LEASE vs LICENCE

AND SOME OF THE ISSUES SURROUNDING RADIO ACCESS NETWORK SHARING WHEN INTERPRETING AGREEMENTS

A Paper for the RICS Telecoms Forum annual conference

on 19 November 2008 at the Royal College of Physicians, London

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Introduction

1. Those forlorn acres of mineral roofing felt surmounting the tower blocks of our towns and cities, formerly home perhaps only to lift gear housing, window cleaning cradles and the odd air conditioning unit, have in recent years sprouted a profusion of pylons, masts, cabinets, cabling and other equipment belonging to the principal telecommunications operators. Airspace has become hot property.

2. By what right is all that equipment there? What if any security of tenure do the telecommunications operators enjoy? What rights do they have to allow others to share their equipment? These are the questions we hope to answer in this paper. So far as we are aware, this is the first occasion on which these questions will have been addressed in substance.

Part 1: Lease/Licence

3. Although it possible that some telecommunications equipment will have been installed without any formal agreement, it is relatively safe to assume that the vast majority of such equipment is in place pursuant to some written agreement. The one thing that can uniformly be said of all such agreements is that they display no uniformity. Thus:

   - Some are described as leases, and demise portions of the airspace, with associated rights of access, sometimes for fixed terms of 10 or 20 years, at a reviewable rent; sometimes on an annual or other periodic basis.
   - Some are described as licences, with widely varying provisions.

- Some – perhaps the majority – avoid labels altogether, and use neutral language to describe the principal terms of the occupational arrangements.

4. Why does it matter whether the agreement takes effect as a lease or a licence? Two principal reasons:

   (a) In general terms, a lease of premises occupied for business purposes will attract statutory security of tenure under Part II of the Landlord and Tenant Act 1954, which will affect the landlord's freedom of manoeuvre. We deal with this in Part 2 of this paper.

   (b) A lease grants an interest in the land occupied, which the telecommunications operator is free to exploit (subject to any provisions to the contrary in the lease). It is rare for a licence to do so. This consideration impacts on Radio Access Network Sharing, which is dealt with in Part 3 of this paper.

5. How to construe agreements to find out whether they are leases or licences? The answer is that it is a matter of substance, and not of the label which the parties attach to the agreement into which they have entered. That this is so was established by the House of Lords in Street v Mountford [1985] AC 809. A document which grants the right to exclusive possession for a term, at a rent, creates a lease, no matter what the parties choose to call it. As Lord Templeman, showing his own lack of familiarity with gardening implements, observed (at p. 819):

> "[…] the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade."

6. Their Lordships in Street were willing to contemplate that there may be cases where the finding of the three hallmarks does not inexorably lead to a lease, such as where the relationship was not intended to give rise to a legal relationship at all, but those need not detain us here (they are discussed in the judgment and at pp. 826 – 827). Although it is now agreed that there are only two hallmarks, and not three (rent being inessential - see section 205(1)(xxvii) of the Law of Property Act 1925), the Street apparently endures: substance prevails over form.

7. So, we conclude that it is the substance of an agreement that is important, rather than the labels the parties have used in it. Right? Not necessarily.

In Clear Channel UK Ltd v Manchester City Council [2006] 1 EGLR 27, the Court of Appeal held that a contract for the claimant to erect and operate advertising stations created a licence rather than a tenancy. Jonathan Parker LJ was particularly influenced by the fact that the contract contained a statement that it should not create a tenancy, and added this trenchant comment to the end of his judgment:

> "I find it surprising and (if I may say so) unedifying that a substantial and reputable commercial organisation like Clear Channel, having (no doubt with full legal assistance) negotiated a contract with the intention *expressed in the contract … that the contract should not* create a tenancy, should then invite the Court to conclude that it did.
>
> In making that comment … [I do not] intend to cast any doubt whatever upon the principles established in Street v Mountford. On the other hand, the fact remains that this was a contract negotiated between two substantial parties of equal bargaining power and with the benefit of full legal advice. Where the contract so negotiated contains not merely a label, but a clause that sets out in unequivocal terms the parties' intention as to its legal effect, I would in any event have taken some persuading that its true effect was directly contrary to that expressed intention. …"

8. So, the only safe course, it would seem, for the party attempting to find out whether the agreement takes effect as a licence or a tenancy, is to comb through its provisions to see which have the better "fit". Some tips to assist with that exercise:

- If the agreement is described as a lease or a tenancy, it would be very difficult to argue with the conclusion that that is exactly what it is, unless the terms of the agreement are uncertain in some important respect (for example if they lack any reference to the term of the agreement).
- If the agreement contains a statement that it is not intended to create a tenancy, then that is likely to carry great weight (see Clear Channel).
- If the agreement is wholly unclear as to where the telecommunications equipment in question is to be stationed, then it may be arguable that no tenancy has been created, since tenancies require a specific area to be demised.
- If the parties agreed that the operator was to have the benefit of an agreement for an uncertain term, then, on the face of it, that cannot

be a tenancy. It is unsafe to assume that this automatically creates a licence, however. It can, be "cured" by implying a periodic tenancy from the regular payment of "rent": Prudential Insurance Co v London Residuary Body [1992] 2 AC 288; such periodicity to be inferred from the payments made.

9. And finally, subject to the normal caveats that attend generalisations, we think that it will be difficult to argue in most cases that an agreement for the installation and use of telecommunications equipment, *however expressed*, takes effect as a licence rather than a tenancy. The reason is that the telecommunications equipment requires a defined location for its installation, which, for obvious reasons, will be exclusive to the telecommunications operator in question. Those ingredients favour a tenancy rather than a licence.

Part 2: Security of Tenure

10. There are two pieces of legislation that may apply to an agreement under which a telecommunications operator has a right to instal telecommunications equipment in a specified location:

    (a) Part II of the Landlord and Tenant Act 1954. This only applies to certain tenancies, and will not therefore apply at all if the agreement only creates a licence.

    (b) The Electronic Communications Code. This applies whether the agreement is a licence or a tenancy.

    We consider each of these in turn, followed by a discussion of:

    (c) The interaction between the two statutory codes.

(a): Part II of the Landlord and Tenant Act 1954

11. Section 23(1) of the Landlord and Tenant Act 1954 provides:

> "… this Part of this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes."

12. In those cases where the view is taken that the agreement with the telecommunications operator created a tenancy rather than a licence, the next question will be whether the operator can be said to *occupy* the area in question.

13. It may well be the case that the operator's only contact with the premises in question will have been to install the necessary machinery and associated cabling at the beginning of the agreement, and to undertake very occasional servicing visits, perhaps at annual periods, thereafter. The question that

arises in those circumstances is whether this level of use and activity can be said to constitute "occupation".

14. Part II of the 1954 Act does not require personal occupation by the tenant. Occupation by its chattels will suffice, provided that that occupation is for the purposes of the tenant's business. It is well settled, for example, that long-term storage will suffice for these purposes. In Northern Electric plc v Addison [1997] 2 EGLR 111, the proposition that an electricity sub-station came within the Act appears to have been common ground between the parties, and was not questioned either by the Judge at first instance, or by the Court of Appeal. That said, an argument may still exist in the Landlord and Tenant Act 1954 context as to whether the use of land merely to contain machinery amounts to occupation: see Commissioners for Customs and Excise v Sinclair Collis Ltd [2001] UKHL 30.

15. However, in two rating cases, the Court of Appeal has treated telecommunications operators as being in rateable occupation. First, in Orange PCF v Bradford (Valuation Officer) [2004] EWCA Civ 155, the Court proceeded on the basis that a telecommunications operator with a licence under the Telecommunications Act 1984, and therefore subject to the Electronic Communications Code, was occupying the land on which telecommunications masts had been erected, but otherwise upon which no activity occurred.

16. Secondly in Vtesse Networks Limited v Bradford [2006] EWCA Civ 1339, the Court held that a person with exclusive use of fibre optic cables could be said to be in "actual occupation". In that case, Vtesse had a network of its own, and third-party owned, fibre optic cables which formed part of its network. The Court of Appeal decided that it did not matter that some of those cables were owned by third parties, as in fact Vtesse had sole use over all of the cables, and was in occupation of them for rating purposes. The 147 km network of cables therefore counted as a single hereditament for ratings purposes.

17. In those circumstances, we take the view that it would be difficult to argue that there is insufficient occupation of the premises by a telecommunications operator for the purposes of the 1954 Act. Accordingly, if the agreement in question takes effect as a tenancy rather than a licence, then that tenancy is likely to be protected by the 1954 Act.

(b): The Electronic Communications Code

18. In 1984, section 10 of the Telecommunications Act of that year introduced a Code known as the Telecommunications Code ("the Code"), granting extensive powers over land to telecommunications operators. Although the operative section has now been replaced by the Communications Act 2003, the Code itself (now relabelled "the Electronic Communications Code") has

been retained, with the modifications introduced by Schedule 3 to that Act. The powers granted to electronic communications operators have also been extended to include, for example, rights for the providers of electronic communications networks compulsorily to acquire land (see section 118).

19. Moreover, the Office of Communications ("OFCOM") is given various duties, including a duty:

> "to encourage others to secure:
>
> (a) that domestic electronic communications apparatus is developed which is capable of being used with ease, and without modification, by the widest possible range of individuals …; and
>
> (b) that domestic electronic communications apparatus which is capable of being so used is as widely available as possible for acquisition for those wishing to use it" (see section 10(1)).

The Government's commitment to electronic communications is difficult to overstate.

20. The Telecommunications Act 1984 and the Communications Act 2003, which provide for the application of the Code in its current form, have the following effect (in summary):

(a) they apply the Code to licensed operators, relating to the equipment used by the operators and forming part of their network.

(b) the Code confers upon the operator the right to keep apparatus installed on, under or over land or buildings, until that right is terminated under either paragraph 20 or 21 of the Code, or following abandonment and other specified eventualities.

(c) there is no provision allowing either party to contract out of the Code.

(d) an operator can apply to court under paragraph 5 of the Code to force an owner of land to enter into a contract to confer the rights permitted under the Code. On such an application, the court must have regard to the overriding principle that "no person should unreasonably be denied access to an electronic communications network".

21. Paragraph 20 gives a landowner power to require "alteration" of electronic telecommunications apparatus installed on the owner's land, "notwithstanding the terms of any agreement binding" the owner. Its purpose is therefore to override contractual stipulations so as to allow redevelopment or other improvements of land in certain circumstances. If

the operator refuses to comply with the requisite notice from the landowner, the matter must then be referred to court.

22. Paragraph 21(1) provides:

> "Where any person is for the time being entitled to require the removal of any of the operator's electronic communications apparatus from any land whether under any enactment or because that apparatus is kept on, under or over that land otherwise than in pursuance of a right binding that person or for any other reason) that person shall not be entitled to enforce the removal of the apparatus except … in accordance with the following provisions of this paragraph …".

23. Each of these paragraphs contains a detailed notice and counter-notice procedure that must be followed to the letter – and that must be considered in conjunction with the statutory regime under the Landlord and Tenant Act 1954.

(c): The interaction between the two statutory codes

24. Paragraph 20 of the Code permits a landowner to carry out an "improvement" of its property notwithstanding the presence of telecommunications equipment, and in so doing to require the "alteration" of that equipment. The word "improvement" is defined in the same paragraph to include redevelopment, while the word "alteration" is defined (misleadingly, in a completely different paragraph) to include removal.

25. Accordingly, supposing the court agrees, paragraph 20 may be used by a landowner to dislodge a sitting operator, in cases where the landowner is seeking to redevelop its property. In cases where the tenancy is one to which Part II of the Landlord and Tenant Act 1954 applies, it is arguable that the landowner will also have to ensure that the procedure for terminating the tenancy that that Act lays down is followed through. Here, however, there is a bizarre divergence between the workings of the two statutes:

    (a) The 1954 Act requires the landlord to establish that, upon termination of the tenancy, it intends to demolish the premises or carry out substantial works of construction (etc) to them. In the ordinary case, the operator will not have been demised anything other than an airspace in which to secure its equipment, and it is therefore difficult to see how the landlord could satisfy this requirement.

    (b) By contrast, under paragraph 20 of the Code, the court must not make an order for the alteration of the telecommunications equipment unless satisfied about certain requirements.

26. The position under paragraph 21 of the Code is even more obscure. This provision presupposes that, in a case of an agreement providing both contractual security of tenure, and statutory protection under the 1954 Act, both contractual and statutory rights must first be terminated before paragraph 21 can apply. Prior to that termination, the opening words of paragraph 21(1) cannot be satisfied, because the landowner will not, by definition, be "*entitled to require the removal*" of the apparatus. The landowner would, of course, be in that position only once it has received a determination from the court in its favour on a preliminary application under section 30(1) of the Landlord and Tenant Act 1954 (aside from section 30(1)(f), with which paragraph 20 of the Code presumably deals).

27. If the literal interpretation is correct, then it will do severe damage to a plans for a landowner to occupy the premises in question for its own purposes, because it will mean that a notice requiring removal can only be served once the whole of the 1954 Act procedure has been exhausted. At that stage, another round of litigation may well then ensue, if any of the operators gives a counter-notice under paragraph 21(3). The landowner will then have to go to court to secure an order for the removal of the apparatus under paragraph 21(5).

28. The court will then have to weigh up the ingredients set out in paragraph 21(6). Paraphrasing those various provisions, the court must approach the matter as if the operators were applying for an order under paragraph 5, which imports a wide measure of discretion, in which the maintenance of the electronic communications network and the need for the redevelopment will be paramount.

29. Although this position may appear draconian in the extreme, it is fair to say that paragraph 21 is not quite so extreme in the operators' favour as is paragraph 20. Paragraph 20(4) introduces three ingredients that must be taken into account by the court in considering whether an alteration to telecommunications apparatus should be made at the suit of the owner of the land on which it is installed:

    (a) First, the court must have regard "to all the circumstances and the principle that no person should unreasonably be denied access to an electronic communications network or to electronic communications services".

    (b) Secondly, the court must be satisfied that the alteration is necessary to enable the owner to carry out the proposed development.

    (c) Thirdly, the court must be satisfied that the alteration "will not substantially interfere with any service which is or is likely to be provided using the operator's network".

That list of ingredients is surprisingly stark, and appears to depress the scales heavily in favour of the operator and against the owner, even in the case of properties that are ripe for redevelopment.

30. In the case of paragraph 21, too, the availability of alternative sites within the area will be a matter of the first importance. There may well be considerable difficulty in finding alternative facilities in the area.

31. It is tempting to speculate that the draftsmen of the Code were in ignorance of the provisions of Part II of the Landlord and Tenant Act 1954. As far as we are aware, none of the provisions of the Code referred to above has been analysed in court, and it will be interesting to see how the many problems arising from the interaction between the two statutory regimes will be resolved in practice.

Part 3: Radio Access Network Sharing

(a) It's Good to Share

32. Operators under the Electronic Communications Act 2003 ("ECA") operating within the Code are governed by a regulatory framework which actively encourages, and can prescribe, sharing. A brief glance at some relevant materials illustrates the point.

33. Under section 45 of the ECA, OFCOM may impose "access-related" conditions upon service providers. Under section 73, those can include, under section 73(3)(a) of that Act, conditions for the sharing of electronic communications apparatus.

34. The Electronic Communications Code (Conditions and Restrictions) Regulations 2003, requires as one of its general conditions (regulation 3(4)) that a "Code Operator shall, where practicable, share the use of electronic communications apparatus".

35. Clearly planning policy favours sharing. Planning Policy Guidance 8 (released August 2001) provides, at paragraph 66, that

> "In order to limit visual intrusion the Government attaches considerable importance to keeping the numbers of radio and telecommunications masts, and of the sites for such installations, to the minimum consistent with the efficient operation of the network. The sharing of masts and sites is strongly encouraged where that represents the optimum environmental solution in a particular case. Use should also be made of existing buildings and other structures, such as electricity pylons, to site new antennas. Local planning authorities may reasonably expect applicants for new masts to show evidence that they have explored the possibility of erecting antennas on an existing building, mast or other structure. Conditions in code operators' licences require

> applicants to explore the possibility of sharing an existing radio site. This evidence should accompany any application made to the local planning authority whether for prior approval or for planning permission."

36. Operators are only too aware of the P.R. need for, and costs benefits of, sharing to limit the number of masts. Take for instance the Mobile Operators Association, whose third of ten commitments stipulates:

> **"SITE SHARING**
>
> Publish clear, transparent and accountable criteria and cross-industry agreement on site sharing, against which progress will be published regularly."

(b) Ways of Sharing

37. For operators, sharing comes in many forms. Understanding the basis of the sharing arrangement is important for understanding its legal effects. There is the world of difference between two entirely discrete sites on one piece of land, and one site housing two (or more) operators. One might distinguish the following forms of what is sometimes called "infrastructure sharing":

(a) Co-location (or "collocation"), where two or more operators place their antennae on the same building or structure, which is not a ground-based mast;

(b) Site-sharing, under which two or more operators place their masts within the same compound;

(c) Mast-sharing, under which two or more operators place their antennae on the same ground-based mast;

(d) Radio Access Network ("RAN") sharing, which involves the sharing of the complete radio access network.

38. The difference would be that, in form (a), the operators' apparatus is kept entirely separate, whereas in forms (b) and (c) their apparatus would be commingled or integrated to a much greater extent. This would especially be so in (c), since it may be that the incoming operator does little more than affix its own antennae and ancillary equipment to a pre-existing structure previously put in place by the sitting operator. In form (d), it is not possible physically to separate the operators, as they are both using the same, or some of the same, equipment.

(c) Obvious and Less Obvious Property Law Implications of Sharing

39. Looking at the position generally, it is clear that these differing forms of sharing have different implications for both site owner and operators in terms of their rights as landlord and tenant. As we have already noted, however, it would be a mistake to disregard also the extensive rights conferred by the Code. We will return to these below. In order to form a view of the pure landlord and tenant issues, it is necessary to separate out two situations.

    (a) The first is where a site owner grants a new right to use that site for purposes falling within the Code to two or more operators, or grants a new right to an operator to use a site while reserving to itself the right to introduce further operators onto the site. In such a situation, the question that arises is what is the legal effect of the right granted.

    (b) The second situation might be where an operator already on-site wishes to "sub-let" or create a shared occupation arrangement with a further operator, by, for instance, allowing them to install their own mast on a pre-existing compound, or a further antenna on a pre-existing mast. We will consider the issues arising out of each of these in turn, as the legal issues arising in each of those contexts differs.

Right Granted to Two or More Operators

40. Co-location does not give rise to any particular property law complications over and above those which arise in respect of any Code-regulated agreement for the installation of electronic communications apparatus, and which have been discussed above in relation to the lease/licence distinction and in relation to the parallel operation of the 1954 Act and the Code.

(i): Sharing a Site

41. Site-sharing gives rise to issues of a rather more complicated nature. In such a situation, a physically separate compound is designated as the area for the location of masts. If the landowner does not purport to grant away to the operators the compound as a whole, but merely grants to the operators rights to erect their own masts and ancillary equipment within the specified compound, then this is essentially a form of co-location. Matters may get more complicated, however, where the landowner confers on the operators the right jointly (with each other, and possibly with any further operators) to occupy the designated compound as a whole for the purposes of erecting their equipment on it. In situations of that kind, questions can arise as to whether the operators have jointly acquired a lease over the entirety of the designated compound, or, alternatively, whether they could argue that they have each been given a lease over some part of it. The relevance of this is

that, if they have no lease (either jointly of the whole or severally of part), they do not have the additional layer of 1954 Act protection.

42. The position was considered (albeit in a very different context) in a joint appeal to the House of Lords in A-G Securities Ltd v Vaughan and Antoniades v Villiers [1990] 1 AC 417. That was a case of houses with multiple rooms being let to multiple occupiers. The manner in which the letting occurred was however materially different in each case. In AG Securities, there were four rooms, each the subject of a separate letting agreement. The landlord in that case was providing accommodation in the same house to individuals who were strangers to one another. The rents differed, as did the date on which the individual leases commenced, as agreements were entered into when a room became free and a suitable occupier presented him or herself. No bedrooms were allocated to the occupiers by the landlord. The essential idea was to allow, from time to time, a shifting population to occupy the house. In Antoniades there were two separate, but identical, agreements entered into in relation to a two bedroom flat, under which the tenants in question were to live together as a "unit", that is, as husband and wife.

43. The House of Lords decided that in the first case, A-G Securities, there was no lease, either of the whole flat, or of the individual rooms (though the latter alternative was not fully explored in that case). In Antoniades, there was a lease of the whole flat. The reason given for this was that in the latter, but not the former, case the agreements were interdependent, and should be read together as constituting one joint letting, which had artificially been separated in order to avoid the provisions of the Rent Act 1977. Another way of formulating the same test is to see if the "four unities" of "interest, title, time and possession" (*per* Lord Jauncey of Tullichettle, A-G Securities, at p. 474), are in place.

44. Although factually remote, the legal issues in that case apply here. Multiple sharers on a site may be (a) joint tenants under one lease or (b) individual tenants under separate leases or (c) mere licensees. Agreements for site sharing entered into by a site owner with two or more separate operators will, therefore, have to be assessed in light of the principles in A-G Securities, that is to say on whether those agreements can fairly be read together so that the operators could argue that there were in fact joint agreements to joint tenants.

45. We would suggest that such a reading would hardly ever be possible, given that agreements of this kind are often on very different terms, for very different periods of time, commencing on different dates and for different rents. In those circumstances, we would suggest that A-G Securities would compel a finding that there was no joint lease over the whole. Indeed, it would be quite unnatural to find such an agreement where two separate commercial entities are operating from the same compound. Whether an

operator can salvage its 1954 Act rights by claiming that it was granted exclusive possession of part of a compound with shared use of ancillary space with another operator would then be a question of construing the terms of the actual individual agreements granted to any given operator to see whether, on their terms, they granted exclusive possession over land for a term.

(ii): Sharing a Mast

46. Mast sharing is likely to be factually much more complex. A mast sharing agreement confers a right for one more than one operator to have their antennae on the same mast, presumably (though not necessarily) each with their own base stations. The position here is likely to be less straight-forward, as the two (or more) sets of apparatus are likely to be more enmeshed with one another, so that it becomes more difficult to separate out the physical spheres of "exclusive control" which the Court will seek in order to find that the agreement conferred the right to exclusive possession on the operator, and hence that the agreement is a lease (see, for instance, the test as formulated in Shell-Mex and BP Limited v Manchester Garages Ltd [1971] 1 WLR 612).

47. We suggest that, so far as mast sharing is concerned, it will not be practically easy to find that the two (or more) operators are tenants under a jointly-held tenancy. It will also be difficult to find, in the alternative, that they have separate leases of those parts of the mast which they occupy. The reason for this is that it seems unlikely that the agreement will specify precisely where the antennae and ancillary equipment are to go, so that no particular "cube of air" is designated the area let to the sharing operator (though some terms are encountered, though rarely). It will therefore be more likely that, where there are multiple operators on differing terms making use of one mast, each under an agreement with the site owner, it will be easier to establish that they are licensees of the space which they occupy.

48. In site- and mast- sharing, the real difficulties are therefore likely to lie in the question of whether or not the operator is enjoying a lease of part of the site or mast. Were this (in our view usually quite high) hurdle to be overcome, then the operator may also thereby be in occupation of that part for the purposes of a business under section 23 of the Landlord and Tenant Act 1954. As we have indicated above, the tendency of the cases has been to suggest that a tenant can occupy via machinery and equipment.

(iii): Sharing a Network

49. RAN sharing is likely to be more difficult problem. The idea behind, for instance, the RAN sharing proposed by Orange and Vodafone in August

2007 (which the press reported ran into some difficulty) was that the base stations of masts could be configured to transmit more than one operator's signal, thereby allowing the existing infrastructure of one operator to be used to transmit for two operators. Such a sharing arrangement would require limited, if any, further equipment on site. The obvious benefit would be the reduction of the number of sites required, and the reduction in costs attendant upon that.

50. The adaption of existing sites will be considered below. What, however, are the implications for site owners who wish to allow a new site to be developed which is a RAN-shared site? Much will depend on the way in which the sharing agreement is structured as between the operators. It may be, for instance, that such sites are to be held under an agreement or agreements entered into jointly by the operators in their own names, or alternatively with a joint venture company incorporated for that purpose in which the operators hold shares.

51. In the former case, much will turn on the drafting of the agreement. If a single agreement is entered into between site owner and operators, then it would seem that the question whether that amounts to a lease or not is an ordinary application of Street v Mountford principles to ascertain the true nature of the agreement. That ought to be a (comparatively) straightforward exercise. Where, on the other hand, a site owner enters into separate (but of necessity linked) agreements with operators, then the question becomes one of whether those separate agreements, as in Antoniades, can be read together as one document.

52. From a Landlord and Tenant Act 1954 perspective, if the agreement is a lease in substance, then it follows that, where there is a joint tenancy, both joint tenants ought to be in occupation (Jacobs v Chaudhuri [1968] 2 WLR 1098) for protection to be conferred under the Act, However, as in such a case there is a trust of land, it will be enough to ensure 1954 Act protection if one of the tenants remains in occupation (section 41(1) of the 1954 Act). Agreements directly with operators are therefore unlikely to create any unique problems.

53. The picture does become rather more complicated under the 1954 Act where the RAN sharing agreement is implemented by means of a specially-incorporated joint venture company, which is the entity which will enter into contracts with the site owner. Any "agreement" for Code purposes, and any lease for 1954 Act purposes, will, therefore, be with the joint venture company providing the facilities to the operators, and not with the operators themselves. This means that, while the joint venture company will have vested in it any lease found to exist, the primary business activity (the provision of an electronic communications network) being carried on by a shareholder company.

54. The reason for this complexity is that under section 23(1A) and (1B) of the 1954 Act (as amended), it would appear that the joint venture company would not be able to rely upon the electronic communications activity of a company which part-owns it to qualify as "occupation" for the purposes of a business. The provisions we have referred to are limited in allowing a tenant to count business activity by either (a) a company in which the tenant has a controlling interest (but not vice-versa) or (b) by a person who has a controlling interest in the tenant, if the tenant is a company. It seems that a "person" within the second limb is a natural person, and not a legal person (see section 46(2)). The present facts will also not fall within section 41 of the Act (occupation by a beneficiary of the tenant) and may not readily fall within the "group company" provisions (section 42 of the Landlord and Tenant Act 1954; section 736 of the Companies Act 1985).

55. It would appear that the only manner in which a joint venture company could enjoy security of tenure is if it could show that its business was making facilities available for the two operators to use. This is also not without its difficulties, as, though licensing of parts of the premises falls outside the principles stated by the House of Lords in Graysim Holdings Limited v P&O Property Holdings Ltd [1996] AC 329, the Courts have had difficulty with cases where the sole business of the tenant is to license out premises for a business other than the business of a tenant: see Hancock and Willis (A Firm) v GMS Syndicate Ltd [1983] 1 EGLR 70.

56. If operators truly value their rights under the Landlord and Tenant Act 1954, Part II, careful consideration will therefore need to be given to the structuring of any site agreement to give effect to RAN sharing, for the costs saved by such agreements may be at the expense of their statutory rights.

Letting Others onto a Site

57. To be distinguished from the above are situations in which a pre-existing site operated by one operator is converted into a shared site. This appears, for instance, to have been what was intended by Vodafone and Orange, who contemplated simply configuring existing base stations so that more than one operator's signal could be transmitted, though leaving the operators' services totally distinct apart from that.

58. Such sharing also has potential implications from a landlord and tenant point of view, as the terms of an agreement may in themselves restrict sharing of occupation and possession, or alienation of whole or part of a site.

59. Again, one can quickly deal with the obvious. Were an operator to elect to "site share" with another, i.e. to allow the other to erect a further mast within a compound over which the first operator has rights, then its

entitlement to do so is a pure contractual question under the terms of the agreement. If the agreement is a lease, then the lease, if well-drafted, may well make provision for alienation, by either qualifying the right by making it subject to a consent requirement or by restricting the right to alienation of the whole, or by excluding it altogether. Where a qualified alienation right exists, and consent must be sought, then statute imposes various limitations on the basis on which a landlord may refuse consent: section 19(1) of the Landlord and Tenant Act 1927, and the further provisions of the Landlord and Tenant Act 1988. An agreement constituting a lease without any qualification is freely alienable. A proposed site-sharing scheme may also face a difficulty in that the agreement may also contain restrictions on making further alterations to the land in question, which may catch the erection of further apparatus on the land. Further, it appears that (in a rather unclear paragraph) the Code itself preserves consent requirements, at least as far as the incoming operator in concerned (paragraph 29(3) of the Code).

60. For the reasons stated above, a mast-sharing scheme, whereby apparatus is installed by one operator onto a mast already erected by an existing operator, gives rise to other difficulties. In such a case, it seems to us that the rights of the other operator are likely to be treated as being in the nature of a licence only, and hence would amount to a breach of a covenant against sharing occupation if, as the Orange and Vtesse cases suggest, use for transmitting data amounts to occupation in the landlord and tenant context. Such permission would not amount to a breach of a covenant not to part with possession, but would breach a covenant not to share occupation: see Akici v LR Butlin [2006] 1 EGLR 34.

61. It seems to us that a RAN-sharing agreement, if implemented over a pre-existing mast already subject to an agreement granted to an operator, requiring the reconfiguration of a base station, would confront only one problem, namely the sharing of occupation provisions we have identified in the above paragraph. There are obvious factual issues which relate to whether a breach of covenant against sharing occupation would be made out against the backdrop of such an arrangement. It may, therefore, be that the sole responsibility for maintenance of the apparatus remains with the original operator under the agreement, so that the use of the mast by the second operator is limited to transmitting its own signal from that mast. Therefore, its "occupation" would be confined to its electronic use of the mast. For the reasons we have stated, there is an arguable case that such use amounts to occupation in landlord and tenant law.

The Code in the Background

62. Of course, the above discussions have been decidedly landlord and tenant-centric. It is important to remember that the Code sits in the background, and confers its own set of rights to operators, and imposes its own sets of

obligations. Accordingly, there are regulations as to how alterations may be effected to apparatus, which provisions also cover the installation of such equipment (paragraph 2 of the Code). This must be seen against the back-drop of paragraph 5, which confers on operators compulsory acquisition powers to permit the erection of apparatus on land, even if the site owner does not consent.