites."*

187. We were also referred to similar statements in CTIL's annual reports for, respectively, the years ended 31st March 2014 and 31st March 2022; in each case referring to CTIL's *"beneficial ownership and management of all the cell sites"* described as owned or operated by Telefonica and Vodafone. In the case of the annual report for the year ended 31st March 2022, there is also reference to *"the transfer by the parent companies of their respective interests in passive network assets in 2012"*. The point was also made that Vodafone's own public documents contained statements which not only did not contradict what was stated in CTIL's public documents, but were in fact consistent with the statements in CTIL's documents to the effect that CTIL had the beneficial ownership of all the sites belonging to Telefonica and Vodafone.

188. We did not find any of this material, by which we mean the documents relied upon by the Respondents in this context, either helpful or persuasive as evidence. As such, we attach little weight to this material. Documents such as annual reports, financial statements and public announcements are not dispositive documents. Nor are they contractual documents. We do not know how such documents came to be drafted, or where the information came

from which appears in the documents. In the case of CTIL's reports and financial statements the references to CTIL having the beneficial ownership and management of all of the cell sites belonging to Telefonica and Vodafone are ambiguous. It is not entirely clear to what these statements were referring, or what they were intended to mean. If they were intended to mean that the Contribution Agreements or either of them and/or the 2012 MSA had the effect of transferring the beneficial interest in the Vodafone Managed Sites to CTIL, they are plainly wrong, for the reasons which we have already set out. This may however be unfair, given the ambiguity in the statements.

189. At best, the documents relied upon by the Respondents in this context constituted secondary evidence which might, in a different case, have provided some corroborating or supporting evidence for the Respondents' case that there has been a transfer to CTIL of the beneficial interest in the Passive Assets, the goodwill in the Vodafone Site Management Business and the management and exploitation of the Vodafone Managed Sites and the Passive Assets located thereon. As it is, the Respondents have failed to establish this case, or any part of it, either by reference to the relevant agreements or by reference to any other direct evidence. The documents relied upon by the Respondents are not capable of making good this failure.

190. Drawing together all of the analysis, in this section of our decision, we conclude that the Respondents have failed to establish that there has been any breach of the Alienation Clause.

(ii) If the Alienation Clause has been breached, and if the breach is only a single breach, is a single breach sufficient to engage Paragraph (a)?

191. Given our conclusion on the question of whether there has been any breach of the Alienation Clause, this question does not strictly arise for decision. In these circumstances we make only two points on this question. First, and if the question had arisen for decision, we note that the breach of the Alienation Clause ultimately relied upon by the Respondents was the alleged sharing of the Rights with CTIL. If this sharing of the Rights had been established, it seems to us that this would have been a continuing breach of the Alienation Clause, as opposed to a single, once and for all breach. As such, and on this hypothesis, we would have concluded that the Respondents had established *"breaches"* of the Alienation Clause, within the terms of Paragraph (a), regardless of whether Paragraph (a) can also be engaged by a single, once and for all breach. Second, and on the interesting question of whether Paragraph (a) can be engaged by a single, once and for all breach, we consider that this question should be left for decision in a case where it strictly arises. We are not persuaded that obiter observations of our own on this question are either necessary or appropriate.

(iii) If the Alienation Clause has been breached, and if Paragraph (a) is engaged, was the breach or were the breaches substantial?

192. This question, again, does not strictly arise for decision. In our view it is not appropriate to attempt to answer this question on a hypothetical basis. The question of whether a breach or breaches are substantial is not one which raises an independent question of law. In order to answer the question it is first necessary to identify the relevant breach or breaches. In the absence of such identification, the question of substantiality cannot be answered. We do not think that it would be sensible or appropriate for us to attempt to hypothesise a breach or breaches of the Alienation Clause, in order to permit us to address the question of substantiality.

(iv) If Paragraph (a) is engaged, and if there has been substantial breach of the Alienation Clause, ought the 2003 Agreement to come to an end?

193. This question, again, does not strictly arise for decision. Again, in our view it is not appropriate to attempt to answer this question on a hypothetical basis. Our reasons are the same as those we have expressed in relation to the previous question.

(v) Preliminary Issue (a) – conclusion

194. Our conclusion on Preliminary Issue (a) is that Icon cannot rely on Paragraph (a). For the reasons which we have stated, the Respondents have failed to establish that Vodafone has breached any of its obligations under the 2003 Agreement. Accordingly, Paragraph (a) is not engaged.

Preliminary Issue (c) – analysis and determination

(i) The planning issues

195. Given the amount of evidence and argument which we heard on the planning issues, we find it convenient to deal with the planning issues first, and then to apply our conclusions on the planning issues, where relevant, to the remaining issues raised by Preliminary Issue (c). We begin by setting out the relevant provisions of planning legislation and the sequence of events leading to the grant of the Prior Approval.

196. The Town and Country Planning Act 1990 (**"TCPA 1990"**), as amended, defines *"development"* at Sections 55(1) and (1A) as follows:

> *"55*
> *(1)…"development means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.*
> *(1A) For the purposes of this Act "building operations" includes-*
> *(a) demolition of buildings*
> *(b) rebuilding;*
> *(c) structural alterations or additions to buildings; and*
> *(d) other operations normally undertaken by a person carrying on business as a builder."*

197. Under Section 57 of the TCPA 1990, planning permission is required for development and, under Section 58(a), it may be granted *"by a development order"*. The General Permitted Development Order 2015 (**"GPDO"**) is a development order for that purpose.

198. Pursuant to Article 3 of the GPDO, planning permission is granted for the classes of development described as permitted development in Schedule 2 to the GPDO, subject to any relevant exception, limitation or condition specified in that schedule. Part 16 of Schedule 2 concerns permitted development within the communications sector and Class A concerns Code operators. Permitted development is defined (so far as relevant to these proceedings) as follows:

> *"A. Development by or on behalf of an electronic communications code operator for the purpose of the operator's electronic communications network in, on, over or*

under land controlled by that operator or in accordance with the electronic communications code, consisting of-
(a) The installation, alteration or replacement of any communications apparatus, …"

199. The limitations and conditions applicable to permitted development under Class A make it necessary, in an AONB, to seek the prior approval of the LPA to erect a mast up to 25m in height. A mast of any greater height would require full planning permission. The prior approval process is set out in paragraph A.3 of Part 16. Paragraphs A.3(4) and A.3(5) provide (so far as relevant):

> *"(4) Before beginning the development … the developer must apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to the siting and appearance of the development.*
> *(5) The application must be accompanied by-*
> *(a) A written description of the proposed development and a plan indicating its proposed location…".*

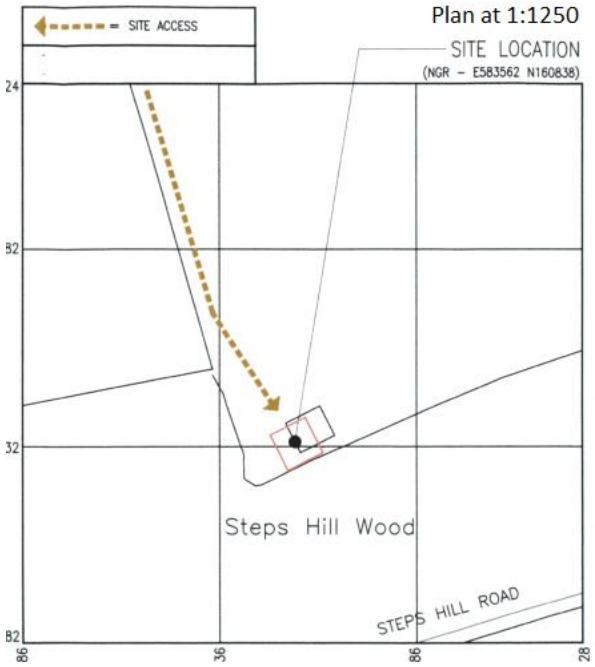
200. Paragraph A.3(9) provides (so far as relevant):

> *"(9) The development must, except to the extent that the local planning authority otherwise agrees in writing, be carried out-*
> *(a) where prior approval has been given as mentioned in sub-paragraph (8)(b)(i), in accordance with the details approved;*
> *…"*

201. Entrust submitted the Prior Approval Application (to determine if prior approval was required) to Maidstone BC on 14th December 2022. The Prior Approval Application was made on behalf of AP Wireless, the parent company of Icon and APW. The application form included a section which said *"Please specify the type of apparatus to be installed or altered (e.g. call box, mast)"*. This was completed with the following words:

> *"The removal of 2no. telecommunications base stations on 2no. masts (1no.15m and 1no.18m in height) and the consolidation of equipment on to 1no.25m lattice tower. The new tower will include relocation of 6no.antenna to 1no. new ring frames which will be attached to 1no. proposed 25m tower. In addition, to the extension of the perimeter fence and ancillary development thereto. For its prior approval to: siting and appearance."*

202. The plan submitted with the application form is included below, and is of note in the dispute because it did not include the Vodafone or MBNL sites:



203. The covering letter to the application form re-stated the description of the proposal set out above and included, *inter alia*, the following paragraphs:

> *"The proposed mast is to replace two existing installations at Steppes Hill site. The site selection and design are discussed further in the Site Supplementary Information document.*
> *…*
> *All Icon Tower installations are designed to be fully compliant with the public exposure guidelines established by the International Commission on Non-Ionizing Radiation Protection (ICNIRP). … A certificate of ICNIRP compliance is required for this installation and is included with the planning submission."*

204. Information provided in the 14 page Site Supplementary Information (**"SSI"**) document and in the ICNIRP certificate is the subject of disputed interpretation by the experts which goes to the heart of the planning issues.

205. The Prior Approval Application was considered by a planning officer at Maidstone BC who wrote a delegated report **("the Report")** dated 14th February 2023. The Report stated at paragraphs 6.17 and 6.18:

> *"6.17 In this case, it is considered by Officer's that due to there currently being no mast or telecommunications at the site there would be an impact from the proposal and as such prior approval is required.*
> *6.18 In concluding that prior approval is required, the only matters that can be considered are the siting and appearance of the proposal. The principle of a mast and paraphernalia falls within permitted development and any decision cannot decide whether it is considered necessary that a mast to support the enhanced network coverage is required."*

206. The Report recommended the grant of prior approval without conditions, but the contents of the Report are the subject of disputed interpretation by the experts, which we deal with below.

207. The Prior Approval was granted for the proposal on 14th February 2023, the same date as the Report, in the following terms:

> *"Prior Notification for Electronic Communications for the removal of 2no. telecommunications base stations on 2no. masts (1no.15m and 1no.18m in height) and the consolidation of equipment on to 1no.25m lattice tower. The new tower will include relocation of 6no.antenna to 1no. new ring frames which will be attached to 1no. proposed 25m tower. In addition, to the extension of the perimeter fence and ancillary development thereto. For its prior approval to: siting and appearance."*

208. On 19th July 2024 Maidstone BC agreed an amendment to the Prior Approval to allow an amended design with a second headframe on the New Tower. The accompanying plan showed a slight alteration to the footprint of the site, although this was not referred to in the letter seeking agreement to the amendment. Nothing turns on this amendment.

209. We have the benefit of an agreed list of the planning issues which we have to resolve. The agreed planning issues are as follows:
    (1) Is the removal of the Masts required by the Prior Approval?
    (2) Is the relocation of the antennas on the Masts required by the Prior Approval?
    (3) If the Prior Approval requires removal of the Masts, what is the risk that the LPA would (i) consider it expedient to issue an enforcement notice pursuant to Section 172 of the 1990 Act or (ii) decide to issue a breach of condition notice pursuant to Section 187A of the 1990 Act?
    (4) If the Prior Approval requires the relocation of the antennas, what is the risk that the LPA would (i) consider it expedient to issue an enforcement notice pursuant to section 172 of the 1990 Act or (ii) decide to issue a breach of condition notice pursuant to Section 187A of the 1990 Act?
    (5) What is the prospect that the LPA would have granted prior approval for the erection of the New Tower without the removal of the Masts, prior to the implementation of the erection of the New Tower?
    (6) If the Prior Approval requires removal of the Masts, what is the prospect that the LPA would grant retrospective planning permission pursuant to Section 73A of the 1990 Act, to permit the retention and use of the New Tower without the removal of the Masts?
    (7) If the Prior Approval requires removal of the Masts, what is the prospect of the LPA agreeing to amend the Prior Approval in accordance with A.3(9)-(10) of the GPDO, Part 16, so as to remove that requirement?

210. Planning issues (1) and (2) were central to the Respondents' basic position that compliance with the Prior Approval required, in three stages, construction of the New Tower, removal of the Masts and relocation of the Active ECA from the Masts on to the New Tower. The first of the three stages of its intended redevelopment had been completed and stages two and three remained to be completed. Without compliance the New Tower would be unlawful and Icon would be at risk of enforcement action by the LPA, giving rise to planning issues (3) and (4). However, it was submitted that the third stage, involving relocation of the antennas, was not actually a condition of the Prior Approval. References in the application to *"consolidation"* and *"relocation"* were, Mr Henderson said in closing, expressions of commercial intent which relied on commercial relationships to be achieved. In the SSI it had been explained that Icon was a tower company which sought to provide towers for sharing by a number of operators. Relocation of antennas is a commercial matter which Icon cannot control; it is not a material planning consideration,

as it does not serve a planning purpose, and therefore enforcement action would be unreasonable (in the *Wednesbury* sense) and an improper and unlawful use of the LPA's powers. Moreover, the prior approval process is concerned only with siting and appearance which in this case involved the removal of two masts in exchange for the erection of a tower. The absence of some or all of the antennas would not change the LPA's assessment of the acceptability of siting and appearance, so there would be no reason for them to take enforcement action.

211. It was originally Vodafone's primary case that the Prior Approval concerned only the siting and appearance of the New Tower and should not be read as requiring, as a condition, completion of the second and third stages. The likelihood of the LPA taking enforcement action to ensure completion of the second and third stages was very low, and the hypothetical prospect of a prior approval for the New Tower without the removal of the Masts, namely planning issue (5), would have been good. It was originally Vodafone's alternative position that, should the second and third stages be considered a condition of the Prior Approval, the respondents could free themselves from the condition by proper engagement with the LPA. This gave rise to planning issues (6) and (7).

212. By the time we received closing submissions on planning, Mr Radley-Gardner's primary case **[T6/48/22 -49/25]** was that the Prior Approval had authorised, under the GPDO, the siting and appearance of a fully functioning mast, which required completion of all three stages. The Respondents were unable to deliver the antennas and without completion of that stage the New Tower would be unlawful under the GPDO. His alternative position was that the Prior Approval included no condition requiring removal of the Masts because the Report was ambiguous on that.

213. The planning experts were asked to address each of the planning issues. Vodafone instructed Mr Norman Gillan to give expert planning evidence. Mr Gillan has a BA(Hons) in Economics and Business and a PgDip in Town Planning. He has been a Member of the Royal Town Planning Institute (**"the RTPI"**) since 2003. For 16 years Mr Gillan worked for a number of planning consultancy firms, predominantly in the communications sector, and in 2016 he set up Gillan Consulting Ltd. He has extensive experience in undertaking planning applications and appeals, and in prior approval applications. The Respondents instructed Mr Saleem Shamash. He qualified as a chartered surveyor in 1986 and has worked in the electronic communications sector continually since then. He is also Member of the RTPI and has specialised in planning work within the sector. Between 2000 and 2020 Mr Shamash was National Town Planning Manager at Arqiva. In 2020 he became a sole practitioner and has since advised the Respondents on various matters. Like Mr Gillan, Mr Shamash has extensive experience of town and country planning matters in the communications sector. Each expert produced a report and a supplemental report, and they combined to produce a joint statement. We now review each expert's opinion across the range of planning issues.

214. It was Mr Gillan's opinion on issues (1) and (2) that removal of the Masts and relocation of Active ECA was not part of the application and not part of the Prior Approval. The application for the Prior Approval did not specify or identify, for example by grid reference or planning reference number, the precise telecommunications base stations and masts to be removed. The covering letter submitted by Entrust with the application referred only to the Orange Site. The additional information provided in the SSI was muddled, referring variously to *"existing installation"* and *"existing installations"* without being clear whether this was the Orange Site, with its remaining concrete base/s, or the Masts. Importantly, in Mr Gillan's view, the plan accompanying the application, which is a

statutory requirement for Prior Approval, did not include the Masts. Although the heights of the masts to be removed were stated in the proposal, if removal of them was to form part of the *"proposed development"* the sites should have been included in the plan.

215. Mr Gillan had analysed the Report in some detail and concluded that rather than approving the removal of the Masts, the LPA had explicitly used their presence to provide a rationale for approving the siting and appearance of the New Tower. He relied in particular on the penultimate paragraph of the Report in which it was stated:

> "*On balance, it is considered that prior approval for a lattice tower on this site is recommended for approval. I have reached this decision largely on the basis that the site history has provided evidence that a similar structure was implemented to the site in 2002, as well as the fact that further masts exist along the backdrop of the field and that the site is well screened by woodland. It is arguable that this limits the harm in terms of the location in that the harm would not be so overt to views or openness that it would warrant refusal."*

216. Following this reasoning, Mr Gillan's opinion on issue (5) was that an alternative application for prior approval of the New Tower would have been approved without reference to removal of the Masts, because that was what the LPA had thought it had approved in any event. However, in cross-examination by Mr Henderson, Mr Gillan admitted **[T4/102/23-103/5]** that if he had been the case officer carrying out the site inspection he would have been 99% sure that the Masts visible in the field would be the masts to be removed, as stated in the application. Mr Gillan also agreed **[T4/120/21-121/15]** that the Report was not a part of the approved details and that there was no ambiguity in the description of the development in the decision notice.

217. If, contrary to his opinion, removal of the Masts and relocation of the antennas was required under the Prior Approval, it was Mr Gillan's opinion on issue (3) and (4) that the LPA would seek informal resolution of the matter, rather than taking enforcement action. Informal resolution might involve reaching a written agreement with Icon to remove reference from the Prior Approval to removal of masts and relocation of antennas. Alternatively, it might involve submission and approval of a retrospective planning application for retention of the New Tower. If the LPA did choose to take enforcement action, in Mr Gillan's opinion an enforcement notice could be successfully appealed. His opinion on issues (6) and (7) was therefore that the prospects were high of the LPA agreeing either to grant retrospective planning permission, or to amend the Prior Approval.

218. Mr Gillan then went on to say that even if, in his opinion, the Prior Approval did require removal of the Masts and relocation of the antennas, relocation of the antennas was not a matter within the control of the Respondents and therefore was unenforceable under planning law. If there was a risk of planning enforcement, then that would not be eliminated by removal of the Masts alone because a tower without any antennas would not be within the scope of the prior approval process.

219. In contrast to Mr Gillan, it was Mr Shamash's opinion on issue (1) that removal of the Masts was explicitly included in the wording of the Prior Approval. The two installations were sufficiently obvious that the sites and their occupiers did not need to be identified in the application or on a location plan. There is no statutory requirement specified for the shape and form of a location plan and, unlike a conventional planning application, there is no requirement in the GPDO to provide a plan with the application site edged red and other land owned by the applicant edged blue. In cross-examination by Mr Radley-Gardner

[T5/60/24-61/3] Mr Shamash explained that the GPDO regime is intended to be a light touch regime, such that an operator is freed from the usual bureaucracy and cost of a full planning application. Mr Shamash's opinion on issue (3) was that the possibility of the LPA taking enforcement action for non-removal of the Masts was high, once they had been alerted to the breach. The presence of three masts in the Field would be viewed as an unnecessary proliferation of masts, contrary to national and local planning policy, and would undermine the decision to grant the Prior Approval. Enforcement action could be taken either through an enforcement notice or a Breach of Condition Notice.

220. On issue (5) it was Mr Shamash's opinion that the LPA would not have granted prior approval for a 25m high new tower in an AONB without the benefit of consolidation, from two existing masts to one, to outweigh the harm, in terms of visual amenity, which the appearance of a tower visible above the tree line would cause. Similarly on issue (6) he considered that the LPA would not be prepared to grant retrospective permission for retention of the New Tower without removal of the Masts. On issue (7) Mr Shamash did not consider it likely that an amendment to the Prior Approval would gain the agreement of the LPA since it would be a fundamental alteration to the details rather than a minor amendment.

221. On issues (2) and (4), regarding, relocation of antennas, it was Mr Shamash's opinion that this detail of the Prior Approval was a less material aspect – constituting a requirement not to complete the development but to carry it out in accordance with the approved details. The LPA would be conscious that it could not enforce a condition that relies upon the cooperation of a third party outside the control of the applicant, so enforcement issues would be more nuanced. In any event, Mr Shamash considered that if the Masts were removed then Vodafone, VMO2 and MBNL would be very likely to relocate their antennas to the New Tower.

222. Having heard lengthy evidence and argument on the planning issues that we are asked to determine, we find that the answers to those issues now fall into place quite easily. We are grateful to the experts for directing us to the relevant parts of planning law and policy and for assisting us in applying them to the circumstances of this case. We found them both to be knowledgeable, helpful and sincere in their opinions. The key issue, number (1), is whether the removal of the Masts is required by the Prior Approval. Mr Gillan's opinion on this was that the Prior Approval did not require removal of the Masts, but he was not able to sustain the reasons for that opinion under cross-examination. His reliance on the ambiguity of the Report was undermined when he acknowledged, helpfully, that the details in the decision notice itself were not ambiguous and, moreover, that the Report did not have any status as part of the approved details. So, as Mr Gillan's reasons for his opinion fell away, we do not give weight to it and rely in full on Mr Shamash's evidence and reasoning to conclude that removal of the Masts is required by the Prior Approval.

223. Once the answer to the key issue is established, we have a firm basis for considering the other issues related to removal of the Masts. Looking next at the hypothetical question in issue (5), whether the LPA would have granted prior approval for the erection of the New Tower without the associated removal of the Masts, it was Mr Gillan's opinion that they would have done so, because that was already the effect of the Prior Approval. In light of our conclusion in issue (1) we cannot give weight to that opinion and are persuaded by Mr Shamash's evidence that the policy considerations to be taken into account in an AONB are such that removal of existing masts would be required to outweigh the harm of a 25m high tower visible above the tree line. For the same reasons we adopt Mr Shamash's evidence that for issues (6) and (7) there is no or, at best, a very low prospect of the LPA

granting retrospective planning permission for retention of the New Tower and the Masts, or of the LPA agreeing an amendment to the Prior Approval to permit that.

224. Turning finally to issues (2) and (4), concerning relocation of the Active ECA on the Masts, there was little difference between the experts who each said, albeit in different terms, that relocation of the antennas referred to in the approved details is not a condition of the Prior Approval and would therefore not be subject to enforcement action. We accept the reasoning that relocation of Active ECA is not a matter that concerns siting and appearance for the purposes of a prior approval and that, since it is not within the control of the Respondents, it is unenforceable as a planning condition. We note, in passing, Mr Radley-Gardner's argument that, until it has functioning antennas on it, the New Tower will be unlawful under the GPDO. Neither expert gave evidence to suggest otherwise. However, this goes beyond the set of agreed planning issues which we were asked to determine and we make no further comment.

225. For clarity we set out below the planning issues and our findings:
    (1) Is the removal of the Masts required by the Prior Approval? - Our answer is yes.
    (2) Is the relocation of the antennas on the Masts required by the Prior Approval? – Our answer is no.
    (3) If the Prior Approval requires removal of the Masts, what is the risk that the LPA would (i) consider it expedient to issue an enforcement notice pursuant to Section 172 of the 1990 Act or (ii) decide to issue a breach of condition notice pursuant to Section 187A of the 1990 Act? – The risk is a high one.
    (4) If the Prior Approval requires the relocation of antennas, what is the risk that the LPA would (i) consider it expedient to issue an enforcement notice pursuant to section 172 of the 1990 Act or (ii) decide to issue a breach of condition notice pursuant to Section 187A of the 1990 Act? – We do not consider that the Prior Approval does require relocation of the antennas. Accordingly, we do not consider that there is a risk in this respect.
    (5) What is the prospect that the LPA would have granted prior approval for the erection of the New Tower without the removal of the Masts, prior to the implementation of the erection of the New Tower? – The prospect is very low or non-existent.
    (6) If the Prior Approval requires removal of the Masts, what is the prospect that the LPA would grant retrospective planning permission pursuant to section 73A of the 1990 Act, to permit the retention and use of the New Tower without the removal of the Masts? – The prospect is very low or non-existent.
    (7) If the Prior Approval requires removal of the Masts, what is the prospect of the LPA agreeing to amend the Prior Approval in accordance with A.3(9)-(10) of the GPDO, Part 16, so as to remove that requirement? - The prospect is very low or non-existent.

(ii) Do the Claimed Works constitute redevelopment of all or part of the land to which the code agreement relates or any neighbouring land, within the meaning of Paragraph (c)?

226. There are two interlinked issues contained within this question. The first issue is whether the Claimed Works constitute works of redevelopment of land, within the meaning of Paragraph (c). The second issue is whether the Claimed Works include works of redevelopment on all or part of any neighbouring land, so far as the Claimed Works are said to include works of redevelopment on neighbouring land and so far as the Claimed Works do qualify as works of redevelopment.

227. The starting point is to identify the land with which we are concerned, in this context. By reference to the wording of Paragraph (c) *"the land to which the code agreement relates"* is the Vodafone Site.

228. By way of reminder, the Claimed Works, that is to say the works relied upon by the Respondents as the intended redevelopment within the meaning of Paragraph (c), were identified in the following terms in the Respondents' closing submissions:
    (i) Decommissioning works on the Orange Site, comprising the removal of concrete bases and a redundant meter cabinet.
    (ii) The construction of the New Tower and associated works comprising the construction of a new concrete base for the New Tower and cabinets and the erection of a new metal mesh fence with access gates.
    (iii) The removal of topsoil within the compound on the Orange Site and the laying of an anti-weed membrane and gravel backfill.
    (iv) Groundworks on adjacent land for power and (if necessary) fibre connections to the Orange Site for the use of MNOs coming on to the Orange Site.
    (v) The construction of a headframe on the New Tower.
    (vi) The removal of the Vodafone Mast and infrastructure from the Vodafone Site and the removal of the MBNL Mast and infrastructure from the MBNL Site.
    (vii) The installation of new infrastructure of Telefonica and MBNL on the Orange Site.

229. We will use the expression **"Item (i)"** to refer to that part of the Claimed Works listed in sub-paragraph (i) above, and so on for the remaining sub-paragraphs above. In referring to the works under Item (vi) it is convenient to refer to these works as the removal of the Masts. We do however keep in mind that this work would also, we assume, involve the removal of a certain amount of other associated Passive ECA on, respectively, the Vodafone Site and the MBNL Site. In relation to Item (vii) we also bear in mind that if there was to be migration to the New Tower from the Vodafone Site and/or the MBNL Site this might, as we understood the relevant evidence, involve the transfer of the Active ECA from the relevant Site, or the installation of new Active ECA.

230. We find it convenient to take first the second of the above two issues, namely the neighbouring land question. By way of reminder, this question is whether the Claimed Works include works of redevelopment on all or part of any neighbouring land, so far as the Claimed Works are said to include works of redevelopment on neighbouring land and so far as the Claimed Works do qualify as works of redevelopment. As can be seen, the only part of the Claimed Works which involves work on the Vodafone Site is part of Item (vi); namely the removal of the Vodafone Mast and infrastructure from the Vodafone Site. Conceivably, and so far as it matters, it might be said that part of Item (vii) qualifies as work on the Vodafone Site, in the sense of Active ECA being removed from the Vodafone Site to the Orange Site, if this was to occur. In reality however it seems to us that this part of Item (vii), if it was to occur, can equally be viewed as part of Item (vi). The remainder of the Claimed Works comprises work on the Orange Site, the MBNL Site and, in the case of Item (iv), other parts of the Field. It follows that each of these areas of land must qualify as neighbouring land, if the relevant parts of the Claimed Works are to fall within the terms of Paragraph (c).

231. The first question which is raised in this context is whether it is possible to have a set of redevelopment works which are works both to the land to which the relevant code agreement relates and neighbouring land. Paragraph (c) refers to redevelopment of all or part of the land to which the code agreement relates *"or"* any neighbouring land. In this context we accept the submission of the Respondents' counsel that *"or"* is not disjunctive.

We accept that the word *"or"* should be read as including a situation where the relevant redevelopment work is intended for land to which the code agreement relates and neighbouring land, as well as a situation where the relevant redevelopment work is intended for one or the other. We say this for two related reasons.

232. First, it was not in dispute before us that Paragraph (c) derives, at least in part, from paragraph (f) of Section 30(1) of the 1954 Act (**"Paragraph (f)"**). The relationship was helpfully analysed and explained by the Tribunal in *EE Ltd v Chichester* [2019] UKUT 164 (LC) [2019] L.&T.R. 21, at [31]-[40]. The Tribunal were concerned with Paragraph 21(5), but the language of that sub-paragraph is the same as in Paragraph (c). The relevant part of the decision of the Tribunal in that case is too lengthy to quote in full, but we highlight [32], [33] and [38]:

> *"32 The terms are therefore very similar to those in para.21(5), allowing for the fact that Code rights need not necessarily be conferred in a lease but may amount to an easement or a contractual licence, or may relate to a temporary matter such as lopping trees. So wider language is used in para.21(5) than in s.30(1)(f); the relevant person can resist if he or she cannot reasonably carry out the redevelopment "if the order were made" rather than "without obtaining possession of the holding". But the core idea is the same.*
> *33 The connection with s.30(1)(f) is apparent from the terms of the Law Commission's recommendation, at para.6.110(3) of its report The Electronic Communications Code (Law Com No.336, 2013), that it should be possible for the site provider to resist the imposition of code rights on the grounds that he or she: "intends to redevelop all or part of the land on which the apparatus is sited, or neighbouring land, and could not reasonably do so unless the Code Rights are brought to an end". The footnote to that paragraph reads "Compare s.30(1)(f) of the Landlord and Tenant Act 1954".*
>
> *"38. For the respondents, Mr Maclean QC resisted this. He pointed to the different terms of s.30(1)(f) of the 1954 Act and of para.21(5) of the Code and says that their different wording indicates that they are very different provisions. That is clearly not correct. Paragraph 21(5) was explicitly modelled, by the Law Commission, on s.30(1)(f); the difference in wording is trivial and is dictated by its context (see [32] above). However, we agree with Mr Maclean QC that the case law associated with s.30(1)(f) is not binding authority in the context of the Code and of para.21(5). Clearly the Code, new as it is, must be looked at with a clean slate and as a fresh start. The principles applicable to the 1954 Act should be adopted where they are relevant, although we are mindful of the need to be aware of the different context in Code cases. Not all principles will be relevant and the factual background will have an effect on this; issues of timing, for example, need to be carefully considered. But we accept (as the respondents themselves argue) that where intentions have changed over time it is the intention at the date of the hearing that is relevant: Betty's Cafes Ltd v Phillips Furnishing Stores Ltd [1959] A.C. 20. And it makes obvious sense to adopt the test imposed in Cunliffe. Parliament's intention would be frustrated if the defence in para.21(5) could be made out where the relevant person did not have a firm intention to carry out the redevelopment plan, or where the plan was not something that that person has a reasonable prospect of being able to bring about of their own volition."*

233. Applying this approach, it seems to us that it is legitimate to consider authorities on Paragraph (f), in relation to Paragraph (c), subject to keeping in mind that the principles

applicable to the 1954 Act should only be adopted where they are relevant. One principle which does seem to us to be relevant is the following statement of Balcombe LJ in *Palisade Investments Ltd v Collin Estates Ltd* [1992] 2 EGLR 94, at 97D, as quoted by Auld LJ in his judgment in *Dolgellau Golf Club v Hett* [1998] L.&T.R. 217 at page 228 of the report:

> *"….the Act was intended to be construed sensibly, so as to hold a fair balance between landlord and tenant. It is not….., to be construed so as to create a series of artificial hoops through which the landlord must jump before he must satisfy the necessary intention."*

234. It seems to us that this statement, as a general statement of principle can also be applied to Paragraph (c). In terms of our general approach to Paragraph (c) we also accept the submission of the Respondent's counsel that, while Paragraph (c) is based on Paragraph (f), its terms are, in certain respects, wider than Paragraph (f). One example of this is, of course, the reference to neighbouring land.

235. Applying the general principles which we have just identified, it seems to us that it would be inconsistent with those general principles to construe the word *"or"* in Paragraph (c) as referring to works on the relevant code agreement land or works on the relevant neighbouring land, but not both.

236. Second, and even without application of the general principles which we have just identified, it seems to us that it would be absurd if a redevelopment which straddled the boundary between the code agreement land and neighbouring land could be excluded from Paragraph (c) on that basis. So far as Paragraph (c) is concerned, it is clear that the policy behind the Code is that a site provider should not be prevented from carrying out redevelopment of the code agreement land or neighbouring land by the presence of the operator, in circumstances where the site provider cannot reasonably carry out the redevelopment unless the code agreement is brought to an end. Put more simply, works of redevelopment falling within Paragraph (c) should not be prevented by code rights. It seems to us that it would be inconsistent with this policy if works of redevelopment which otherwise satisfied the terms of Paragraph (c) were disqualified by the fact that they were to be carried out partly on the code agreement land and partly on the neighbouring land.

237. We therefore conclude that the Claimed Works in the present case are capable of being considered together, notwithstanding that they relate both to the Vodafone Site and other land. It is neither necessary nor appropriate to segregate works on the Vodafone Site and the other land as separate works of redevelopment for the purposes of Paragraph (c), assuming that they otherwise qualify as one set of works, simply because they are works on separate parcels of land.

238. This brings us directly to the question of whether the Orange Site, the MBNL Site and the remainder of the Field can qualify as neighbouring land. So far as authority was concerned, we received much less assistance on this question than we had hoped for. We do not say this by way of criticism of the parties. It may be that authority on the question of what is meant by *"neighbouring land"* is limited. In the event we were only referred to a single authority on the meaning of neighbouring land, which we should deal with first. The case in question was *Northampton BC v Lovatt* (1998) 30 HLR 875. The case was concerned with a claim for possession brought by Northampton Borough Council against Mr and Mrs Lovatt, who were tenants of the council pursuant to a secure tenancy, within the meaning of Part IV of the Housing Act 1985. The three eldest sons of the tenants had engaged in a course of criminal and anti-social conduct on the housing estate where they lived. The

council obtained an order for possession against the tenants in reliance, principally, upon the ground of possession set out in Ground 2 in Schedule 2 to the Housing Act 1985, which is in the following terms:

> *"The tenant or a person residing in the dwelling house has been guilty of conduct which is a nuisance or annoyance to neighbours, or has been convicted of using the dwelling house or allowing it to be used for immoral or illegal purposes."*

239. The order for possession was challenged in the Court of Appeal on the ground, amongst others, that the activities of the tenants' sons had occurred too far away from their home to constitute nuisance or annoyance to neighbours. The bulk of the relevant conduct which had been found to constitute the nuisance and annoyance occurred more than 100 metres from the tenants' home, at various locations around the estate. All three members of the Court of Appeal gave substantive judgments. The leading judgment was given by Henry LJ, who concluded that the appeal should be dismissed and the possession order upheld. Chadwick LJ reached the same conclusion, for the reasons expressed in his own judgment, which were similar but not the same as the reasons expressed by Henry LJ. Pill LJ gave a dissenting judgment, setting out the reasons why, as he concluded, the appeal should be allowed and the possession order set aside.

240. In their judgments the members of the Court of Appeal were principally concerned with the scope and reach of Ground 2, within the context of the secure tenancy regime. Their Lordships were not directly concerned, in the abstract, with the meaning of the word *"neighbours"* in Ground 2. In his judgment Henry LJ reviewed the limited case law to which the Court of Appeal had been referred, and the legislative history of the reference to neighbours in Ground 2. For present purposes the relevant feature of this judgment was that Henry LJ was not persuaded that the reference to neighbours in Ground 2 was the equivalent of a reference to adjoining occupiers. As he concluded, at pages 882-883 of the report:

> *"I turn to the construction of Ground 2. Mr Wood's first submission is that Ground 2 is concerned with activities carried on by the tenant (or persons residing with him) on or at the premises which are detrimental to the peace, comfort and amenity of people living nearby.*
> *First, he contends that the terms "neighbours" and "adjoining occupiers" are interchangeable. I do not agree. All adjoining occupiers are neighbours, but not all neighbours are adjoining occupiers. Neighbours is the wider word, and was intended to be - I agree with the editors of Woodfall on Landlord and Tenant that the intention was to avoid "arid disputes as to proximity". It is clearly intended to cover all persons sufficiently close to the source of the conduct complained of to be adversely affected by that conduct. In these days of amplified music, there is force in G K Chesterton's observation:*
> *"Your next-door neighbour ... is not a man; he is an environment."*

241. In his dissenting judgment Pill LJ addressed himself principally to the argument of the tenants that Ground 2 only referred to conduct in, or in and around the demised dwelling house. Pill LJ accepted this argument, and for that reason applied a narrower meaning to the word *"neighbours"* than Henry LJ, regarding the reference to neighbours as equivalent to adjoining occupiers. As can be seen, this reasoning was essentially concerned with the location of the anti-social conduct, not with the geographical reach of the reference to neighbours. The third judgment in the Court of Appeal was given by Chadwick LJ. In reaching the same conclusion as Henry LJ, Chadwick LJ also addressed himself to the

question of what was meant by the reference to neighbours in Ground 2. The answer which he gave to that question, at pages 892-893 of the report, was very much tied to the legislative context of Ground 2:

> *"The conduct at which Ground 2 is aimed is conduct within the neighbourhood which causes nuisance and annoyance to others within the neighbourhood. The neighbourhood, for this purpose, is the area with which the Council is identified, by reason of its status as local housing authority and landlord, as having responsibility for the amenities and quality of life; that is to say the area within which persons affected may fairly regard the Council as having some responsibility for those whose conduct is causing the nuisance or annoyance. The persons affected will be neighbours for the purposes of Ground 2. Who those persons are in any particular case will, of course, depend on the circumstances of that case. In the present case I am satisfied that the District Judge was entitled to take the view that they included the persons identified in his judgment."*

242. As can be seen, the statutory context in which *Northampton* was decided was very different to the present case. We do however take the case as authority for the proposition that a reference to neighbours is not necessarily limited to adjacent occupiers, and is capable of extending more widely. How much more widely the concept of neighbour, or associated expressions is capable of extending depends heavily upon the context. For this reason, and at the more specific level, we do not think that the question of the extent of the expression *"neighbouring land"* in Paragraph (c) is much illuminated by considering what is meant by *"neighbours"* in a statute intended to allow landlords of property held on secure tenancies to evict tenants guilty of anti-social behaviour towards those living around them.

243. Returning to Paragraph (c) the reference to neighbouring land must, it seems to us, imply a test of geographical proximity. The expression clearly cannot extend to any land, geographically remote to the code agreement land. The relevant land must, at the least, have some degree of geographical proximity to the code agreement land.

244. It seems to us that a helpful way to approach the question of what degree of geographical proximity is required is to consider what the reference to neighbouring land in Paragraph (c) was intended to achieve. In general terms, the answer to that question seems to us to be that the reference to neighbouring land is intended to address a situation where the presence of the relevant ECA on the code agreement land obstructs the relevant redevelopment of neighbouring land; whether that redevelopment is confined to the neighbouring land or engages both the code agreement land and the neighbouring land. In either case there is a relationship between the code agreement land and the neighbouring land in the sense that the redevelopment of the neighbouring land cannot proceed without the removal of the ECA from the code agreement land.

245. In this context we also note the distinction between Paragraph (f) and Paragraph (c). Paragraph (f) is confined to works on the holding, as that expression is defined in the 1954 Act. Paragraph (c) is more flexible in this respect.

246. With the above points in mind, it seems to us that the reference to neighbouring land is capable of including land which is not actually adjacent to the code agreement land. In our view the reference to neighbouring land is capable of including land within a sufficient degree of proximity to the code agreement land to qualify as neighbouring land, without necessarily having to be adjacent to the code agreement land. What constitutes a sufficient

degree of proximity seems to us to be a fact sensitive question, which does not admit of a general answer.

247. With the above test of geographical proximity in mind, we turn to the relevant parts of the Claimed Works in the present case which, as we have explained, means the bulk of the Claimed Works. Assuming, for these purposes, that the Claimed Works otherwise satisfy the requirements of Paragraph (c), our analysis is as follows.

248. In closing submissions Mr Radley-Gardner argued strongly that none of the Claimed Works outside the Vodafone Site were works on neighbouring land. His essential point was that the reference to neighbouring land implied a physical relationship with the relevant code agreement land. The situation needed to be one where the code agreement land had to be cleared of ECA in order, physically, to allow the redevelopment of the neighbouring land. In the present case the only relationship between the Vodafone Site and the other Sites and (we assume) the remainder of the Field, was that, on the Respondents' case, they were under a legal/planning obligation to remove the Vodafone Mast and the MBNL Mast, in order to enable the redevelopment of the Orange Site including (we assume) any ancillary works on the remainder of the Field. Mr Radley-Gardner submitted that such a legal relationship was insufficient as, in theory, it would permit a site provider to yoke together any two properties, for the purposes of Paragraph (c), no matter how far apart they might be, by the device of a legal obligation such as a planning condition.

249. In our view this argument is misconceived. The test of what is neighbouring land in Paragraph (c) seems to us to be a test of geographical proximity, not legal relationship. The presence or absence of a legal relationship is relevant to the question of whether works on different areas of land can be treated as one set of redevelopment works for the purposes of Paragraph (c). If the redevelopment of the other land involves no actual requirement to carry out work on the code agreement land, there is clearly an argument to be made that the work on the code agreement land should not be treated, for the purpose of Paragraph (c), as part of the redevelopment of the other land. In such a case there is clearly also an argument to be made that the clearing of the ECA from the code agreement land is not reasonably required in order to allow the redevelopment of the other land to proceed. We do not think however that these arguments are relevant to the question of what other land is capable of constituting neighbouring land. As we have said, this latter question seems to us to engage a test of geographical proximity. We bear in mind that schemes of redevelopment can be both complicated and extensive. Planning requirements, in particular, may necessitate considerable off-site works. It would, in our judgment, be odd if the test for determining neighbouring land was a physical one, which depended upon whether the relevant work on the neighbouring land could only be carried out, in physical terms, by clearing the ECA from the code agreement site. It seems to us that such a test would be problematic. It is not difficult to think of examples where a set of redevelopment works could, physically, be constructed on land adjacent to the relevant code agreement land but, for legal/planning reasons, could only be constructed if associated works could be carried out on the code agreement land which necessitated the removal of the ECA from the code agreement land.

250. Turning to the Claimed Works themselves and starting with Item (iv), Mr Freemantle explained that, depending upon the requirements of the operators on the Orange Site, it might be necessary to carry out trenching works on the Field in order to bring new power and fibre connections to the Orange Site. In closing submissions Mr Watkin submitted that Icon had the right to do this, pursuant to rights to install and run services over the Field

granted by clause 12.4.1.2 in box 12 of the transfer dated 25th September 2018, by which APW acquired the freehold title to the Steps Hill Sites. These rights were granted over the Access Way, which was defined to mean the green shaded access route shown coloured green on the plan annexed to the transfer. The same route can be seen on the plan we have included in this decision, shown as a shaded route running around the perimeter of three sides of the Field and connecting to South Street at each end of the boundary between the Field and South Street. We find it difficult to see how the Field cannot be said to be neighbouring land, in relation to the Vodafone Site. The Field constitutes a distinct parcel of land, which encloses the Vodafone Site. In terms of geographical proximity, the Field seems to us to constitute neighbouring land, within the meaning of Paragraph (c).

251. This leaves the remainder of the Claimed Works, with the exception of the removal of the Vodafone Mast and infrastructure from the Vodafone Site. Here, the question is whether the MBNL Site and the Orange Site can each qualify as neighbouring land. Although we are clearly much more concerned with the Orange Site, it seems to us that the question is essentially the same, for each Site.

252. This question is not so easily answered, because the Sites are, in geographical terms, located at some distance from each other. In particular, the Orange Site is approximately 160 metres from the Vodafone Site. Is this too far to qualify as neighbouring land?

253. Although we have not found this an easy question, we have come to conclusion that the Orange Site and the MBNL Site can qualify as neighbouring land. Our reasons can shortly be stated. The test is a fact (or location) sensitive one, based on geographical proximity. The Sites are all located within the Field. They are reasonably close to each other. They are mobile communications sites and, in terms of providing mobile communications coverage their locations are, as we understand the evidence, more or less equivalent to each other. The remainder of the Field, excluding the Sites, is adjacent to the Vodafone Site and is, it seems to us, neighbouring land within the meaning of Paragraph (c). If this is correct, it would be odd if two enclaves within the Field, namely the MBNL Site and the Orange Site, could not also qualify as neighbouring land.

254. Drawing together all of the above analysis, we arrive at the following conclusion on the second of the two issues which are considering in this part of our decision. We conclude that the Claimed Works, so far as they are to be carried out on land which is outside the Vodafone Site and assuming that they otherwise qualify as works of redevelopment for the purposes of Paragraph (c), constitute works of redevelopment on neighbouring land within the meaning of Paragraph (c). Putting the matter another way, we conclude that the Orange Site, the MBNL Site and the remainder of the Field all constitute neighbouring land, for the purposes of Paragraph (c).

255. This brings us to the first issue which we have to address, in order to answer the question with which we are dealing in this section of the decision. This first issue is whether the Claimed Works constitute works of redevelopment of land, within the meaning of Paragraph (c). The word *"redevelop"* is not defined in the Code. In terms of the type of works which are included in the concept of redevelopment, we make the following three general points.

256. First, we accept that redevelop is a broad expression, capable of including a wide variety of works, provided that they can fairly be described as redevelopment. Equally, redevelopment implies some kind of change in the land which is the subject of the redevelopment, so that what was there before is replaced by something new.

257. Second, we consider that there is a material contrast to be drawn, as between Paragraph (c) and Paragraph (f). Paragraph (f) refers to the intention to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof. Although the description of the type of works falling within Paragraph (f) is prescriptive, its scope is wide. In particular, qualifying works for the purposes of Paragraph (f) include works of demolition. This leads into the question of whether Paragraph (c), in its use of the word redevelop, includes works of demolition, such as the removal of a mast. In the present case this question does not strictly arise. It was conceded by Mr Watkin, in oral closing submissions, that Paragraph (c) did not include work confined to the removal of a mast from land. This concession was however made on the basis of what Mr Watkin characterised as purposive grounds; namely that if the removal of a mast qualified as redevelopment work for the purposes of Paragraph (c), any site provider could bring a code agreement to an end by formulating an intention to remove the relevant mast. Mr Watkin contrasted the situation where a site provider intended to demolish a water tower which had ECA on it. Mr Watkin submitted that the intention to demolish the water tower would be an intention to redevelop the water tower, within the meaning of Paragraph (c).

258. While, as we have explained, it is not strictly necessary for us to decide this point, in the circumstances of the present case where it is conceded that taking down a mast is not redevelopment, we do not think that Mr Watkin was right to submit that work of demolition could, in cases other than the taking down of masts, qualify as work of redevelopment. We say this for a couple of reasons.

259. If Mr Watkin was right to concede that taking down a mast on the relevant land would not qualify as redevelopment work, and we consider that Mr Watkin was right to make this concession, it is difficult to see why other work of demolition, such as Mr Watkin's water tower example, should qualify as redevelopment work. We cannot see a logical basis for distinguishing between these different types of demolition work. Beyond this, the word used in Paragraph (c) is *"redevelop"*. Those responsible for the drafting of the Code would have had in mind, it seems reasonable to assume, the wording of Paragraph (f). As we have said, the concept of redevelopment seems to us to mean more than mere demolition works. In a case involving demolition it seems to us also to require the construction of something new, in place of what has been demolished. If it had been intended that the concept of redevelopment should include work comprising only demolition, this could have been made clear by using language similar to that used in Paragraph (f). In the absence of such language we do not consider that mere work of demolition, without more, qualifies as work of redevelopment, within the terms of Paragraph (c). Finally, there is authority to the effect that the demolition of a building on land, without any further work, did not qualify as development work for the purposes of a planning direction (the Town and Country Planning (Demolition – Description of Buildings) Direction 1995; see the judgment of His Honour Judge Pelling KC (sitting as a judge of the High Court) in *R (on the application of Save Britain's Heritage) v Secretary of State for Communities and Local Government* [2010] EWHC 979 (Admin) [2011] Env. L.R. 6, at [22]. Although the statutory context of that case was different, we consider that the view expressed by Judge Pelling at [22] does support our conclusion that work confined to demolition does not constitute work of redevelopment for the purposes of Paragraph (c).

260. Our third general point is that the intention referred to in Paragraph (c) must be an intention to redevelop all or part of the land to which the code agreement relates or any neighbouring land. The requirement is for redevelopment of land. This is material because *"land"* is

defined in Paragraph 108(1) not to include ECA. We accept however that this definition does not necessarily mean that any work done to the ECA on a particular site, including work to the relevant mast or tower, cannot qualify as redevelopment work. We have already stated our view that the concept of redevelopment implies some kind of change in the land which is the subject of the redevelopment, so that what was there before is replaced by something new. Consistent with this view it seems to us that Mr Watkin was right to submit that the taking down of one mast and the construction of another mast is capable of constituting work of redevelopment. The land is changed and can, in our view, be described as redeveloped where one mast is taken down and replaced by a new mast. That such work can qualify as work of redevelopment appears to have been accepted by the Tribunal in *EE Ltd v Chichester*, although it is not clear in that case that there was any argument on the point. It will however be noted that, in the conclusion which we have just expressed, we are referring to a case where one mast is taken down and a new mast is erected on the same land.

261. With these broad principles in mind, we turn to the Claimed Works and the individual Items. We start with the work done on the Orange Site which constitutes Items (i), (ii), (iii) and (v). With the exception of Item (v), we conclude that all of this work qualifies as work of redevelopment, assuming that it otherwise falls within the terms of Paragraph (c). So far as this work has already been done, it seems to us clear that this work is properly described as the redevelopment of the Orange Site. A new concrete base has been installed. New fencing has been installed. The New Tower has been erected, together with the installation of associated infrastructure comprising Passive ECA. We exclude Item (v), as we assume that this particular Item involved the fitting of the new headframe to the New Tower; that is to say the fitting of Passive ECA to Passive ECA. In our view this work, which has been identified as a separate item within the Claimed Works, does not qualify as work of redevelopment.

262. So far as Item (iv) is concerned, we accept that the trenching works, if they have to be carried out, qualify as works of redevelopment, given that they involve the creation of new service routes within the remainder of the Field. We say this however on the basis that these works can be treated as a part of the redevelopment of the Orange Site. If these works are taken in isolation it seems to us that they are not correctly described as works of redevelopment. They only become such if they can be treated as part of the work of redevelopment of the Orange Site.

263. This leaves Items (vi) and (vii). We start with Item (vi). Can the removal of the Masts or either of the Masts qualify as work of redevelopment? If the work of removal of the Masts is considered in isolation, it seems to us that it cannot constitute work of redevelopment, given that it is common ground that the mere removal of a mast cannot qualify as work of redevelopment. The Respondents argue however that the work of removal of the Masts can qualify as work of redevelopment because this work forms part of the same scheme of redevelopment as Items (i) to (v) and can thus be treated, in the case of each of the Vodafone Site and the MBNL Site, in the same category as work comprising the demolition of one mast and the erection of a new mast, which we have accepted does qualify as redevelopment.

264. We accept that if the removal of the Masts can be seen as part of the same scheme of redevelopment as the work on the Orange Site comprising Items (i) to (v), then the removal of the Masts does qualify as work of redevelopment. On this hypothesis the removal of the Masts is not isolated work of demolition, but part of a scheme of demolition and reconstruction.

265. This however assumes that the hypothesis is correct. In our view, the question of whether works of demolition, which would not otherwise qualify as works of redevelopment for the purposes of Paragraph (c), can be treated as part of a scheme of redevelopment is a fact sensitive one, which depends upon the relationship between the work of demolition and the work of reconstruction. An obvious example of a sufficient relationship between the two is a scheme of redevelopment where one building is demolished, so that a new building can be erected on the same site. The further one moves from this direct relationship, the more difficult it may be to find the required relationship between the work of demolition and the work of construction.

266. Coming to the present case, we do not think that the required relationship exists. The demolition of the Masts seems to us to be more or less entirely separate from the work of construction on the Orange Site. There is no physical relationship between the two sets of works. The demolition of the Masts was not part of the work of construction of the New Tower and, in physical terms, there was no necessity to demolish the Masts in order to enable the construction of the New Tower. All this may be said to be borne out by the fact that the work of construction of the New Tower on the Orange Site has already been completed, while the Masts have remained in place. The only link which exists between the work on the Orange Site and the demolition of the Masts is the planning link. Given our conclusions on the planning issues, there is a planning requirement that the Masts be removed, as a condition of the Prior Approval. In our view however this planning link is insufficient, in itself, to create the required relationship between what we have accepted were works of redevelopment on the Orange Site and the demolition of the Masts. In our view, and on the particular and, it may be said, unusual facts of the present case, the demolition of the Masts is not correctly seen as part of the same scheme of redevelopment as the work on the Orange Site.

267. We therefore conclude that Item (vi), namely the removal of the Masts, does not qualify as work of redevelopment within the meaning of Paragraph (c). This is because, in our view, the removal of the Masts from the Vodafone Site and the MBNL Site falls to be treated as a separate set of works, or indeed as two separate sets of works, which do not qualify in and of themselves as redevelopment works.

268. It will be appreciated that this conclusion has significant consequences for the Respondents' case on Paragraph (c). It means that Icon cannot demonstrate an intention to redevelop the Vodafone Site because, even if it is assumed that the remaining requirements in Paragraph (c) are satisfied in relation to Item (vi), the work of removal of the Masts cannot qualify as work of redevelopment. The work of removal of the Masts does not qualify as part of a wider scheme of redevelopment, for the reasons which we have explained, and, taken on its own, does not qualify as work of redevelopment.

269. This leaves Item (vii). We cannot see that Item (vii) qualifies as work of redevelopment, within the meaning of Paragraph (c). Item (vii) comprises the migration of the Active ECA from, respectively, the Vodafone Site and the MBNL Site to the Passive ECA on the Orange Site and/or, depending upon the requirements of the operators who may be using the New Tower, the installation of new Active ECA on the Passive ECA on the Orange Site. In either event, all that is happening is that the relevant transmission equipment comprising the Active ECA is being imported on to the Passive ECA on the Orange Site. We cannot see that this work of attachment of Active ECA to Passive ECA can legitimately be described as redevelopment work, within the meaning of Paragraph (c). Nor do we consider that such work can qualify as redevelopment work on the basis that it can be

regarded as part of the work of redevelopment within Items (i) to (iii). It seems to us that the installation of Active ECA on Passive ECA is fundamentally different to the demolition of a mast in order to enable the construction of a new mast. In the latter case there is a change to the relevant land. In the former case all that changes is that apparatus comprising Active ECA is attached to Passive ECA.

270. Drawing together all of the above analysis, we arrive at the following conclusions on the first of the two interlinked issues which we are considering in this part of our decision; namely whether the Claimed Works constitute works of redevelopment of land, within the meaning of Paragraph (c):
    (1) We conclude that Items (i) to (iii) have constituted works of redevelopment of land, within the meaning of Paragraph (c). We use the past tense because Items (i) to (iii) have already been done.
    (2) We conclude that Item (iv) does not constitute work of redevelopment of land, within the meaning of Paragraph (c), unless this work can be treated as part of the redevelopment work constituted by Items (i) to (iii).
    (3) We conclude that Item (v) does not constitute work of redevelopment of land, within the meaning of Paragraph (c).
    (4) We conclude that Item (vi) does not constitute work of redevelopment of land, within the meaning of Paragraph (c)
    (5) We conclude that Item (vii) does not constitute work of redevelopment of land within the meaning of Paragraph (c).

271. We can now return to the overall question which we have been considering in this part of our decision; namely whether the Claimed Works constitute redevelopment of all or part of the land to which the code agreement relates or any neighbouring land, within the meaning of Paragraph (c). On the basis of our consideration of the two interlinked issues contained within this question, as set out in this part of our decision, our overall answer to this question can be summarised as follows:
    (1) Items (i) to (iii) have constituted works of redevelopment of neighbouring land, within the meaning of Paragraph (c). We again use the past tense because Items (i) to (iii) have already been done.
    (2) Item (iv) constitutes work on neighbouring land, within the meaning of Paragraph (c), but it does not constitute work of redevelopment unless it can be treated as part of the redevelopment work constituted by Items (i) to (iii).
    (3) Item (v) does not constitute work which took place on neighbouring land or work of redevelopment, within the meaning of Paragraph (c). This is because Item (v) involved the installation of Passive ECA on to Passive ECA.
    (4) Item (vi) constitutes work on land to which the code agreement relates (the Vodafone Site) and on neighbouring land (the MBNL Site), within the meaning of Paragraph (c). This work, being confined to demolition of the Masts, does not constitute work of redevelopment within the meaning of Paragraph (c).
    (5) Item (vii) constitutes work on neighbouring land, and possibly on land to which the code agreement relates, but this work does not constitute work of redevelopment within the meaning of Paragraph (c).

(iii) Is there a time limit within which Icon must intend to carry out the Claimed Works?

272. In the case of Paragraph (f) the law is that the landlord must intend to commence the relevant works within a reasonable time of the termination of the current tenancy; see the judgment of Lloyd LJ in *London Hilton Jewellers Ltd v Hilton International Hotels Ltd* [1990] 1 EGLR 112, at 114D-E. The date of termination of the current tenancy is

controlled by Section 64 of the 1954 Act. Where an application to court has been made pursuant to Section 24 or Section 29 of the 1954 Act, following the giving of a notice to terminate the tenancy, Section 64 continues the current tenancy until three months after the date on which the application is finally disposed of, provided that this date falls after the date of termination specified in the relevant notice of termination. What constitutes a reasonable time after the termination of the current tenancy is a fact sensitive question. There is no fixed time limit; see the discussion of this question in Reynolds and Clark, Renewal of Business Tenancies (Sixth Edition) at 7-213 to 7-215.

273. The Respondents argued that there was no equivalent time limit in Paragraph (c). As the Respondents' counsel pointed out, the intention which must be proved in the case of Paragraph (f) is an intention to carry out the relevant works *"on the termination of the current tenancy"*. There are no equivalent words in Paragraph (c). Rather, what has to be demonstrated is that the redevelopment cannot reasonably be carried out unless the code agreement comes to an end. In addition to this, the Code does not specify a termination date for the relevant code agreement. The notices of termination in the present case, served pursuant to Paragraph 31, specified 10th March 2025 as the date on which Icon wished to bring the 2003 Agreement to an end. As the Respondents' counsel explained however, Part 6 of the Code contains further provisions which govern the process of requiring the removal of ECA from land. The right of removal has to be exercised in accordance with the procedure in Paragraph 40. We note that the procedure in Paragraph 40 is not necessarily straightforward. We also note that the procedure is not subject to a fixed time limit, and is capable of becoming drawn out.

274. There is considerable force in these points, but we are not persuaded that there is no time limit in Paragraph (c), for the carrying out of the relevant works of redevelopment. If there was no such time limit it would, in theory, be possible for a site provider to point to an intention to do works of redevelopment at a point well in the future. It is true that the intention would have to be proved at the time when it came to be determined by a tribunal whether the intention existed. It is also true that, if the alleged intention was to carry out works at a point a long way in the future, this would no doubt be relied upon to call into question whether the intention actually existed. Nevertheless, it remains the case that a site provider would not be subject to any restriction, in terms of the timetable for commencement of the relevant works. There would be nothing to stop a site provider claiming an intention to carry out works of redevelopment ten or more years in the future. As a matter of evidence, it might be difficult to prove such an intention, but there would be nothing to prevent the site provider putting forward such a case.

275. Equally, the absence of any time limit would cause problems for the tribunal called upon to assess whether the relevant intention exists. The existence of a time limit requires the site provider, in order to prove the required intention, to address the question of the timetable for the relevant work. The presence or absence of a realistic timetable is an important indicator, in the case of Paragraph (f), as to whether the relevant intention exists. If however there is no time limit in the case of Paragraph (c), the importance of this indicator is undermined. In practical terms, it seems to us to make the question of whether the required intention exists harder to decide if there is no restriction on when the relevant work has to begin.

276. We also take into account the language of Paragraph (c) itself. Paragraph (c) requires the site provider to demonstrate that the relevant redevelopment work cannot be carried out without the code agreement coming to an end. In our view it is implicit in this requirement

that the intention is to commence the relevant work within a reasonable time of the code agreement coming to an end.

277. Any such reasonable time will have to take account of the time likely to be required to secure the removal of the ECA from the relevant land, but subject to that and any other such consideration, it seems to us that there is a requirement that the relevant work must be commenced within a reasonable time of the code agreement coming to an end. What that reasonable time is in any particular case is a fact sensitive question, but we do not consider that it is open to the site provider to allege an intention to carry out the relevant work at any point in the future, however distant from the termination of the code agreement. The time between the termination of the code agreement and the intended commencement date of the relevant work must be a reasonable one.

278. We therefore conclude that there is a time limit within which Icon must intend to carry out the Claimed Works. Icon must demonstrate that it intends to commence the Claimed Works within a reasonable time of the 2003 Agreement coming to an end.

(iv) Can Icon intend to do works, within the meaning of Paragraph (c), which it has already carried out?

279. There was no dispute between the parties as to what is required to prove an intention under Paragraph (c). It was common ground that the test of intention is the same as applies in the case of Paragraph (f). The test is very well-known and has been restated many times. There are two parts to the test, as it applies to Paragraph (c). The first part of the test is subjective. The site provider has to prove a firm and settled intention to carry out the relevant work of redevelopment, which is not likely to be changed. The second part of the test is objective. The site provider has to prove a reasonable prospect of being able to bring about the relevant redevelopment by their own act or volition.

280. The two part test of intention derives from the decision of the Court of Appeal in *Cunliffe v Goodman* [1950] 2 KB 237. The case was actually concerned with the question of whether an intention existed for the purposes of the second limb of Section 18(1) of the Landlord and Tenant Act 1927, but it is accepted that the test of intention established by that case is equally applicable to the test of intention in Paragraph (f). In his judgment Asquith LJ stated the test of intention in the following terms, at page 253 of the report:

> *"The question to be· answered is whether the defendant (on whom the onus lies) has proved that the plaintiff, on November 30, 1945 "intended" to pull down the premises on this site. This question is in my view one of fact. If the plaintiff did no more than entertain the idea of this demolition, if she got no further than to contemplate it as a (perhaps attractive) possibility, then one would have to say (and it matters not which way it is put) either that there was no evidence of a positive "intention," or that the word "intention" was incapable as a matter of construction of applying to anything so tentative, and so indefinite. An "intention" to my mind connotes a state of affairs which the party "intending" - I will call him X – does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition."*

281. Asquith LJ then went on to make the following useful observations on the second part of the test, also on page 253 of the report:

> *"X cannot, with any due regard to the English language, be said to "intend" a result which is wholly beyond the control of his will. He cannot "intend" that it shall be a fine day tomorrow : at most he can hope or desire or pray that it will. Nor, short of this, can X be said to "intend" a particular result if its occurrence, though it may be not wholly uninfluenced by X's will, is dependent on so many other influences, accidents and cross-currents of circumstance that, not merely is it quite likely not to be achieved at all, but, if it is achieved, X.'s volition will have been no more than a minor agency collaborating with, or not thwarted by, the factors which predominately determine its occurrence. If there is a sufficiently formidable succession of fences to be surmounted before the result at which X aims can be achieved, it may well be unmeaning to say that X "intended" that result."*

282. It initially appeared to be common ground between the parties that, as with Paragraph (f), the relevant intention, for the purposes of Paragraph (c) has to be proved at the date of determination of the question of whether the relevant intention does exist. This date is often referred to as the date of the relevant hearing held to determine whether the intention exists but it is, strictly, the date on which this question comes to be determined by the relevant court or tribunal; see the speech of Lord Denning in *Betty's Cafes Ltd v Phillips Furnishing Stores Ltd* [1959] AC 20, at page 51 of the report. In the remainder of this decision we will refer to this date, on which the existence of the intention has to be demonstrated, as **"the Decision Date"**.

283. Our reference to common ground in our previous paragraph is qualified, because in opening Mr Watkin materially qualified his position. With, we do not doubt, one eye on this issue of whether a party can intend, within the meaning of Paragraph (c), to do works which it has already carried out, Mr Watkin submitted that if the intention to do works, which had been carried out, had previously existed, we should interpret Paragraph (c) as permitting such an intention or such works to fall within the terms of Paragraph (c).

284. The answer to the question of whether Icon can intend to do works, within the meaning of Paragraph (c), which it has already carried out seems to us to be straightforward. Where a person intends to do something, the relevant thing is to be done in the future. A person cannot intend to do something which has already happened. The concept is an impossible one. This is reflected, as it had to be, in the language used by Asquith LJ to formulate his test of intention. All of that language looks to the future. An intention:

> *"to my mind connotes a state of affairs which the party "intending"- I will call him X – does more than merely contemplate : it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition."*

285. It seems to us that this language rules out the concept of an intention to carry out works which have already been completed by the Decision Date.

286. The Respondents' counsel argued that there is a material difference between Paragraph (f) and Paragraph (c) in this respect. Paragraph (f) is necessarily prospective because it relates to works on the relevant demised premises to be carried out on the termination of the current tenancy. In these circumstances there is no question of an existing but incomplete set of works being obstructed by the relevant tenancy. The intention referred to in Paragraph (f) is necessarily a prospective one. Paragraph (c) is more generously worded, and requires a consideration of the whole scheme of redevelopment, regardless of whether

part of the scheme has already been carried out. We were urged to give Paragraph (c) a purposive construction, consistent with the policy behind Paragraph (c); namely not allowing Code rights to inhibit redevelopment. In this respect we were referred to the approach identified by Lady Rose JSC in *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd*, which we have quoted above, but repeat for ease of reference:

> *"106 In light of Lord Nicholls' and Lord Mustill's comments, with which I respectfully agree, the starting point here is not to try to define the word "occupier" and then allow that definition to mandate how the regime established by the code works. The correct approach is to work out how the regime is intended to work and then consider what meaning should be given to the word "occupier" so as best to achieve that goal."*

287. As this argument was developed, the Respondents' counsel pointed to various reasons why the removal of the Masts from the Vodafone Site and the MBNL Site had to be treated as part of the overall redevelopment scheme in relation to the Steps Hill Sites, including the fact that Icon was obliged, by reason of the planning position, to take down the Masts as part of, and as a condition of the work of constructing the New Tower. In considering what was intended, so it was submitted, it was wrong to exclude that part of the redevelopment work which had already been done.

288. In oral closing submissions Mr Watkin gave us some examples to illustrate and support these arguments. He referred us to the construction of a house on code agreement land. If the construction of the house was complete, but for the tiles on the roof, and if the code agreement prevented the tiles being put in place, the site provider still intended to carry out a redevelopment within the policy and meaning of the Code, even if it was only the roof tiles which required the termination of the Code rights. Mr Watkin also gave us the example (supplied by Mr Clark) of a marathon runner embarking on the last mile of a marathon. At the beginning of that last mile, so it was submitted, the marathon runner still intends to run the marathon. The marathon runner does not intend to run a single mile.

289. We are not able to accept any of the Respondents' arguments on this particular question. We say this for the following reasons.

290. First, the basis of these arguments is that the work of removal of the Masts can and should be treated as part of an overall scheme of redevelopment in relation to the Steps Hill Sites. We have however already decided, in the relevant earlier section of this decision, that the work of removal of the Masts cannot be treated as part of what we have accepted were works of redevelopment on the Orange Site. As such, the argument that the required intention exists, because the removal of the Masts constitutes the last stage of on overall redevelopment scheme in relation to the Steps Hill Sites, cannot get off the ground.

291. Second, and even if we are wrong to treat the work of removal of the Masts as separate to the redevelopment works on the Orange Site, the Respondents' arguments still seem to us to suffer from a further difficulty; namely that they conflict with the plain wording of Paragraph (c). Paragraph (c) requires that the site provider intends to redevelop all or part of the land to which the code agreement relates, or any neighbouring land. Such an intention to redevelop cannot exist in relation to works of redevelopment which have already been carried out. A person cannot intend to do that which has already been done. Even if one assumes, as we are assuming for current purposes, that Item (vi) can all be treated as part of an overall scheme of redevelopment with the works of redevelopment on

the Orange Site, it remains the case that Icon does not intend to do any work of redevelopment on the Orange Site. The only work outstanding on the Orange Site is Item (vii), which comprises the installation of Active ECA on the Passive ECA on the Orange Site. We have however already concluded that Item (vii) does not constitute work of redevelopment. So far as the remainder of the Field is concerned, there is Item (iv), if this Item otherwise falls within the terms of Paragraph (c). In the case of the Vodafone Site and the MBNL Site there is Item (vi), the removal of the Masts, again assuming that this work otherwise falls within the terms of Paragraph (c).

292. Assuming that the Respondents can demonstrate that Icon has the required intention to carry out the works which have yet to be done, that is to say Items (iv), (vi) and (vii), we cannot see how the remainder of the Claimed Works can be treated as any part of this intention, simply because it is or may be possible to describe them as being part of the same scheme of redevelopment. Icon cannot intend to carry out works which it has already carried out. It can only intend to redevelop, within the meaning of Paragraph (c), in respect of the works which remain to be carried out, assuming that those works are the subject of the required intention and assuming that those works, in and of themselves qualify as works of redevelopment. We are not convinced that Mr Watkin's examples are the right way to analyse this particular question. We prefer simply to apply the plain language of Paragraph (c), together with the requirement that the required intention must be proved to exist at the Decision Date, not at any earlier date. For what it is worth however, it seems to us that both the examples provided by the Respondents' counsel bear out our conclusion on this point. A site provider does not intend to construct a house, in circumstances where all that has to be done is the installation of the roof tiles. If an intention exists, it is an intention to install the roof tiles. Equally, a marathon runner embarking on the last mile of the marathon does not intend to run a marathon. As a matter of plain language it seems to us that the marathon runner is correctly described as intending to run the last mile of the marathon. As it happens, we have already decided that the removal of the Masts is not correctly treated as the last mile of the marathon, or any part of the marathon, but even if we are wrong in that earlier conclusion, there remains only the intention to run that last mile.

293. We can also see no reason of policy or anything relating to the working of the Code which justifies overriding the plain wording of Paragraph (c) in this respect even if, which we doubt, it would be permissible to do so. Paragraph (c) uses the word *"intends"*. We cannot see anything relating to the working of the Code which suggests that giving this word its normal meaning undermines the circumstances in which this particular ground of termination is intended to be available.

294. We therefore conclude, in answer to this question, that Icon cannot intend to do works, within the meaning of Paragraph (c), which it has already carried out.

295. This conclusion also has significant consequences for the Respondents' case on Preliminary Issue (c). It means that Icon cannot demonstrate the required intention to redevelop in relation to Items (i) to (iii), or in relation to Item (v) if, contrary to our earlier conclusion on this point, Item (v) qualifies as work of redevelopment.

296. The consequences go further than this. We find it convenient to put Item (iv) to one side for present purposes. This leaves Item (vi), the removal of the Masts from, respectively, the Vodafone Site and the MBNL Site. It is however common ground between the parties that the removal of a mast, taken in isolation, cannot constitute work of redevelopment within the meaning of Paragraph (c). We have also reached the same conclusion by our

own reasoning. We have also decided that Item (vi) cannot be treated as part of the same set of works as the work of redevelopment on the Orange Site, which has the consequence that the Respondents' arguments on intention cannot get off the ground.

297. If however we are wrong in our earlier conclusion, and if we assume that the required relationship exists between the removal of the Masts and the works on the Orange Site, we do not consider that this resolves the problem that the works on the Orange Site have already been done. In circumstances where the works of redevelopment on the Orange Site have been carried out, it seems to us that the Respondents are back to a position where the removal of the Masts has to be considered in isolation. We do not think that the removal of the Masts can be constituted work of redevelopment by virtue of the relationship which we are assuming, for these purposes, to exist between the removal of the Masts and the redevelopment of the Orange Site. We do not think that this is the correct analysis. What matters for the purposes of Paragraph (c) is what the site provider intends. If all that the site provider can be said to intend is the removal of the Masts, it seems to us that this is not work of redevelopment within the meaning of Paragraph (c). Treating it as work of redevelopment because it forms the tail end of a scheme of redevelopment seems to us to be allowing, by the back door, the inclusion of the work already done in the work which is intended. Equally, this seems to us to involve a failure to respect the requirement that the intention must be proved to exist at the Decision Date. In our view, the position is the same under Paragraph (c) as it is under Paragraph (f). The required intention must be proved to exist at the Decision Date. We do not accept Mr Watkin's argument that the date on which the intention must be proved is flexible under Paragraph (c). It seems to us that if it had been intended that Paragraph (c) should include an intention which previously existed, but has been put into effect by the carrying out of the intended works, Paragraph (c) could easily have said this. Equally, it is reasonable to assume that those responsible for the drafting of the Code would have appreciated the need to spell this out, not only as a matter of language, but in order to differentiate Paragraph (c) from Paragraph (f) in this respect. This was not done.

298. This leads us to the following conclusions, further to our answer to the question which we are considering in this part of our decision and further to our earlier decision on the status of the work of removal of the Masts:
    (1) Icon cannot demonstrate the required intention to redevelop in relation to Item (vi), because the works comprising Item (vi), namely the removal of the Masts, do not constitute work of redevelopment within the meaning of Paragraph (c).
    (2) There are two reasons for this.
    (3) The first reason is that the work of removal of the Masts does not constitute work of redevelopment because the required relationship between this work and the works on the Orange Site, which would allow the removal of the Masts to be treated as part of an overall scheme of redevelopment, does not exist, independent of the fact that the works on the Orange Site have already been carried out.
    (4) The second reason is that even if, contrary to our conclusion, the required relationship would have existed, in circumstances where the work on the Orange Site had not yet been carried out, the work on the Orange Site has been carried out. In these circumstances Icon can only intend, within the meaning Paragraph (c), the work of removal of the Masts. If however this is all that Icon can intend, then what is intended is not work of redevelopment because it is common ground that the work of removal of the Masts, taken in isolation, is not work of redevelopment. As we have explained, we do not accept the Respondents' arguments that Icon can be said to intend work of redevelopment on the basis that the removal of the Masts constitutes the last stage (assuming, contrary to our earlier conclusion, this to be the

correct analysis) of an overall scheme of redevelopment in relation to the Steps Hill Sites.

299. For what it is worth, it seems to us that our analysis in sub-paragraph (4) of our previous paragraph can be applied to Item (iv), if we are correct in our earlier conclusion that Item (iv) can only qualify as work of redevelopment, within the meaning of Paragraph (c), if it can be treated as part of Items (i) to (iii). Applying the relevant part of our reasoning in relation to Item (vi) in this section of our decision, it seems to us that Item (iv) cannot be so treated. It follows that Icon cannot demonstrate the required intention to redevelop in relation to Item (iv), because the works comprising Item (iv), namely the trenching works, do not constitute work of redevelopment within the meaning of Paragraph (c).

300. Our reasoning in this section of our decision also renders it unnecessary to decide whether the Respondents could have said that Icon intends to carry out, at the least, work on the Orange Site, namely Items (i) to (iii), which we have accepted constitutes work of redevelopment. As such, the Respondents might have argued that Icon does intend to carry out work of redevelopment, namely Items (i) to (iii), on neighbouring land, but cannot reasonably do so because it is a planning requirement, in relation to these works, that the Masts be removed; meaning that the work of redevelopment on the Orange Site cannot reasonably be done unless the 2003 Agreement comes to an end. This argument is however impossible in circumstances where Items (i) to (iii) have been done, and cannot now be said to be intended by Icon. In these circumstances we do not decide whether this argument, had it been available to the Respondents, would have been correct.

(v) What intention does Icon have?

301. On the basis of our conclusions thus far, this question does not arise. For the reasons which we have already set out, Icon cannot demonstrate the required intention to redevelop, within the terms of Paragraph (c). This is because Items (i), (ii), (iii) and (v) have already been done, and because Items (iv) to (viii) do not constitute works of redevelopment within the meaning of Paragraph (c).

302. In case however this case goes further, we will set out, as briefly as possible, our findings on the question of intention, applying the two part test which derives from *Cunliffe v Goodman*. In this section we consider the question of whether this intention has been proved in relation to the Claimed Works, while leaving to one side the question, which we consider in the next section of this decision, of whether the intention, if otherwise proved to exist, is impermissibly conditional, in the sense used in *S Franses Ltd v Cavendish Hotel (London) Ltd* [2018] UKSC 62 [2019] AC 249. We also proceed on the basis, contrary to our previous conclusions, that the Claimed Works otherwise fall within the terms of Paragraph (c).

303. We start with Item (iv). It was clear from Mr Freemantle's evidence that the position in relation to groundworks for new power and fibre connections to the Orange Site was nowhere near settled. As Mr Freemantle candidly explained, in his evidence in answer to questions from the Tribunal, it was an *"open question"* whether a new power supply would be required to the Orange Site. The position was the same with a fibre connection. A fibre connection could be brought in *"if fibre were needed on site"*. Whether a new power supply and/or fibre connection would be required was left up in the air. As we understood the position, the answer to the question of whether this work would be done depended upon the requirements of the operators who came on to the Orange Site. Those requirements are not yet known, because there are not yet any operators on the Orange

Site. So far as we can see from the available evidence, Icon would have the ability to lay new power and fibre connections to the Orange Site across the remainder of the Field, in reliance upon the service rights granted by the transfer of the Sites by the Bucks to APW dated 25th September 2018. This satisfies the second limb of the test of intention, but so far as the first limb is concerned, it is clear, on the evidence that no settled decision has been made, or could be made at this stage, to implement the service works which comprise Item (iv). We therefore find that the Respondents have failed to prove that Icon has, as at the Decision Date, the required intention to carry out the works within Item (iv).

304. So far as Items (i), (ii), (iii) and (v) are concerned, it is clear that Icon had the intention to do these works. To state the obvious, they have been done. We add two equally obvious but important points. The first point is that this intention cannot now exist, because the relevant work has all been completed. The second point is that the required intention has to be proved to exist at the Decision Date. In the case of Items (i), (ii), (iii) and (v), a finding that the required intention had been proved would be in direct conflict with the rule of law that the required intention must be proved to exist at the Decision Date.

305. We take Item (vi) next assuming, contrary to our conclusion in the previous section of this decision, that the removal of the Masts constitutes work of redevelopment. In Paragraph (f) cases it is usually the case that a corporate landlord seeks to satisfy the first part of the test by producing an appropriate resolution which evidences the decision of the landlord to proceed with the relevant works. There was no evidence of that kind in the present case. We do not regard such evidence as essential in the present case, for two reasons.

306. First, our conclusions on the planning issues mean that Icon is under an effective obligation to remove the Masts. Icon is not in a position where it is at liberty to make up its own mind whether to remove the Masts or not. This is some evidence to support the Respondent's case that Icon has made the subjective decision to remove the Masts.

307. Second, and in our view of more importance, is all the evidence which we have heard both in relation to the business model of the Respondents and in relation to the commercial realities of the situation. We refer, in particular, to the evidence of Mr Kay and Mr Freemantle. In his evidence Mr Kay explained Icon's business model and commercial objectives. As he put matters, Icon's new infrastructure on the Orange Site had been designed with a clear engineering methodology, which was intended to be able to accommodate all four MNOs currently using the Vodafone Site and the MBNL Site, and to be capable, shareable and adaptable. Mr Freemantle confirmed in his evidence that the New Tower had been designed to accommodate at least four operators, with the capacity for upgrades to the existing Active ECA on the Vodafone Site and the MBNL Site. In their evidence the telecommunications experts also confirm the capacity of the New Tower, although we note that they are not agreed on how commercially attractive the New Tower will be to other potential users.

308. The commercial objectives behind the construction of the New Tower emerged quite clearly from the evidence referred to in our previous paragraph and from the evidence generally. The New Tower is designed to accommodate the four MNOs which currently use the Vodafone Site and the MBNL Site, at rents which we assume to be more advantageous to Icon. It is quite clear from the evidence that what Icon is seeking to achieve, in relation to the Sites, is a situation where the Vodafone Site and the MBNL Site are decommissioned, thereby compelling Vodafone, Telefonica, H3G and EE to migrate to the Orange Site. Indeed, if this was not the intention of Icon, the Respondents' investment in the construction of the New Tower on the Orange Site would make little

commercial sense. If this investment is to be repaid, operators must be brought to the New Tower, which has been constructed with the intention that it should have plenty of spare capacity for additional operators to join the Orange Site. This commercial objective is, at the least, much more likely to be realised if there is no competition from the Masts. In these circumstances it seems quite clear to us from the evidence, and we so find, that Icon has demonstrated a decision to proceed with the removal of the Masts.

309. So far as the second objective part of the test of intention is concerned, there is nothing in the evidence, including the evidence of the telecommunications experts, to suggest that there is any practical or legal obstacle to the removal of the Vodafone Mast, beyond the existence of the 2003 Agreement. We find that Icon has a reasonable prospect of implementing the removal of the Vodafone Mast within a reasonable time of the termination of the 2003 Agreement (assuming termination). So far as the MBNL Site is concerned, and so far as this matters, the position is not quite so straightforward. The evidence is that a notice was served on Icon by MBNL, acting as agent for H3G, pursuant to Paragraph 33 seeking renewal of the code agreement for the MBNL Site. The future timetable is uncertain, but it has to be kept in mind that we are assuming, in our answer to this question, that the removal of the Masts and each of them constitutes work of redevelopment falling with Paragraph (c). As such, and bearing in mind the drawn out process which applies to the termination of the 2003 Agreement (assuming a right of termination), it seems to us reasonable to make the finding, as we do, that Icon has a reasonable prospect of implementing the removal of MBNL Mast within a reasonable time of the termination of the 2003 Agreement (again assuming termination).

310. We therefore find that if, contrary to our previous conclusion, the removal of the Masts qualifies as work of redevelopment within the meaning of Paragraph (c), the Respondents have proved that Icon has, as at the Decision Date, the required intention to carry out the works within Item (vi).

311. This leaves Item (vii) which, as we have also concluded, comprises work which does not qualify as work of redevelopment within the meaning of Paragraph (c). In relation to Item (vii), in particular, we heard a good deal of argument and evidence as to whether Vodafone or any of the other MNOs using the Vodafone Site and the MBNL Site would be prepared to migrate to the Orange Site, if the Masts were removed. As matters have turned out, this is not an issue which directly arises, for two reasons.

312. First, and as we have already concluded, Item (vii) does not comprise work of redevelopment for the purposes of Paragraph (c).

313. Second, it seems to us that the question of intention is effectively redundant for a different reason, which renders it unnecessary to consider the two part test of intention in relation to Item (vii). When it comes to installation of Active ECA on the New Tower we have heard no evidence that this work would actually be carried out by Icon or by any party acting as an agent of Icon, or by a contractual arrangement with a third party which would permit Icon to say that it was doing the work for the purposes of Paragraph (c). We assume that each operator moving to the New Tower would make its own arrangements for the installation of its Active ECA on the New Tower. On the evidence, the position is uncertain. This is not surprising, given that there is no way of knowing precisely when and in what circumstances and pursuant to what arrangements any particular operator would move to the Orange Site. Given this position, it seems to us that the Respondents are not able to prove that Icon has the required intention to carry out the works within Item

(vii), because there is no evidence that Icon will, either directly or indirectly, be carrying out those works.

314. So far as concerns the question of whether Vodafone or any of the other MNOs would migrate to the New Tower, if the Masts were removed, we will briefly express our views. The Respondents' counsel drew our attention to the decision of Vos J (as he then was) at first instance in *Humber Oil Terminals Trustee Ltd v Associated British Ports* [2011] EWHC 20243 (Ch), as authority for the point that a landlord may rely on predicted actions of their tenant, in establishing that there is a reasonable prospect of achieving a particular result. In *Humber Oil* Vos J found that the tenant, following the termination of its leases of parts of the Immingham Oil Terminal on the Humber Estuary, would have negotiated new terms with its landlord for the use of the relevant facilities. The Respondents' counsel submitted that the position was the same in the present case, and that *"once all the posturing is over"* (to use the language of Vos J in his judgment at [122]) the MNOs, including Vodafone, could be expected to agree terms with Icon for their use of the New Tower.

315. So far as the MNOs other than Vodafone who are using the Masts are concerned, we are not able to say what they would do. In closing submissions Mr Watkin argued that we were entitled to infer, from the available evidence, that other MNOs would wish to stay in the location. Mr Watkin also submitted that Vodafone could have called evidence from the other MNOs, but had not done so. It was submitted that we could infer from this that Vodafone was seeking to insinuate that there were difficulties with the other MNOs migrating to the New Tower, without being able to demonstrate this by evidence.

316. We were not persuaded by these arguments, in the case of the MNOs other than Vodafone. The burden of demonstrating that there is a reasonable prospect that the other MNOs would migrate to the New Tower, in the event of the removal of the Masts, lies upon the Respondents. This is simply a function of the burden which is upon the Respondents to prove that Icon has the required intention for the purposes of Paragraph (c). We have heard no evidence from any of the other MNOs. We do not know their particular circumstances, or requirements, or commercial options if the Masts were to become unavailable. We do not consider that we are able, on the available evidence, to make a finding that there would be a reasonable prospect of the other MNOs moving to the New Tower, if the Masts were removed.

317. This leaves Vodafone itself. Here, the position is different. In the case of Vodafone there was evidence from Mr Yorston that Icon's conduct had called into question whether Vodafone would wish to engage with Icon moving forward. There was also evidence from Vodafone that it had no need of an upgrade to the facilities provided by the Vodafone Mast. We are however, in the case of this particular issue, required to consider a scenario in which the Masts are to be removed, leaving the New Tower as the only existing option, in terms of mobile communications sites in this location. On this hypothesis it seems to us that the most likely outcome would be that Vodafone would agree terms with Icon for the use of the New Tower and would migrate from the Vodafone Site. On this hypothesis we find that there would be a reasonable prospect of Icon achieving this result. We also consider that the position would be the same if one assumes a situation where only the Vodafone Mast was to be removed. We heard no evidence to support the case that Vodafone relocating to the MBNL Site would be a realistic option.

318. This completes our analysis of the question of what intention Icon has. We do not state our conclusions on the analysis at this stage. This is because we have yet to consider the

question of whether the required intention, so far as it has been proved to exist, is impermissibly conditional. We now turn to that question.

(vi) Is Icon's intention impermissibly conditional?

319. This question arises by reason of the decision of the Supreme Court in *Franses*. *Franses* was, on its facts, an unusual case. The case was concerned with an application for a new tenancy of business premises by the tenant, pursuant to the relevant provisions of the 1954 Act. The landlord opposed the application in reliance upon Paragraph (f). The scheme of works relied upon by the landlord went through several iterations. The key feature of the scheme was that it had no practical utility. If the works were carried out, the refitted premises could not be used without the grant of planning permission for a change of use. The landlord's evidence was that it was prepared to run the risk that the premises would be left incapable of use as a result of the works, because the purpose of the works was to obtain vacant possession of the premises from the tenant. Put more simply, the works were designed to satisfy Paragraph (f). The judge at first instance (His Honour Judge Saggerson) found that the landlord genuinely intended to carry out the works if they were necessary in order to get rid of the tenant, but that the landlord did not intend to carry out the works if it were not necessary to do so for that purpose. In other words, the landlord did not intend to carry out the works if the tenant left voluntarily or if it turned out that the works could be done pursuant to a right of entry in the tenancy.

320. What is unusual about *Franses* is that the landlord's principal witness appears to have been unusually candid in admitting that the scheme of works had been designed to satisfy Paragraph (f). It is not unusual, in a Paragraph (f) case, for the genuineness of the landlord's intention to be challenged on the basis that the relevant scheme of works is said not to make financial sense or to have no proper commercial purpose. It is however unusual for it to be quite so clear, on the evidence, that the relevant scheme is an artificial one, which will only proceed if it is necessary to satisfy Paragraph (f).

321. At first instance and on appeal to the High Court (Jay J), the landlord's intention was held to be sufficient. The Supreme Court, which heard the case on a leapfrog appeal, disagreed, holding that the landlord's intention was impermissibly conditional. The essential reasons for this conclusion were expressed by Lord Sumption JSC in his judgment in the following terms, at [19]:

> *"19 I respectfully disagree. The problem is not the mere conditionality of the landlord's intention, but the nature of the condition. Section 30(1)(f) of the Act assumes that the landlord's intention to demolish or reconstruct the premises is being obstructed by the tenant's occupation. Hence the requirement that the landlord "could not reasonably do so without obtaining possession of the holding". Hence also the provision of section 31A that the court shall not hold this requirement to have been satisfied if the works can reasonably be carried out by exercising a right of entry and the tenant is willing to include a right of entry for that purpose in the terms of the new tenancy. These provisions show that the landlord's intention to demolish or reconstruct the premises must exist independently of the tenant's statutory claim to a new tenancy, so that the tenant's right of occupation under a new lease would serve to obstruct it. The landlord's intention to carry out the works cannot therefore be conditional on whether the tenant chooses to assert his claim to a new tenancy and to persist in that claim. The acid test is whether the landlord would intend to do the same works if the tenant left voluntarily. On the facts found by Judge Saggerson, the tenant's possession of the premises did not obstruct the*

landlord's intended works, for if the tenant gave up possession the landlord had no intention of carrying them out. Likewise, the landlord did not intend to carry them out if the tenant persuaded the court that the works could reasonably be carried out while it remained in possession. In my judgment, a conditional intention of this kind is not the fixed and settled intention that ground (f) requires. The answer would be the same if what the landlord proposed was a demolition, conditionally on its being necessary to obtain possession from the court."

322. We do not regard it as necessary to address the question of whether Icon's intention is impermissibly conditional in relation to the bulk of the Claimed Works. So far as Items (i), (ii), (iii) and (v) are concerned, the work has been done and questions of impermissible conditionality do not arise. So far as Item (iv) is concerned the Respondents have failed to prove the required intention, independent of questions of impermissible conditionality. So far as Item (vii) is concerned, the Respondents have also failed to prove the required intention, independent of questions of impermissible conditionality. In these circumstances it seems to us that it is neither necessary nor appropriate to consider questions of impermissible conditionality in relation to an intention which, on the facts, has not been proved to exist.

323. This leaves Item (vi); the removal of the Masts. Although we heard a great deal of evidence and argument on the question of impermissible conditionality in the course of the Trial, we do not regard this question either as a difficult question to answer or as a question requiring extensive analysis of the evidence. We say this for essentially the same two reasons as we have previously relied upon, in finding that the Respondents have proved the required intention on the part of Icon, as at the Decision Date, if it is assumed (contrary to our earlier conclusion) that the removal of the Masts constitutes work of redevelopment within the meaning of Paragraph (c).

324. First, there are our conclusions on the planning issues. As we have already noted, Icon is not in a position where it is at liberty to make up its own mind whether to remove the Masts or not. Icon is subject to an effective obligation to remove the Masts, with or without the 2003 Agreement in place.

325. Second, there is the evidence which we have heard, both in relation to the business model of the Respondents and in relation to the commercial realities of the situation. We have summarised our findings on this evidence in the previous section of this decision. As we have found, it is quite clear from the evidence that what Icon is seeking to achieve, in relation to the Steps Hill Sites, is a situation where the Vodafone Site and the MBNL Site are decommissioned, thereby compelling Vodafone, Telefonica, H3G and EE to migrate to the Orange Site. This necessarily requires the removal of the Masts. There is no evidence that Vodafone, or for that matter any of the other users of the Vodafone Site and the MBNL Site would need to move to the New Tower, if the Masts remained in place and available for use. Putting the matter another way, the removal of the Masts is essential to the commercial success of the New Tower. Nor can we see that this position would change if one posits a situation where the users of the Vodafone Site and the MBNL Site all vacated these Sites on a voluntary basis, without making any claims to code rights. On that hypothesis, the commercial success of the New Tower would still depend upon the removal of the Masts because, in order to make the New Tower commercially attractive, Icon would need to ensure that there were no competing masts available in the same area. The New Tower would need to be the only option for an operator wishing to operate from this geographical location.

326. In closing submissions Mr Radley-Gardner argued that, on the evidence, it was clear that Icon was created as a response to the threat posed by Code rents, which were lower than expected when they came in and threatened the business model of APW, which was to aggregate sites and income streams for investment. The whole point of the exercise was to bring the four MNOs over to the New Tower. The opportunity to achieve that only arose when the opportunity arose to bring an end to the Code agreements. The scheme of work in relation to the Steps Hill Sites was put together in order to checkmate the renewal applications in respect of the Vodafone Site and the MBNL Site. It was submitted that none of the Claimed Works would have been done or would be done, if there had been a voluntary vacation of the Vodafone Site and the MBNL Site and no claim to the renewal of Code rights.

327. We do not think that the evidence can support Mr Radley-Gardner's argument. Indeed, it seems to us that this part of Vodafone's case misses an essential feature of the present case. APW was the owner of all three of the Steps Hill Sites and now, in succession, Icon is the owner of all three of the Steps Hill Sites. In his evidence Mr Kay explained how the Steps Hill Sites were presented to the board of Radius as an opportunity for the construction of a new tower in November 2022. The Prior Approval Application was made in December 2022, and the Prior Approval was granted in February 2023. Vodafone commenced the Renewal Proceedings in March 2023. The original Paragraph 33 notices were served on APW by Vodafone in March 2020, but there does not appear to have been any action taken further to those notices, between March 2020 and November 2022. This timetable does not support the case that APW only conceived the construction of the New Tower as a device to defeat Vodafone's Code rights, which device would not have been implemented in the absence of those Code rights. Beyond this, it seems to us that there is a more fundamental difficulty with this part of Vodafone's case. We have already referred to the evidence given by Mr Kay and Mr Freemantle as to the commercial thinking behind the construction of the New Tower. On the basis of this evidence it seems to us, and we so find, that APW would always have been looking to construct a new tower on the Orange Site, and to remove the Masts, regardless of what rights did or did not exist in relation to the Vodafone Site and the MBNL Site. This was what fitted the commercial strategy of APW, and now Icon, to create a new tower, with excess capacity, on to which users wishing to operate in that geographical location could be consolidated, to the commercial advantage of APW and Icon.

328. It is easy, in the present case, to become caught up in the question of the merits of what the Respondents have done in relation to the Steps Hill Sites. On the one hand, it may be said that the Respondents have, by their conduct of the planning process, engineered a situation where it can be said that the Masts have to be removed as a condition of the construction of the New Tower, thereby putting the Respondents into a position where they can exploit Paragraph (c) in an attempt to defeat Vodafone's Code rights. It may be said that this is not a legitimate way of proceeding and that a device of this kind should not succeed. On the other hand, it may be said that it is perfectly legitimate for the Respondents to have used their common ownership of the Steps Hill Sites and their lawful use of the planning process to enable the demolition of the Masts and the construction of the New Tower. In our view, and so far as Paragraph (c) is concerned, it is largely irrelevant which of these views is correct, or indeed whether the correct view lies somewhere between these competing scenarios. We do not regard it as necessary to decide what is the correct view. In our view what is important is that the construction of the New Tower was clearly consistent with the commercial objectives of the Respondents, as explained by their witnesses, regardless of whether Code rights existed or did not exist in relation to the Steps Hill Sites.

329. The test of conditionality, as identified in *Franses*, was helpfully summarised, in the context of Code rights, in the following terms by the Tribunal in *EE v Chichester*, at [37]:

> *"37 Likewise, say the claimants, the respondents cannot satisfy the requirements of para.21(5) if their intention to redevelop is conditional on whether the claimants assert their claim to Code rights. The acid test is whether the respondents would intend to do the same works if the claimants did not seek Code rights."*

330. In *EE v Chichester* the case of the landowners ran into serious trouble on the evidence. The Tribunal were not persuaded, on the evidence, that the landowners had a genuine intention to proceed with the scheme of redevelopment which was ultimately placed before the Tribunal. The Tribunal concluded, on the evidence, that the scheme had been put together in response to the claimants' application for Code rights. In the present case the evidence is very different and points firmly in the opposite direction. Applying Lord Sumption's *"acid test"* in the present case, we find that Icon would proceed with the removal of the Masts, even in circumstances where Vodafone was not seeking Code rights and, together with Telefonica, was willing voluntarily to vacate the Vodafone Site.

331. Drawing together all of the analysis in this and the previous section of this decision, our findings and conclusions are as follows:
    (1) If, contrary to our previous conclusion, the work within Item (vi), namely the removal of the Masts, had constituted work of redevelopment falling within the terms of Paragraph (c), our findings on the evidence would have been (i) that the Respondents have proved the required intention on the part of Icon, as at the Decision Date, to carry out this work, and (ii) that this intention is not impermissibly conditional.
    (2) For the reasons which we have given, the required intention has not been proved in relation to any of the other Items which constitute the Claimed Works.

(vii) Other issues within Preliminary Issue (c)

332. There are two other issues which were raised in relation to Preliminary Issue (c). Although these issues do not strictly arise for the decision, in the light of our previous conclusions, we deal briefly with them for the sake of completeness.

333. First, there was some argument from Vodafone, at least in its opening submissions, that in considering whether the Claimed Works could not reasonably be done unless the 2003 Agreement came to an end, we were entitled to take account of a range of considerations. It was also argued, in relation to the question of whether the Claimed Works could not reasonably be done, that we were only concerned with physical impediments to the work on the Orange Site. The argument was that the work on the Orange Site was not in any way obstructed by the presence of the Masts. The work on the Orange Site could, physically, be carried out without the removal of the Masts, as had in fact occurred. It was also argued that the Code was not intended to facilitate what were referred to as *"blue on blue"* applications; that is to say applications between Code operators. It was also argued that if the position is that Icon is required to remove the Masts as a condition of the Prior Approval, this is a problem which Icon has brought upon itself.

334. We accept the submission of the Respondents that considerations of this kind are not relevant to the question of whether a site provider can satisfy Paragraph (c). There is no general reasonableness requirement within Paragraph (c), nor any element of discretion.

So far as the final part of Paragraph (c) is concerned, the question is simply whether the relevant works cannot reasonably be carried out unless the relevant code agreement comes to an end. The impediments which may be created by the code agreement are not limited to physical impediment. Equally, if there is an impediment created by the existence of the code agreement, it seems to us that it does not cease to be an impediment because it may have come about in a particular way. What matters is whether the impediment, if it exists, cannot reasonably be overcome without the code agreement coming to an end.

335. Second, it was also argued by Vodafone that Icon had the ability to require the removal of the Vodafone Mast pursuant to the terms of the 2003 Agreement, so that it was not necessary for the 2003 Agreement to be brought to an end in order for Icon to carry out the Claimed Works or any part of them. The provision in question is to be found in paragraph 1.3.2 of the Third Schedule to the 2003 Agreement, and provides as follows:

> *"1.3.2 on the termination of this Agreement (howsoever caused) the Company will remove the Apparatus and will if required by the Owner reinstate the Site (and any part of the Land used by the Company) to the Owner's reasonable satisfaction having regard to the condition of the Site at the date of this Agreement"*

336. We do not think that this provision can be relied upon for the purposes of Paragraph (c). The obligation to remove the Apparatus arises on termination of the 2003 Agreement. If the 2003 Agreement is not terminated, the obligation does not arise. Nor, as it seems to us, could the obligation be the subject of any effective enforcement if Icon was required to enter into a renewal of the 2003 Agreement. In summary, we do not consider that this provision provides Icon with a means of requiring the removal of the Vodafone Mast, without the 2003 Agreement coming to an end. The present case does not seem to us to fall into that category of cases, under the 1954 Act, where the landlord's case under Paragraph (f) fails because the landlord has the right to do the relevant work under the terms of the relevant tenancy; see *Heath v Drown* [1973] AC 498.

(viii) Can Icon satisfy Paragraph (c)?

337. For the reasons which we have given, we conclude that Icon cannot satisfy Paragraph (c). Icon is unable to demonstrate an intention to redevelop, within the meaning of Paragraph (c). In summary, this is because Icon is only able to demonstrate an intention, within the meaning of Paragraph (c), in relation to one part of the Claimed Works; namely the removal of the Masts. The work of removal of the Masts is not however work of redevelopment within the meaning of Paragraph (c). As such, Icon does not have an intention to redevelop, within the meaning of Paragraph (c).

(ix) Preliminary Issue (c) - conclusion

338. Our conclusion on Preliminary Issue (c) is that Icon cannot rely on Paragraph (c). For the reasons which we have stated, the Respondents have failed to demonstrate that Icon can satisfy the requirements of Paragraph (c). Accordingly, Paragraph (c) is not engaged.

Preliminary Issue (d) – analysis and determination

(i) Is CTIL the occupier of the Vodafone Site for the purposes of Parts 2 and 4 of the Code?

339. For ease of reference, we repeat the terms of Paragraph 21:

> *"(1) Subject to sub-paragraph (5) and paragraph 27ZA, the court may make an order under paragraph 20 if (and only if) the court thinks that both of the following conditions are met.*
> *(2) The first condition is that the prejudice caused to the relevant person by the order is capable of being adequately compensated by money.*
> *(3) The second condition is that the public benefit likely to result from the making of the order outweighs the prejudice to the relevant person.*
> *(4) In deciding whether the second condition is met, the court must have regard to the public interest in access to a choice of high quality electronic communications services.*
> *(5) The court may not make an order under paragraph 20 if it thinks that the relevant person intends to redevelop all or part of the land to which the code right would relate, or any neighbouring land, and could not reasonably do so if the order were made."*

340. As can be seen, Paragraph 21 is tied to Paragraph 20, pursuant to which an operator may apply to the court for an order imposing on the operator and the relevant person an agreement which confers a code right on the operator and provides for the code right to bind the relevant person. Indeed, it is in the Renewal Proceedings that Vodafone seeks a renewal of the 2003 Agreement pursuant to Paragraph 33 and, so far as necessary, Paragraph 20. Sub-paragraphs (2) and (3) of Paragraph 21 set out the two conditions (**"the Conditions"**) which must be satisfied before an order can be made under Paragraph 20. We will refer to the condition in sub-paragraph (2) as **"the First Condition"**, and to the condition in sub-paragraph (3) as **"the Second Condition"**.

341. Paragraph (d) thus imports into Paragraph 31 the test which would have to be met for the imposition of a code agreement on an application under Paragraph 20. Effectively, one is asking the hypothetical question of whether the court could make an order under Paragraph 20, by reference to the test stated in Paragraph 21, in a case where Paragraph (d) is relied upon.

342. One consequence of this is that, where Paragraph (d) is relied upon, one has to consider whether the court could not make an order under Paragraph 21 by reason of Paragraph 21(5). In the present case it seems to us that, by reason of our decision on Preliminary Issue (c), the disqualification in Paragraph 21(5) is not engaged.

343. The preliminary point taken by the Respondents on Paragraph 21 is that Vodafone could not seek new code rights against Icon because CTIL is in occupation of the Vodafone Site. The basis for the argument is Paragraph 9(1), which provides that a code right in respect of land may only be conferred on an operator by an agreement between the occupier of the land and the operator.

344. In *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd* (referred to earlier in this decision) the Supreme Court decided that, in order for the regime under the Code to work as it should, it was not necessary to construe the Code as preventing the operator from obtaining additional code rights in respect of the land. Effectively, the occupation by the operator of the relevant site could be ignored, on the basis that the operator was not intended to be the same person as the occupier of the land referred to in Paragraph 9(1). It was not however necessary to ignore the occupation of anyone else, including a different operator in occupation of the relevant site. In the first of

the three cases before the Supreme Court in *Compton Beauchamp* this meant that CTIL, which was seeking new code rights pursuant to Paragraph 20, was not able to seek those code rights against Compton Beauchamp Estates Ltd, the landowner, because the party in occupation of the site was, as the Tribunal had determined at first instance, Vodafone rather than Compton Beauchamp Estates Ltd; see the judgment of Lady Rose JSC at [162]-[164].

345. As we understood this part of the Respondents' argument, it works in the following way. If CTIL is the occupier of the Vodafone Site, an order under Paragraph 20 could not be sought by Vodafone against Icon, and could not be made by the Tribunal. As such, the Conditions cannot be met in the present case, because there is no order which could be made under Paragraph 20 against Icon. Putting the matter another way, the Conditions cannot operate in a case where the relevant order, which is the basis of each Condition, could not be made against the site provider seeking to rely upon Paragraph (d).

346. The Respondents' preliminary point raises at least one interesting question. The question to be asked in relation to Paragraph 21, where Paragraph (d) is relied upon, is a hypothetical one. As such, the question may be said to require the assumption that an agreement is to be imposed upon the site provider, as referred to in Paragraph (d), regardless of whether such an agreement could in fact be imposed upon that site provider pursuant to Paragraph 20.

347. It is not however necessary for us to decide this or any other such interesting questions, because the preliminary point depends upon the proposition that CTIL is in occupation of the Vodafone Site in its own right. The Respondents accept that occupation may be vicarious, that is to say through an agent, but their argument is that CTIL occupies the Vodafone Site not as agent of Vodafone but in its own right for the purposes of its own business, with Vodafone and Telefonica as its customers. We have however already rejected this argument, for the reasons which we have set out at length in our analysis and determination of Preliminary Issue (a). We have concluded, both by reference to the relevant agreements and by reference to the remainder of the evidence, that CTIL has remained as the agent of Vodafone in relation to the Vodafone Site and the Passive Assets thereon, and has not been operating any independent business of its own on the Vodafone Site, either in relation to Vodafone or Telefonica. We have rejected the argument that CTIL is or has been in occupation of the Vodafone Site, providing services to Vodafone and Telefonica as its customers. In these circumstances it seems to us that the preliminary point cannot get off the ground. For all the reasons set out earlier in this decision, we do not consider that CTIL is the occupier of the Vodafone Site, within the meaning of Paragraph 9(1).

348. We therefore conclude that CTIL is not the occupier of the Vodafone Site, for the purposes of Part 2 and Part 4 of the Code, with the consequence that the Respondents' preliminary point on Paragraph (d) fails.

(ii) If so, is Vodafone unable to satisfy the public benefit test in Paragraph 21 because it could not seek a code agreement in respect of the Vodafone Site against Icon, but only against CTIL?

349. By reason of our answer to the previous question, it is not necessary for us to answer this question, or the issues (one of which we have identified above) to which it may give rise.

(iii) Is the First Condition met?

350. So far as the First Condition is concerned, the starting point is to identify the prejudice which, so it is alleged, would be caused to Icon, assuming the making of an order under Paragraph 20. We will adopt the expression used by the Respondents' counsel, namely **"the Notional Order"**, to refer to the order under Paragraph 20 which it is necessary to assume for the purposes of deciding whether the Conditions are met. For the avoidance of doubt, the Notional Order would be an order imposing upon Vodafone and Icon a new code agreement pursuant to Paragraph 20.

351. As the Respondents' case was stated in closing submissions, Icon alleges that it would suffer the following prejudice as a result of the making of the Notional Order, which is also said not to be capable of being adequately compensated by money:
    (1) The inability to make lawful use of the Orange Site and thus commercially to exploit the Orange Site.
    (2) The risk of enforcement action in relation to the Orange Site.
    (3) The wider damage caused to Icon's business.
    (4) Wider public disbenefits from Icon not being able to retain the New Tower.

352. Vodafone's list of issues for the Trial included, at paragraph 12, the issue of whether Icon was *"permitted to assert that any prejudice to it is not capable of being adequately compensated by money (para 21(2) of the Code), given its statement of case"*. As we have explained, the parties were not able to agree a list of issues for the Trial, with the exception of the planning issues. As we understood the position this particular argument, which is absent from the Respondents' list of issues, was not pursued by Vodafone in closing submissions. If however we have misunderstood the position we should say, for the sake of completeness, that we have considered Icon's statement of case in the Termination Proceedings and, in particular, that part of the statement of case which pleads Icon's case on Paragraph (d). In our view, and if this did remain in issue at the Trial, Icon's case was sufficiently pleaded for the Respondents to be entitled to argue that the prejudice which they allege, for the purposes of Paragraph 21(2), is not capable of being adequately compensated by money.

353. In terms of the correct approach to the question of whether prejudice can adequately be compensated by money, we were helpfully referred to a number of cases which contain guidance on that approach. In *Evans v Marshall v Bertola* [1973] 1 WLR 349 Sachs LJ identified the relevant question in the following terms, at 379H:

> *"The standard question in relation to the grant of an injunction, " Are damages an adequate remedy? ", might perhaps, in the light of the authorities of recent years, be rewritten: " Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages? "*

354. We accept that difficulties in the quantification of damages are often a factor in identifying the adequacy of damages as a remedy. In this context, the Respondents' counsel referred us to a statement of AL Smith LJ in his judgment in *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287. In considering the position of the plaintiff in that case who, in the absence of an injunction, would be saddled with a lease with an unexpired term of 19 years and a continuing nuisance from the activities of the defendants, AL Smith LJ said this:

> *"Moreover, how are these injuries to be put into money, and upon what principle are these damages to be assessed so as to represent the continuing injury to the Plaintiff? To guess at them is not assessing them at all."*

355. It is important to note that this statement was made in the context of AL Smith LJ considering the question of whether the injury to the plaintiff's rights was a small one. The judge went on to note that, in order to constitute a real assessment in that case, it would have been necessary to proceed on the basis of a buy out of the plaintiff's interest in his lease, which was not an approach sanctioned by the court at the instance of the tortfeasor. In these circumstances we are not sure that the statement referred to by the Respondents' counsel is directly on point but, as we have said, we accept that difficulties in quantification are often a factor in considering the adequacy of damages as a remedy. We also accept that loss of profits from business activity, particularly in the context of competitive businesses, is an area where the difficulty of assessing damages may have the consequence that prejudice is not capable of being compensated by money; see *Sunrise Brokers LLP v Rodgers* [2014] EWCA Civ 1373 [2015] ICR 272, at [53] and, in the context of telecommunications, *Software Cellular Network Ltd v T-Mobile UK Ltd* [2007] EWHC 1790 (Ch), at [32]-[36].

356. Also helpful on this question is the decision of the Tribunal in *Cornerstone Telecommunications Infrastructure Limited v University of the Arts of London* [2020] UKUT 248 (LC). In this case the Tribunal were concerned with CTIL's application under Paragraph 20 for rights to install and operate ECA on the roof of the respondent's building at Elephant and Castle. This created problems for the respondent, the University of Arts because, simplifying what were more complex contractual arrangements, it had entered into contractual arrangements with a developer which meant that, for commercial reasons, it needed to be able to deliver vacant possession of the relevant building to the developer at a certain point. As such, the University argued that the Conditions were not met. In particular, the University argued that it would suffer prejudice, not capable of being adequately compensated in money, if the code agreement was imposed, because it would no longer be in control of its ability to meet its contractual obligations to the developer and, in particular, to meet the commercial requirement to give vacant possession of the building to the developer at a certain point. If the code agreement was imposed, the University would have to resort to proceedings under Part 5 of the Code at the relevant time, which might or might not be successful. The Tribunal summarised the position in the following terms, at [34] and [36]:

> *"34. So the imposition of an agreement under paragraph 20 would mean that the respondent was no longer in control of its ability to give vacant possession of the LCC building to the developer within 18 months of the commencement of the lease-back and might well be unable to do so. The risk of litigation, and the time that litigation would take, put it at risk of having to pay rent beyond the first 18 months of the lease; and if the litigation is unsuccessful then at worst it will be unable to deliver vacant possession at the end of the three-year lease. That will leave it liable either to an unpredictable level of damages to the developer (which it would seek to recover from the claimant) or to an order for specific performance or an injunction. The consequences of litigation with the developer are unpredictable and unquantifiable in terms of reputational damage and damage to the working relationship with the developer. The respondent will also be prejudiced if entry into the new building is delayed, because students will have to continue working in an unsatisfactory environment."*
>
> *"36. In summary the respondent says, first, that a number of these prejudices are not capable of being quantified in money – in particular the risk to reputation,*

the risk to its relationship with its students, and the risk of a claim for an injunction. Accordingly the condition in paragraph 21(2) is not met. Nor, secondly, is the condition in paragraph 21(3) because the level of prejudice is so very high (as well as being unquantifiable at present) that it cannot be said that the public benefit likely to result from the making of the order outweighs the prejudice to it, even bearing in mind the public interest in a choice of high quality electronic communications networks."

357. In their conclusions on the Paragraph 21 issue the Tribunal first provided, at [51]-[52], some useful guidance on the correct approach to both of the Conditions:

> *"51. It is clear that Parliament in enacting the Code intended private landowners to participate in the provision of telecommunications sites for the public good by suffering the use of their land for that purpose, being compensated for any damage caused but for consideration calculated on a basis that prevents them from making a profit out of the deal as they could under the Code's statutory predecessor. The test for the imposition of such rights is quite a stiff one; for the respondent to escape this public duty, unless it is itself going to redevelop the site, it must show either that it will suffer loss that cannot be compensated in money, or that the prejudice it will suffer is so great that it outweighs the public benefit derived from the use of the site. The level of prejudice must be very high indeed to outweigh the public benefit, in the light of the public demand for, and dependence upon, the availability of electronic communications. The benefit is perhaps even higher today than it was when the Code was enacted and certainly in the current circumstances we are all keenly aware of it.*
>
> *52. But the very fact that Parliament provided, in paragraph 21(2), a way out for the landowner who will suffer prejudice that cannot be compensated, or in paragraph 21(3) contemplated a level of prejudice so great that it would outweigh the public benefit, points to the fact that Parliament did not intend a landowner to comply with this public duty at all costs. There comes a point when it is too much to ask."*

358. What particularly concerned the Tribunal on the facts of the case, was the element of risk confronting the respondent and, in particular, the risk of litigation; see [53]. The Tribunal decided, for this reason, that the First Condition was not met. The Tribunal expressed their conclusions in the following terms, at [56]-[57]:

> *"56. The consequence of risk is stress; the risk of litigation will cause stress and uncertainty to the respondent's employees, at a time when they are preparing for a move of the entire institution to a new building (itself a stressful process). If litigation becomes a reality there will be further stress, with its associated operational consequences. Whether or not the respondent is the successful party in any litigation there will be reputational damage in terms of how the respondent is regarded by the public, and difficulties in its relationship with the developer and with its students and prospective students. We regard all these as prejudices that cannot be compensated in money.*
>
> *57. There is a further risk, albeit a lower risk, that the respondent will be unsuccessful in that litigation and will be unable to meet its obligations to the developer. Injunction proceedings might then be taken against it. Again this involves prejudice, in terms of stress, damage to the relationship with the developer, and reputational damage, that cannot be compensated in money."*

359. In the present case it seems to us that there are two difficulties with the Respondents' case.

360. The first difficulty is that the prejudice to Icon relied upon by the Respondents seems to us to be materially overstated. Applying our findings on the planning issues, Icon is subject to a planning condition (or requirement) which requires the removal of the Masts, in circumstances where, at least as matters stand, it is unable to achieve that result. The risk of the LPA taking enforcement action is a high one. Effectively, and as the Respondents submitted in their closing submissions, Icon is currently unable to make lawful use of the New Tower. If the Notional Order was to be made, Icon's ability to solve this planning problem, at least so far as the Vodafone Site is concerned, by bringing the 2003 Agreement to an end and removing Vodafone and Telefonica from the Vodafone Site, would be gone. Effectively therefore, and on a worst case scenario, Icon is looking at the loss of its investment in the Orange Site, so far as that investment can be demonstrated to have been the investment of Icon.

361. There is also the risk of enforcement action, in itself. It is not however clear to us what prejudice is thereby constituted. We have accepted that the risk of enforcement is a high one. In these circumstances it seems to us that this translates not into the prospect of a long and expensive planning battle with the LPA but rather, and as the Respondents have been at pains to stress throughout the Trial, to a planning situation where Icon cannot make lawful use of the New Tower.

362. So far as the alleged reputational loss from the failure of the investment in the Orange Site is concerned, we do not accept that there is any loss of this kind. If one assumes a worst case scenario where the investment in the Orange Site is lost, there is no evidence before us to support the case that this will result in reputational loss to Icon, as opposed to financial loss. Nor do we accept that any such reputational loss will occur. This will simply be a failed investment and a failed scheme. There is, in our view, a stark contrast between the present case and the *University of Arts* case. As the Tribunal found in that case, the University was looking at very serious problems if it was to have a code agreement imposed upon it; see in particular the decision at [56] and [57], as quoted above. The University faced the risk of uncertain litigation, damage to its reputation in the eyes of the public, problems in its relationship with the developer, and problems with the accommodation of its students and prospective students. The contrast with the present case, where all that is involved is the loss of a commercial investment, seems to us be very clear.

363. So far as the alleged wider public disbenefits are concerned, they do not seem to us to be relevant in relation to the First Condition, where we are concerned with prejudice caused to the relevant person, namely Icon. If however we are wrong in taking this view, we do not accept that these wider public disbenefits exist. As matters stand there are two masts (the Masts) located in the Field both of which are functioning perfectly adequately. There is no evidence before us that there is, or is likely to be any difficulty with the operation of the Vodafone Mast or the MBNL Mast. There is no evidence before us that the greater capacity offered by the New Tower is currently required by any of the operators on the Vodafone Site or the MBNL Site. We have found that the reality is that Vodafone would be likely to migrate to the New Tower if it was forced to do by the termination of the 2003 Agreement, but it is equally clear from the evidence, and we so find, that Vodafone has no desire to do so, if it can stay on the Vodafone Site.

364. Ultimately, one comes back to the same point, which is that what is really at stake here is Icon's investment in the Orange Site. This seemed to us to be confirmed by the following statement by Mr Watkin, in his closing submissions, at **[T7/149/22-150/4]**:

> *"But the major point in relation to this is that what we're losing is the ability for Icon to invest and try and achieve a return on its investment, and the difficulty is that you can't work out how that's going to be. Icon has lost the opportunity to try and make a profit, and it's no good just saying, "Well, there's no evidence that they can make a profit and therefore there's no prejudice to them".*"

365. We agree with Mr Watkin that the First Condition cannot be said to be met in the present case on the basis that there is no prejudice. We are not engaged in quantifying loss. We are not required to undertake this exercise and we are not in a position to undertake this exercise. Nor does the evidence permit us to find that there is no prejudice; see our analysis immediately above. We are however engaged in considering whether the prejudice is capable of being adequately compensated in money. In answering that question Mr Watkin's submissions seems to us, as we have said, to confirm that what is really at stake here is Icon's investment in the Orange Site.

366. It is perhaps worth adding that we have not seen the evidence to establish that a valuable business opportunity would be lost if the Notional Order was made. The making of the Notional Order would have the effect that Icon could not secure vacant possession of the Vodafone Site and would not be able to demolish the Vodafone Mast. We have accepted that, if the 2003 Agreement was brought to an end, with no new code agreement, there is a reasonable prospect that Vodafone would migrate to the New Tower; see the relevant part of our analysis of Preliminary Issue (c). We have been unable to make any similar finding in relation to the remaining MNOs using the Masts. As we have understood Icon's commercial objective, it is to have all four MNOs migrate to the New Tower. Whether that could be achieved seems to us to be up in the air. We accept that this is not directly relevant to the question of whether the First Condition is met because, as we have endeavoured to make clear, we are not concerned with actual quantification of the prejudice to Icon. We mention the point because it seems to us to demonstrate that there would be scope for argument, on the quantification of the loss of the investment, as to the true extent of the loss said to have been caused by the Notional Order.

367. The second difficulty with the Respondents' case is that we cannot see why any prejudice to Icon cannot adequately be compensated by money. As we have explained, the prejudice, on a worst case scenario, is essentially the loss of Icon's investment in the Orange Site. We cannot see why this loss cannot adequately be compensated by money. So far as quantification is concerned we have found the evidence of Mr Kay helpful in understanding Icon's business model and commercial objectives. We do not accept that it would be a difficult exercise, let alone an impossible exercise to put a value on the loss of Icon's investment in the Orange Site, either in terms of past expenditure or in terms of anticipated future profit from the New Tower, or in terms of the resolution of the planning position. Courts and tribunals regularly carry out exercises of this kind. We reject the Respondents' submission that the exercise would be one of guesswork; to use the language of AL Smith LJ in *Shelfer*. In our view the detriment which Icon would suffer, if the Notional Order was to be made, is perfectly capable of being quantified and is perfectly capable of taking into account both the commercial position and the planning position.

368. If one asks the question posed by Sachs LJ in *Evans*, it seems to us, by analogy and taking into account all the circumstances of the present case, that there would be nothing unjust

in Icon being confined to compensation in money in the present case, assuming the making of the Notional Order. Indeed, if this was an injunction case, and we were exercising the discretion of a court in relation to the question of whether an injunction should be granted or whether Icon should be confined to a remedy in damages, we would have no hesitation in deciding that Icon should be confined to a remedy in damages. The key point seems to us to be one which we have already made; namely that all that is at stake here, assuming the making of the Notional Order, is Icon's investment in the Orange Site.

369. We also find the authorities cited to us by the Respondents' counsel to be helpful in this context. We have already made reference to *Shelfer* and *Evans*. It seems to us that the facts of *Sunrise Brokers* and *Software Cellular Network* can be contrasted with the present case. *Sunrise Brokers* was a case in which an injunction was sought by an employer to prevent an employee working for a competitor. The difficulties with assessing damages in such circumstances were explained by Underhill LJ in the following terms, at [53]:

> *"53 I accept that there was no positive argument advanced below that damages would be an adequate remedy for the claimant if the defendant joined EOX sooner than his contract permitted: what Mr Duggan told us is confirmed by the transcript of the closing submissions. I do not find that surprising. In a case of this kind there are evident and grave difficulties in assessing the loss which an employer may suffer from the employee taking work with a competitor: even where it is possible to identify clients who have transferred their business (which will not always be straightforward, particularly where the new employer is outside the jurisdiction) there may be real issues about causation and the related question of the length of the period for which the loss of the business could be said to be attributable to the employee's breach. If the sums potentially lost are large they will not be realistically recoverable from the employee in any event: in the present case no claim was advanced against EOX. There may be other intangible but real losses to the employer's reputation. I do not say that there may not be particular cases in which relief should be refused on the basis that damages are an adequate remedy - Mr Craig referred us to Phoenix Partners Group LLP v Asoyag [2010] IRLR 594 - but unless a specific case to that effect was explicitly advanced, the judge was in my view fully entitled to proceed on the assumption that injunctive relief was the appropriate remedy."*

370. The position in the present case bears no relation to the facts of *Sunrise Brokers* and, in our view, gives rise to none of the problems identified by Underhill LJ in the extract from his judgment quoted above. The same applies to *Software Cellular*, where the court was concerned with whether damages would be an adequate remedy in the context of a claim by the claimant, trading as Truphone, for an order requiring T-Mobile to activate the Truphone numbers. On the question of whether damages would be an adequate remedy, Mr Robin Knowles CBE QC (sitting as a Deputy Judge of the High Court, as he then was) said this at [32]-[34]:

> *"32. Truphone argues that it will be impossible to quantify the loss that it suffers as a result of its inability to launch a full service. It makes a credible claim that its commercial survival will be in doubt if it must await trial, even a speedy trial, before it can (if successful at that trial) launch a full service.*
>
> *33. T-Mobile urged that Truphone can launch a service, even of not a full service. Indeed some publicity material suggested that it had already, although Truphone emphasised that this material had been issued prematurely. To my mind however, the size of T-Mobile's share of the UK mobile telephone market*

or the call origination market in the UK must mean that it is realistic that a service launched now without the ability to receive calls from a T-Mobile number to a Truphone number would be the launch of a materially compromised service.

34. On any view the loss suffered should Truphone show at trial that it was throughout entitled to be able to launch a full service, and not simply a compromised service, would be very hard to quantify reliably. Quite possibly, in a rapidly developing market and taking into consideration customer loyalty, the losses would reach forward as well as lie in the past."

371. Again, the contrast with the present case seems to us to be clear. In the present case we cannot see that there is any risk of Icon's overall business model or reputation being compromised in any way, simply by the loss of its investment in the Orange Site. Icon's position bears no resemblance to that of Truphone in *Software Cellular*.

372. In summary it seems to us that the prejudice caused to Icon by the making of the Notional Order can adequately be compensated by money.

373. This is sufficient to allow us to determine the question of whether the First Condition has been met in the present case. There is however a further argument with which we should deal in relation to the First Condition, which was raised on Vodafone's side. Vodafone's counsel argued, and Mr Radley-Gardner stressed in closing submissions that Icon found itself in a predicament of its own making. It had launched a speculative build, in the hope of attracting MNOs, and it was its look out if it was unable to attract any MNOs to the New Tower. The same argument might equally be applied to the planning position. In that context also Icon has taken the risk of constructing the New Tower, in circumstances where the Prior Approval required the removal of the Masts. Icon thus took the risk that it would not be able to satisfy this planning requirement, with the result that its present planning difficulties are entirely of its own making.

374. There is considerable attraction in arguments of this kind, essentially because Icon's position is an unattractive one. Icon chose to take the risk of constructing the New Tower in circumstances where it could not be confident that it would be able to meet the planning requirement to remove the Masts. The planning requirement did not come out of the blue. It was part of the Prior Approval Application. In these circumstances it can be said that Icon's current planning predicament and the possible loss of its investment in the New Tower are problems entirely of its own making. It took a risk with its scheme and the risk has been realised.

375. We are not however persuaded that arguments of this kind have much relevance to the question of whether the First Condition is met. We say this for two reasons.

376. First, there is no general merits test in the First Condition. The fact that the prejudice to Icon can be said to be self-induced does not seem to us, in and of itself, to be a factor which we should be taking into account in deciding whether the First Condition has been met. At best it seems to us that this is a factor which can be taken into account, as part of the overall circumstances of the case, in deciding whether it is just that Icon should be confined to a financial remedy in respect of its prejudice. We have already concluded that this is just, without reference to this particular factor, but this factor may be said to provide further support for our conclusion. This however seems to us to be the limit of the role this factor can play.

377. Second, arguments of this kind would be relevant if they went to the question of causation which is engaged by the First Condition. The prejudice to the relevant person must be caused by the order referred to in Paragraph 21(2); that is to say the prejudice must be caused by the Notional Order. There is therefore a causation requirement in the First Condition. In the present case we can see the argument that the prejudice caused to Icon would not be caused by the Notional Order, but has already been caused by Icon's decision to take the risk of proceeding with the construction of the New Tower, without securing its position in relation to the removal of the Masts. We confess that, at first sight, the argument has a considerable attraction. We are not however persuaded that this argument is correct, on the facts of the present case. As we have indicated, it can certainly be said that Icon's current problems have been caused by its decision to proceed with the construction of the New Tower at its own risk. The problem for this argument is that, as it seems to us, it can equally be said that Icon would be able to resolve these problems, at least so far as the Vodafone Site is concerned, if the Notional Order was not made, thereby opening the way to Icon being able to remove the Vodafone Mast. In our view this is sufficient to establish the required causation between the making of the Notional Order and the prejudice to Icon.

378. We therefore conclude that the argument that Icon is in a predicament of its own making is only relevant, to the question of whether the First Condition is met, to the limited extent we have identified above.

379. Nevertheless, we have already concluded, for the reasons stated above, that the prejudice caused to Icon by the making of the Notional Order is capable of being adequately compensated by money. Drawing together all of the above analysis, we therefore conclude that the First Condition is met in the present case.

(iv) Is the Second Condition met?

380. Turning to the Second Condition, we have already identified the prejudice to Icon, in our analysis of the First Condition. The question is whether the public benefit likely to result from the making of the Notional Order outweighs the prejudice to Icon.

381. As the Tribunal stated in the *University of Arts* case, at [51], the test is a stiff one:

> *"The test for the imposition of such rights is quite a stiff one; for the respondent to escape this public duty, unless it is itself going to redevelop the site, it must show either that it will suffer loss that cannot be compensated in money, or that the prejudice it will suffer is so great that it outweighs the public benefit derived from the use of the site. The level of prejudice must be very high indeed to outweigh the public benefit, in the light of the public demand for, and dependence upon, the availability of electronic communications."*

382. This leads into the question of how one measures public benefit. The Respondents contend that, in assessing public benefit, it is legitimate to take account of the fact that the New Tower is available for Vodafone's use, if it is unable to obtain a new code agreement in relation to the Vodafone Site.

383. This question was considered by the Tribunal in *Cornerstone Telecommunications Infrastructure Limited v University of London* [2018] UKUT 356 (LC). The case was concerned with an application for the imposition of an agreement permitting the claimant to obtain access to the roof of one of the respondent's buildings, in order to survey the

building and decide whether it was a suitable location for ECA. This gave rise to several issues, one of which was whether, assuming jurisdiction to make such an order, the claimant had shown a good arguable case that the Conditions were satisfied. On this issue, the claimant did not have to satisfy the Conditions, but rather had to demonstrate a good arguable case that it could satisfy the Conditions.

384. Although the Tribunal was concerned with the question of whether there was a good arguable case that the Conditions could be met, it was still necessary for the Tribunal to determine the legal framework of the Conditions. This included the question of whether, in considering the question of public benefit, it was relevant to consider the availability of alternative sites which the claimant could use. The Tribunal considered that a comparison of this kind was neither required nor permitted. As the Tribunal explained, at [131]-[133]:

> *"131. There was a certain amount of cross examination and submission about the availability of alternative sites which might be used by the claimant instead of the University's Building. I do not regard that evidence as directly relevant to the para.21 test to be applied by the Tribunal. The focus of para.21(3) (the second condition) is the public benefit likely to result from the making of the order sought by the operator. No comparison is required (or permitted at this stage) between that public benefit and the public benefit which might result from the making of a different order conferring rights over different land. Mr Radley-Gardner referred to a decision of the Court of Appeal under the old Code, St Leger-Davey v First Secretary of State *J.P.L. 344 [2004] EWCA Civ 1612 at [22]–[24]; [2004] 12 WLUK 3 *J.P.L. 344 in support of his submission that a comparison between sites was not relevant to the second condition. I agree with his submission, but I do think the Court of Appeal's decision supports it, as the test under the old Code was materially different.*
> *132. If any further underpinning is required of what seems to me to be the clear effect of para.21(3) it can be found in paras 4.32 and 4.33 of the Law Commission's Report, to which Mr Radley-Gardner also referred. The Commission rejected the suggestion made by one consultee that an operator should be required to show that there was no reasonable alternative to the land over which rights were sought; it considered that approach would be "impractical and too stringent" and would be likely to produce stalemate where two or three sites were possible.*
> *133. The choice of sites is left by the Code to the judgment of operators. It might possibly be argued that the availability of an alternative site was relevant to the exercise of the Tribunal's discretion (as to which I express no concluded view) but, generally, a comparison between sites is not required to demonstrate satisfaction of the second para.21 condition."*

385. The reference to the Tribunal's discretion in [133] was a reference to the Tribunal's discretion under Paragraph 26(3), which was engaged because the application was one for interim code rights under Paragraph 26. This discretion is not engaged in the present case.

386. The determination of the scope of public benefit by the Tribunal in the *University of London* case was followed and applied by the Tribunal in the *University of Arts* case, at [27]:

> *"27. We have to consider in detail the parties' arguments about those two conditions. We begin by saying that we accept what the claimant says about the public benefit of making the order sought. This is a busy urban area comprising retail, residential and university premises where electronic communications are*

in constant demand, and indeed the provision of such communications is an important element in the redevelopment plans. This is a suitable site to replace the buildings the claimant has had to leave. It is now well-established (see Cornerstone Telecommunications Infrastructure Limited v University of London [2018] UKUT 356 (LC), paragraphs 131 – 133) that it is no part of the Tribunal's task to consider whether alternative sites would do just as well. In any case it is not clear that any alternatives are available, save for the possibility that the claimant might share the rooftop site by agreement with MBNL on behalf of EE and H3G. Whether sharing would be on offer is not known, but in any event we regard such a sharing arrangement as in effect an alternative site which we do not have to consider. We have to weigh the public benefit arising from the imposition of a paragraph 20 agreement as if the alternative were that the claimant does not operate from the roof-top; that benefit is not diminished by the fact that the same benefit might be achieved by the use of an alternative site or of a sharing deal on the same rooftop."

387. On the basis of these two authorities Mr Radley-Gardner submitted that the identification of the public benefit likely to result from the making of the Notional Order was a simple exercise. The existence of the New Tower is not taken into account in the exercise. One simply needs to look at what is on the Vodafone Site and ask whether it is productive of public benefit. The answer to that question, so he submitted, was straightforward. The Vodafone Mast is propagating the networks of two operators; namely Vodafone and Telefonica. If the Notional Order is made, the Vodafone Mast can continue to do so.

388. For his part Mr Watkin submitted that the situations in the *University of London* and *University of Arts* cases could be distinguished. In the present case, as he pointed out, the person against whom code rights are assumed to be sought pursuant to Paragraph 20 is the party able to provide Vodafone with what is, on the evidence, a suitable alternative site on the New Tower. Mr Watkin also submitted that if one was compelled only to consider the Vodafone Mast, and thereby to conclude that Vodafone's network service would be lost if the Notional Order was not made, this would collapse the question of public benefit into the question of whether the person making the application under Paragraph 20 was an operator or not. We understood Mr Watkin's point to be that if the person making the application was an operator, and if the availability of an alternative location could not be considered, the operator would always be able to demonstrate a public benefit as a result of being allowed to remain on the relevant site, because an assumption would be required, whether contrary to reality or not, that otherwise the network services of the operator would be lost from that location.

389. We are inclined to agree with Mr Watkin that the present case can be distinguished from the *University of London* and *University of Arts* cases. In those cases, as it seems to us, the Tribunal was saying that it was not permissible to conduct a general inquiry into whether alternative sites were available. No comparison was required (or permitted) at that stage between the public benefit resulting from the order sought by the operator in relation to the relevant site and the public benefit which might result from the making of a different order conferring rights over different land; see the decision in *University of London* at [131]. We are inclined to think that the Tribunal did not, in either of these cases, intend to impose a general rule of law to the effect that the availability of an alternative location for an operator can never be taken into account in assessing the public benefit likely to result from the making of the Notional Order. In the present case the Respondents are not seeking to establish that there are suitable alternative sites which Vodafone could use. Their argument is that Icon, the site provider in respect of the Vodafone Site, can provide an

alternative site which, on any view of the matter, offers equivalent or better facilities through which Vodafone can operate its network.

390. We do not think that it is necessary to express a concluded view on whether Mr Watkin is right in his argument, or on the thoughts which we have expressed in our previous paragraph, for reasons which we shall explain shortly. We are prepared to proceed on the basis that, on the particular facts of this case, it would be wrong to disregard the reality that there would be a suitable alternative site available to Vodafone, if the Notional Order was not made.

391. In terms of the Second Condition however, the Respondents' argument assumes that there would be no public benefit likely to result from the making the Notional Order, because Vodafone could continue to operate its network from the New Tower, and the network would remain available for the use of the public, as before.

392. In our view there is a serious flaw in this argument. As Mr Radley-Gardner reminded us in his closing submissions, the commercial driver behind the construction of the New Tower and Icon's opposition to the renewal of the existing code agreement (the 2003 Agreement) is for Icon to avoid the deleterious consequences of the renewal of the existing code agreement at new Code rents. The object is to capture the four main MNOs, who are currently making use of the Masts, and require them to migrate to the New Tower, where they will be required to pay commercial rents, as opposed to Code rents.

393. The reason why the rents payable for space on the New Tower would be commercial rents, and thus higher or likely to be higher than Code rents, is because the Code contains provisions, in Paragraph 24, which govern the amount of consideration (rent) payable by an operator to a relevant person under a code agreement. Paragraph 24(3) sets out the assumptions on which the market value of the rent is to be assessed. These assumptions include, at sub-paragraph (a), the assumption that the right that the transaction relates to does not relate to the provision or use of an electronic communications network. This assumption therefore avoids any uplift in value which results from the fact that the relevant site is to be used as a mobile communications site. Also included is the assumption, at sub-paragraph (d), that there is more than one site which the buyer could use for the purpose for which buyer seeks the right.

394. The purpose of the valuation provisions in Paragraph 24 is to ensure that operators are not required to pay rents which reflect the rent which would be payable on the open market. Matters such as scarcity of available sites and the fact that the relevant site may be critical to an operator's network fall to be disregarded. This is consistent with the overall purposes of the Code, which include ensuring the availability of mobile communications facilities to the public as widely as possible and at competitive prices. Parliament has decided, in enacting the Code, that it is in the public interest that operators should have the benefit of paying Code rents, rather than open market rents, for the sites they use. This, in turn, is consistent with a matter to which we are required to have regard, in deciding whether the Second Condition is met; namely *"the public interest in access to a choice of high quality electronic communications services"*.

395. In seeking to compel Vodafone to migrate to the New Tower, Icon is seeking to prevent Vodafone from having one of the benefits which Parliament intended to confer upon operators and, through operators, upon the public; namely the benefit of Vodafone paying a Code rent.

396. Looked at in this way it seems to us that a significant public benefit would result from the making of the Notional Order; namely that Vodafone would secure the advantage, which Parliament intended operators to have under the Code, of paying a Code rent for the site, in this location, from which it will operate its network. Putting the matter the other way round, if the Notional Order was not made, Icon would be able to deprive Vodafone of the advantage of paying a Code rent, and would be able to compel Vodafone to pay a market rent. This would, in our view, constitute a substantial detriment to the public, given that it would defeat one of the benefits which Parliament intended to confer upon operators by the Code and, through operators, upon the public. In our view, allowing this to occur would not be serving the public interest in access to a choice of high quality electronic communications services.

397. As the Tribunal noted in the *University of Arts* case, the level of prejudice must be very high indeed to outweigh the public benefit, in the light of the public demand for, and dependence upon, the availability of electronic communications. It is no answer to this, in the present case, to say that a suitable alternative site is available, so that there is no loss of network facilities to the public. The suitable alternative site is not available on terms which ensure the continuation of the benefits which the Code was intended to confer upon the public; in this instance meaning a Code rent.

398. In their submissions the Respondents' counsel identified what they referred to as wider public disbenefits. As however we have already stated, in our analysis of the question of whether the First Condition is met, we do not accept that these wider disbenefits exist. In particular, we do not accept that the public benefit which we have identified as resulting from the making of the Notional Order falls to be diminished or disregarded because the benefit of a new Code agreement will pass to CTIL. This factor does not alter the fact that Vodafone will have been forced off a Code rent on to an open market rent. Nor does this factor offset the damage to the purposes behind the Code which would be caused if the Notional Order was not made and Icon's commercial objective was thereby achieved.

399. The Second Condition requires that the public benefit *"likely"* to result from the making of the Notional Order outweighs the prejudice to the relevant person, namely Icon. Drawing together all of the above analysis, we conclude that the public benefit which will result from the making of the Notional Order outweighs the prejudice to Icon. We are only required to conclude that the public benefit likely to result from the Notional Order outweighs the prejudice to Icon, in order to find that the Second Condition is met. Clearly, our conclusion satisfies that requirement. On any view of the matter the public benefit which is likely to result from the making of the Notional Order outweighs the prejudice to Icon.

400. We therefore conclude that the Second Condition is met in the present case.

(v) Preliminary Issue (d) - conclusion

401. Our conclusion on Preliminary Issue (d) is that Icon cannot rely on Paragraph (d). For the reasons which we have stated, the test under Paragraph 21 for the imposition of the code agreement on the site provider is met. Accordingly, Paragraph (d) is not engaged.

The outcome of the Preliminary Issues

402. For the reasons set out in this decision, we return the following answers to the Preliminary Issues:

(1) Preliminary Issue (a) – The Respondents have failed to establish a breach of the Alienation Clause. Accordingly, Icon cannot rely upon Paragraph (a).
(2) Preliminary Issue (c) – The Respondents have failed to establish that Icon has an intention to redevelop within the meaning of Paragraph (c). Accordingly, Icon cannot rely upon Paragraph (c).
(3) Preliminary Issue (d) – The test under Paragraph 21 for the imposition of the code agreement on the site provider is met. Accordingly, Icon cannot rely on Paragraph (d).

The Chamber President, Mr Justice Edwin Johnson Mrs Diane Martin TD, MRICS FAAV

20 February 2025

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.