Neutral Citation Number: [2026] UKUT 45 (LC)

Case No: LC-2025-000202

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

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

Ref: LC-2024-000563

The Rolls Building, 7 Rolls Buildings,
Fetter Lane, London EC4A 1NL
9th February 2026

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

CATCHWORDS: Electronic Communications Code – Respondents in occupation of telecommunications site - reference made to the FTT pursuant to a notice expressed to be given by the Respondents to the Appellant pursuant to paragraph 20 of the Code - whether the FTT was right to find that the occupation of the site by the Respondents was pursuant to a tenancy at will – whether the FTT was right to find, if the occupation of the site was pursuant to a periodic tenancy, that the Respondents were not entitled to seek the imposition of a new code agreement under Part 4 of the Code – whether the FTT was right to find, if the imposition of the new code agreement could be sought, that the Respondents were first required to terminate the periodic tenancy at common law – whether the FTT was right to decide that the notice was not required to contain the information about alternative dispute resolution contained in paragraph 20(2A) of the Code

BETWEEN:

AP WIRELESS II (UK) LIMITED

Appellant

-and-

(1) EE LIMITED
(2) HUTCHISON 3G UK LIMITED

Respondents

Equipoint, Coventry Road,
Yardley, Birmingham,
B25 8AB

The President, Mr Justice Edwin Johnson
2nd, 3rd, and 4th December 2025

Wayne Clark KC and Fern Schofield, instructed by Freeths LLP, for the Appellant
Oliver Radley-Gardner KC and James Andrews-Tipler, instructed by Womble Bond Dickinson (UK) LLP, for the Respondents

The following cases are referred to in this decision:

CTIL v Compton Beauchamp Estates Ltd [2022] UKSC 18 [2022] 1 WLR 3360
Volpi v Volpi [2022] EWCA Civ 464 [2022] 4 WLR 48
Fage UK Limited v Chobani UK Limited [2014] EWCA Civ 5
Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd [2006] EWCA Civ 386 [2006] 1 CLC 582
Todd v Adams [2002] EWCA Civ 509 [2002] CLC 1050
Clin v Walter Lilly & Co. Limited [2021] EWCA Civ 136 [2021] WLR 2753
Datec v Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23 [2007] 1 WLR 1325
Assicurazioni Generali SpA v Arab Insurance Group [2002] EWCA Civ 1642 [2003] 1 WLR 577
Javad v Aqil [1991] 1 W.L.R. 1007
Barclays Wealth Trustees (Jersey) Ltd v Erimus Housing Ltd [2014] EWCA Civ 303 [2014] 2 P.&C.R. 4
Cardiothoracic v Shrewdcrest Ltd [1986] 1 W.L.R. 368
Arqiva Services Ltd v AP Wireless II (UK) Ltd [2020] UKUT 0195 (LC)
Mann Aviation Group (Engineering) Limited v Longmint Aviation Limited [2011] EWHC 2238 (Ch) 2011 WL 274332
EE & H3G v Wandsworth LBC (Castlemaine) BIR/00CN/ERO/2024/0613
Walji v Mount Cook Land Limited [2002] 1 P.&C.R. 13
Prudential Assurance Co Ltd v London Residuary Body [1992] 2 AC 386
AP Wireless II (UK) Limited v On Tower (UK) Limited [2025] EWCA Civ 971
On Tower UK Limited and On Tower UK 2 Limited v AP Wireless II (UK) Limited (Patricroft and other sites) LC-2023-000852
Gravesham Borough Council v On Tower UK Limited [2024] UKUT 151 (LC), the
Tarjomani v Panther Securities Ltd (1983) 46 P.&C.R. 32
Rennie v Proma Ltd (1990) 22 H.L.R. 12
Lipton v BA Cityflyer Ltd [2024] UKSC 24 [2025] AC 154
Liverpool CC v Doran [2009] EWCA Civ 146 [2009] 1 WLR 2365
A1 Properties (Sunderland) Ltd v Tudor Studios RTM Co. Ltd [2024] UKSC 27 [2024] 3 WLR 601
R. v Soneji (Kamlesh Kumar) [2005] UKHL 49
Avon Freeholds Limited v Cresta Court E RTM Company Ltd [2025] EWCA Civ 1016
Atesheva v Halifax Management Ltd [2024] UKUT 314 (LC) [2025] HLR 6
Elim Court RTM Co Ltd v Avon Freeholds Ltd [2017] EWCA Civ 89

Index

Introduction

1. This is an appeal against a decision of the First-tier Tribunal (**"the FTT"**) dated 17th April 2025. By the decision (**"the Decision"**) the FTT determined a number of preliminary issues in a reference made to the FTT by the Respondents.

2. The case is concerned with a rooftop site (**"the Site"**) at Swan Office Centre, Equipoint, Coventry Road, Yardley, Birmingham B25 8AD (**"the Building"**). The Respondents to this appeal, EE Limited and Hutchison 3G UK Limited, are operators for the purposes of the Electronic Communications Code, as contained in Schedule 3A to the Communications Act 2003 (**"the Code"**). The Respondents have, for some years, made use of the Site as a location for electronic communications apparatus (**"ECA"**), for the purposes of their mobile communications networks.

3. On or about 7th March 2023 the Respondents served a notice on the then owner of the freehold interest in the Site, Equipoint Developments Limited (**"EDL"**). By this notice the Respondents (i) sought the agreement of EDL to conferring rights upon the Respondents to install ECA and carry out related works on the Site, and (ii) required the agreement of EDL to conferring rights upon the Respondents, on a temporary basis, in relation to the ECA already installed on the Site. This notice (**"the 2023 Notice"**) was expressed to be given pursuant to paragraph 20(2) and paragraph 27(1) of Part 4 of the Code.

4. There was no agreement reached between the parties pursuant to the 2023 Notice. On the 6th August 2024 the Respondents commenced proceedings against the Appellant, by a

reference to the Upper Tribunal Lands Chamber (**"the Reference"**). The Reference was expressed to be made pursuant to paragraph 20(3) of the Code. By the Reference, the Respondents sought an order imposing an agreement on the Appellant and the Respondents conferring code rights on the Respondents in respect of the Site. The Appellant was named as respondent to the Reference because it had, by then, been granted a lease by EDL reversionary upon whatever form of tenancy the Respondents had in respect of the Site.

5. The preliminary issues in the Reference were heard before the FTT over three days between 7th and 9th April 2025. By the Decision the FTT determined that the Respondents had occupied the Site as tenants at will and not, as the Appellant had contended, as tenants under an implied periodic tenancy. The FTT determined that the Respondents, as tenants at will, had been entitled to seek the imposition of a new code agreement pursuant to the provisions of Part 4 of the Code. The FTT also determined that the Appellant's challenge to the validity of the Notice failed.

6. With the permission of the FTT the Appellant appeals against the Decision. The appeal (**"the Appeal"**) is made on the grounds that the FTT was wrong to decide that the Respondents have a tenancy at will, and should have decided that the Respondents have an implied periodic tenancy, protected by the 1954 Act. In the alternative, if the FTT was right to find that the Respondents have a tenancy at will, the Appellant contends that the Reference could not be made, because the 2023 Notice failed to contain certain prescribed information, with the consequence that a required pre-condition to the making of the Reference had not been satisfied.

7. The Respondents have filed a respondent's notice in the appeal (**"the Respondent's Notice"**), pursuant to which they contend, for various reasons, that if the FTT was wrong to find a tenancy at will rather than an implied periodic tenancy, the actual determination of the FTT on the question of jurisdiction can still be upheld. On the hypothesis that the Respondents have an implied periodic tenancy, the Respondents say that the FTT was still right to find that the 2023 Notice was valid and that the FTT had jurisdiction to entertain the Reference and grant the relief sought by the Respondents.

8. On the hearing of the Appeal and the issues raised by the Respondent's Notice, the Appellant was represented by Wayne Clark KC and Fern Schofield. The Respondents were represented by Oliver Radley-Gardner KC and James Andrews-Tipler. I am grateful to all counsel for their assistance, by their written and oral submissions, in the Appeal.

The conventions of this decision

9. References to Paragraphs, without more, in this decision are, unless otherwise indicated, references to the paragraphs of the Decision. References to the Judge are references to Judge Jackson, who heard the Preliminary Issues in the FTT and produced the Decision.

10. The expressions *"lease"* and *"tenancy"* are used interchangeably in this decision. Italics have been added to quotations.

Relevant background

11. The background to the case is set out in the Decision, and was the subject of a statement of agreed facts, in addition to the oral evidence of two witnesses, at the hearing before the FTT. For the purposes of the Appeal, I can summarise this background very briefly, although I

will need to go into the facts in more detail when I come to consider the grounds of the Appeal.

12. By a written agreement dated 24th March 2010 which, it is agreed, took effect as a lease of the Site, the Site was demised to the Respondents for a term of 5 years expiring on 28th February 2015. This lease (**"the Lease"**) was granted by HXRUK (Midlands) Limited, which was then the proprietor of the registered freehold title to the Building (**"the Freehold"**). The Lease was contracted out of the protection of Part II of the Landlord and Tenant Act 1954 (**"the 1954 Act"**). Accordingly, the Lease came to an end on 28th February 2015 (**"the Term Date"**), when the contractual term of the Lease expired.

13. The Lease was expressed to be granted to T-Mobile (UK) Limited, the First Respondent, and Hutchison 3G UK Limited, the Second Respondent. T-Mobile (UK) Limited is now EE Limited.

14. Shortly before the Term Date, on 27th February 2015, St Francis Property Investments Limited acquired the Freehold from its then owner, JCAM Commercial Real Estate Property XVI Limited. As from 4th April 2017 this company changed its name to Corbally Property Investments Limited. I will refer to the company as **"Corbally"**.

15. On 28th December 2017 the Code came into force. It replaced the Telecommunications Code (**"the Old Code"**), as set out in Schedule 2 to the Telecommunications Act 1984.

16. On 29th March 2018 EDL acquired the Freehold from Corbally. The acquisition was completed by registration on 12th April 2018.

17. Since the Term Date the Respondents have maintained their ECA on the Site.

18. The status of this continued use of the Site by the Respondents, since 28th February 2015, is in dispute between the parties. The Appellant says that the Respondents have, since the Term Date, occupied the Site pursuant to an implied periodic tenancy which is protected by the 1954 Act. The Respondents say that they have, since the Term Date, occupied the Site pursuant to a tenancy at will which, as a tenancy at will, cannot enjoy the protection of the 1954 Act.

19. As I have said, the Appellant was granted a lease of the Site by EDL, the then freehold owner of the Building, on 8th March 2024. This lease (**"the Reversionary Lease"**) was granted reversionary upon whatever form of tenancy the Respondents had, in respect of the Site.

20. I have already made reference to the 2023 Notice, which was served on EDL by the Respondents, on or about 7th March 2023, seeking a new code agreement. As I have said, the 2023 Notice was expressed to be given pursuant to paragraph 20(2) and paragraph 27(1) of Part 4 of the Code.

21. In the absence of agreement to what was sought and required by the Notice, the Respondents commenced the proceedings in the Upper Tribunal (Lands Chamber), by the Reference. As I have said, the Reference was expressed to be made pursuant to paragraph 20(3) of the Code, and sought an order imposing an agreement on the Appellant and the Respondents conferring code rights on the Respondents in respect of the Site.

22. The Reference was, on receipt by the Upper Tribunal, transferred to the FTT. The Appellant's case was and remains that the Upper Tribunal had no jurisdiction, and the FTT equally has no jurisdiction to impose upon the parties an agreement conferring code rights. The Appellant's case is that the Respondents, by virtue of having an implied periodic tenancy of the Site, have no right to make an application under paragraph 20 of the Code, with the consequence that the Reference should be struck out.

23. On 24th September 2024 the FTT gave directions for a series of preliminary issues to be determined by the FTT (**"the Preliminary Issues"**), for the purposes of deciding whether the FTT had jurisdiction to impose upon the parties an agreement conferring code rights.

The 2018 Agreement

24. At this stage in my decision, and subject to one exception, it is not necessary to go through any of the detail of the dealings which took place between the relevant parties between the Term Date and 8th March 2024. I refer to 8th March 2024 as the end date for these dealings because it was conceded by Mr Clark, before the Judge, that no periodic tenancy could have been created after this date, which was when the Reversionary Lease was granted.

25. The exception is an agreement which was reached between the parties, here meaning the Respondents and EDL, in 2018. Some explanation of this agreement, and of the circumstances which resulted in the agreement is necessary, in order to explain the context of findings made in relation to this agreement by the Judge in the Decision. I can largely take this explanation, in summarised form, from the statement of agreed facts (**"the Agreed Statement"**) which was before the Judge.

26. On or about 26th April 2018 Peter Lynn and Partners, as solicitors for EDL, served upon the Respondents what purported to be a notice under paragraph 31(1) of the Code, which was described in the covering letter in the following terms:

> *"The owner now intends to redevelop Equipoint and as such hereby give you notice to also at bring the Agreement to an end. We now enclose by way of service upon you a statutory notice bringing your Agreement under the Electronic Communications Code to an end pursuant to paragraph 31(1) of Part 5 of Schedule 3A of the Communications Act 2003."*

27. On 15th May 2018 the Respondents' solicitors, DWF, served on EDL what were expressed to be counter-notices pursuant to paragraph 20(2) of the Old Code. These counter-notices were served subject to the following qualification in the covering letter from DWF:

> *"Entirely without prejudice to our contention that your letter and/or Notice cannot constitute notice pursuant to Paragraph 20 of the Code (as defined above), and entirely without prejudice to our contention that your letter and Notice are insufficient to terminate our clients' rights to occupy the Property, we enclose, by way of service, a Counter-Notice pursuant to Paragraph 20(2) of the Code (as defined above)."*

28. On 20th July 2018 the Respondents' solicitors, DWF, in further response to the notice served by EDL on or about 26th April 2018, served on EDL what purported to be counter-notices pursuant to paragraphs 32(1) and 32(3) of the Code. The covering letter stated

that the counter-notices were served "*entirely without prejudice to our contention that your statutory notice cannot constitute valid notice pursuant to Paragraph 31(1) of the Code.*".

29. On 5th October 2018 DWF emailed Peter Lynn and Partners to record their understanding that it had been agreed between the parties that they were able to withdraw from the proceedings before the Tribunal on the basis that EDL would be able to proceed with its proposed redevelopment without having to disturb the ECA:

> *"As you may be aware, my clients have carried out adjustment works to their mast equipment which is located on the rooftop of your client's premises Equipment* [Equipoint]*, Coventry Road, Birmingham ("the Premises"). Your client has said that, as a result of these adjustment works, it is possible for them to proceed with the proposed redevelopment, and that my clients' apparatus can remain in situ.*
> *Accordingly, I understand that it has been agreed the parties will withdraw from the Paragraph 31(1) Tribunal process."*

30. The email went on to make the point that because the deadline for the Respondents to make an application to the Tribunal pursuant to paragraph 34 of the Code was fast approaching, an appropriate agreement needed to be reached between the parties if the need to commence proceedings was to be avoided:

> *"My client's deadline to issue Tribunal proceedings under Paragraph 34 is approaching very shortly (**15 October**), and due to the new code process, it is not possible to avoid the route we are on unless we can reach an appropriate agreement. If we are not able to reach an agreement by early next week, my clients will need to protect their position. Perhaps we can discuss."*

31. An agreement was reached between the parties, further to this email, the terms of which were recorded in a letter from DWF to Peter Lynn & Partners, dated 9th October 2018, which was counter-signed by Peter Lynn & Partners for EDL. I will use the same expression as the Judge to refer to this agreement, as recorded in the letter of 9th October 2018; that is to say **"the 2018 Agreement"**. The terms of the 2018 Agreement were relatively simple, as follows:

> *"Accordingly, it has hereby been agreed between the parties that:*
> *1. Equipoint withdraws its Paragraph 31 Notice.*
> *2. EE and H3G withdraw their Paragraph 32 Counter-Notices.*
> *3. EE, H3G and Equipoint agree to the continuation of the code agreement pursuant to Paragraph 32(2) of the Code.*
> *4. All parties acknowledge that there is no requirement for EE and H3G to issue Tribunal proceedings under Paragraph 32(1)(b) and 34 of the Code."*

32. It is common ground that the notice served by EDL, the counter-notices served by the Respondents, and the 2018 Agreement were all misconceived.Both parties were proceeding on the basis that there was a code agreement in place, in respect of which EDL could serve a notice pursuant to paragraph 31(1) of the Code, and in respect of which the Respondents could serve counter-notices pursuant to paragraph 32(1) and 32(3) of the Code. The reason for this misconception was that whatever the basis of the Respondents' occupation of the Site, there was no written agreement in respect of that occupation which satisfied the

requirements for a code agreement, within the meaning of the Code, as set out in paragraph 11 of the Code.

The Preliminary Issues

33. In order to understand the issues in the Appeal, it is necessary to set out the Preliminary Issues. The Preliminary Issues were specified in the following terms, in paragraph 1 of the directions order of 24th September 2024:

> *"1. In order to determine whether or not it has jurisdiction to impose a new agreement under paragraph 20 of the Code, the Tribunal will determine the following preliminary issues (the "**Preliminary Issues**") in relation to the site located at Equipoint, Swan Office Centre, Coventry Road, Birmingham B24 89AD (the "**Site**"):*
>
> *(1) On what legal basis do the Claimants occupy the Site:*
>
> *a. as tenants under a tenancy at will;*
>
> *b. as periodic tenants without security of tenure under the provisions of Part II of the Landlord and Tenant Act 1954;*
>
> *c. as periodic tenants with security of tenure under the provisions of Part II of the Landlord and Tenant Act 1954; or, alternatively*
>
> *d. as licensees under a periodic licence?*
>
> *(2) On the true construction of the Code, are the Claimants entitled to seek the imposition of a new agreement under Part 4 of the Code in light of the current legal basis of their occupation as determined by the Tribunal?*
>
> *(3) If the Tribunal finds that the Claimants occupy as periodic tenants or licensees, were the Claimants prior to making the Reference first required to terminate any such periodic interest by serving a notice at common law?*
>
> *(4) Whether the Claimants are entitled to rely upon the paragraph 20 notices in these proceedings where the notices were served prior to the introduction of the requirement to refer to ADR and did not refer to that requirement.*
>
> *(5) Whether the Claimants are entitled to rely upon the Paragraph 20 notices in these proceedings where the wording of paragraph 16 differs from the wording in the notice prescribed by Ofcom?"*

34. I will use the expression **"Preliminary Issue 1"**, and so on (using the same numbering as in the directions order), for the purposes of identifying the individual Preliminary Issues.

35. On the first day of the hearing of the Preliminary Issues Mr Clark, for the Appellant (then the respondent to the Reference) confirmed that the Appellant was no longer pursuing its alternative argument that, if the Respondents were not occupying the Site pursuant to an implied periodic tenancy, they were occupying the Site as licensees pursuant to a periodic licence. The Judge was not therefore required to consider the question of whether an implied periodic licence had come into existence after the Term Date.

The Decision

36. I come now to the Decision itself. The Judge first set out the background to the case and then, at Paragraph 17, addressed himself to Preliminary Issue 1. After making reference to

certain authorities, the Judge identified, at Paragraph 19, the matters to which he had regard in analysing the legal status of the Respondents' occupation of the Site:

> *"19. In analysing the legal status of occupation I have had regard to:*
> *(i) Demand, payment and acceptance of rent and the significance, if any to be attached, to demands marked "without prejudice".*
> *(ii) Ongoing negotiations*
> *(iii) Statutory framework either under 1954 Act, the Old Code or, after 28th December 2017, the Code.*
> *In doing so I keep firmly in mind what was said by Judge Cooke in* ***Queens Oak Farm*** *at paragraphs 40 and 41:*
> *"40. I bear in mind that in determining the status of the claimant after the expiry of the 1997 lease I must consider the evidence objectively; the subjective intentions of the parties are not relevant.*
> *41. Because the evidence has to be considered objectively, I regard the evidence of witnesses of fact with some caution."*

37. The Judge then proceeded to consider in detail, at Paragraphs 20-63, the evidence in the case and the statutory framework.

38. My reference to the evidence needs some qualification. The Judge had the benefit of the Agreed Statement (the statement of agreed facts which I have mentioned), and the documentary evidence. The Judge also heard the evidence of two witnesses; one for the Appellant and one for the Respondents. Neither of these witnesses had any direct or personal knowledge of the case. In these circumstances the Judge concluded, at Paragraph 63, that he had to decide the Preliminary Issues, which he characterised as being essentially questions of law, on the basis of the Statement.

39. The Judge then came to his conclusions on Preliminary Issue 1, at Paragraphs 64-72. At Paragraph 64, the Judge recorded the submission of Mr Clark:

> *"64. Mr Clark* [*Mr Clark*] *submits that a periodic tenancy arose in one of three alternate circumstances:*
> *(i) During the freehold ownership of St Francis following expiry of the Agreement (28th February 2015) until disposal to EDL on 29th March 2018 (registration 12th April 2018)*
> *(ii) Following EDL's acquisition of the freehold on 29th March 2018*
> *(iii) On the terms of an agreement reached between EDL and the Claimants in October 2018 ('the 2018 Agreement')*
> *Mr Clark confirmed that it is not the Respondent's case that a periodic tenancy arose following the grant of its dispositionary lease on 8th March 2024."*

40. In expressing his conclusions, the Judge addressed himself to the same sets of circumstances. So far as the period between February 2015 and March 2018 was concerned, the Judge concluded, at Paragraph 66, that the Respondents had remained as tenants at will, following the expiration of the Lease:

> *"66. Rent was paid throughout this period. The first two demands (for annual payments 1st March 2015 – 29th February 2016 and 1st March 2016 – 28th February 2017) were both marked "without prejudice to expiry on*

28/02/2015". AF8 sets out that the Claimants wished to pursue negotiations in advance of expiry of the Agreement. That is, of course, the subjective intention of the Claimants. However the Claimants express wish to negotiate, once communicated to EDL on 21st November 2016, is a relevant circumstance. The Claimants continuing occupation of the site after expiry of the Agreement is directly referrable to the protections afforded to the Claimants under the Old Code. Similarly the statutory regime of the Code which came into force on 28th December 2017 readily explains the continuing basis of occupation. I find that the Claimants remained tenants at will following expiry of the Agreement throughout the period of St Francis' ownership."

41. The Judge then turned to the period between March 2018 and March 2024, when the Reversionary Lease was granted. After noting that the disposal of the Freehold by Corbally to EDL, on 12th April 2018, would have had the effect of terminating the tenancy at will which the Judge had found to exist between February 2015 and March 2018, the Judge concluded, at Paragraphs 68-70, that the Respondents remained as tenants at will for this second period:

> *"68. Rent was paid annually in advance throughout this period [AF9.4 and 19]. At the time of EDL's acquisition of the site rent had already been paid in advance to St Francis having been demanded on 21st December 2017 [AF9.4]. The first demand by EDL was not made until 10th December 2018 [AF 19]. Accordingly no presumption of a periodic tenancy by reason of payment of rent could possibly have arisen until December 2018 at the earliest. Crucially this postdates the October 2018 Agreement.*
>
> *69. On acquisition of the freehold EDL moved quickly to terminate of the expired Agreement on redevelopment grounds. To that end a paragraph 31 notice was served in April 2018 [388-9] and counter notices in July 2018 [404-409]. The overwhelming inference must be that the parties did not intend to enter into any intermediate contractual arrangement. The tenant continued to occupy on sufferance. The landlord wanted to get possession.*
>
> *70. My finding is that for the period between EDL's acquisition of the freehold and the October 2018 Agreement nothing changed. The tenancy at will with St Francis terminated as a matter of law on EDL's acquisition of the freehold. However that does not mean that a periodic tenancy arose. By the time of the December 2018 demand both parties were operating under the (mistaken) belief that, following the coming into force of the Code, the Claimants had a code agreement that could only be terminated on redevelopment grounds. Looking objectively at all the relevant circumstances I find that the Claimants remained in occupation as tenants at will."*

42. The Judge then turned to the 2018 Agreement. At Paragraphs 71 and 72, the Judge concluded that the 2018 Agreement did not create a periodic tenancy:

> *"71. I repeat my findings at paragraphs 34 -42. The intention of the parties was that the legal basis of the Claimants occupation of the site would be governed by the statutory framework. As Mr Read submits that is the very antithesis of the parties intending to create a periodic tenancy (Claimants Skeleton Argument at paragraph 36). The 2018 Agreement did not create a periodic tenancy.*

> *72. For the period following the 2018 Agreement I repeat my findings at paragraphs 43-46. The parties continued on the footing of the 2018 Agreement namely, continuation of the existing agreement subject to the protections afforded to the Claimants by the Code. No periodic tenancy arose."*

43. The Judge's overall conclusion on Preliminary Issue 1, at Paragraph 81, was therefore that the Respondents occupied the Site as tenants under a tenancy at will.

44. The Judge also considered two subsidiary arguments raised by the Respondents in the context of Preliminary Issue 1. The first of these arguments was that no implied periodic tenancy could have been created between the parties because, if an implied periodic tenancy would have otherwise have arisen on the facts of the case, it could not have done so by reason of Section 54(2) of the Law Property Act 1925, which provides that a lease can be created by parol (ie. verbally and not in writing) only where the relevant lease takes effect in possession for a term not exceeding three years at the best rent which can reasonably be obtained without taking a fine. The argument of the Respondents was that the agreed rent far exceeded the rent which would have been payable either under a code agreement or on renewal under the 1954 Act. The second argument was that if an implied periodic tenancy had arisen after 28th December 2017, it would have been excluded from the protection of the 1954 Act as a tenancy falling within the terms of Section 43(4) of the 1954 Act. I will refer to this second argument as **"the Section 43(4) Argument"**.

45. Given the Judge's conclusion that the Respondents occupied the Site as tenants at will, these two subsidiary arguments did not strictly arise for decision. The Judge did however helpfully consider both arguments, and rejected both arguments for the reasons which he gave at Paragraphs 73-80.

46. The Judge then turned to Preliminary Issue 2. In the light of the Judge's answer to Preliminary Issue 1, Preliminary Issue 2 did not arise. Given the Judge's conclusion that the Respondents were tenants at will of the Site, their tenancy was incapable of protection by the 1954 Act. As such, the Respondents were entitled to seek the imposition of new code rights, by a new code agreement, pursuant to the provisions of Part 4 of the Code.

47. The Judge did however, in case he was wrong on Preliminary Issue 1, go on to consider the Respondents' argument that, even if they did have an implied periodic tenancy, protected by the 1954 Act, they were still entitled to seek the imposition of a new code agreement, conferring new code rights, pursuant to Part 4 of the Code. The problem which confronted this argument was that the Supreme Court had decided, in *CTIL v Compton Beauchamp Estates Ltd* [2022] UKSC 18 [2022] 1 WLR 3360, that an operator with a subsisting agreement (as defined in the transitional provisions in Schedule 2 to the Digital Economy Act 2017) which was protected by the 1954 Act did not have the option of renewing its rights in respect of electronic communications apparatus under the Code, but had first to exercise its rights of renewal under the 1954 Act. The Supreme Court also considered that the same principle should apply to an operator occupying pursuant to a tenancy, protected by the 1954 Act, which was not a subsisting agreement because it was not in writing. The Respondents argued that this reasoning did not apply to a periodic tenancy protected by the 1954 Act because such a tenant could not request a new tenancy by the service of a notice pursuant to Section 26. The provisions of Section 26 are not available in the case of a periodic tenancy. The tenant must await the service of a notice pursuant to Section 25, before being able to invoke rights of renewal under the 1954 Act. The Judge considered

this argument, at Paragraphs 83-89, but was not persuaded that the argument was sound. As the Judge explained, at Paragraphs 87-88:

> *"87. Superficially Mr Read's argument is attractive. An operator under Mr Read's solution is not seeking to use Part 4 when it can achieve its renewal under the 1954 Act. However, such a solution would be unworkable in practice. For example what would happen if following a Part 4 reference a site provider issued a section 25 notice and subsequently a claim either for a new tenancy or termination in the County Court? The solution proposed by Mr Read would lead to a dual regime with both the Tribunal and County Court having jurisdiction over the same dispute with no mechanism to determine where priority lies. The Tribunal cannot allow its jurisdiction to be accessed based on the whim of a site provider as to whether or not it decides to issue 1954 Act notices.*
>
> *88. A line has to be drawn somewhere. As Lewison LJ observed in **Ashloch** those holding under periodic tenancies protected by Part II of the 1954 Act who cannot take the initiative to renew their tenancies under that act may be "out in the cold". However as I observed in **Patricroft** the operator has protection of its ECA under Part 6 and can apply for additional rights under Part 4. The only disadvantage is that it cannot obtain a new rent on a no-network assumption."*

48. The Judge then dealt with Preliminary Issue 3. Again, in the light of the Judge's answer to Preliminary Issue 1, Preliminary Issue 3 did not arise. Again, in case he was wrong on Preliminary Issue 1, the Judge went on to consider the Respondents' argument that, if they had an implied periodic tenancy, they had not been required, prior to making the Reference, to terminate that periodic tenancy by the service of a notice at common law. The Judge rejected this argument. As the Judge explained, at Paragraph 92:

> *"92. Mr Read invites me to depart from my previous decision on this point. No notice is required because imposition of an agreement under Paragraph 20 operates as a surrender and regrant and the existing agreement will be terminated by operation of law. I discussed termination by operation of law in **Patricroft** at paragraphs 33-35 in a slightly different context. Whilst Mr Read's point is well made, I am bound by what was said by the Deputy Chamber president in **Gravesham** at [72]:*
>
> > *"On Tower was not entitled to serve a notice under paragraph 27 to secure temporary rights because its tenancy was still continuing. Even if I am wrong about the first ground of appeal, I would nevertheless hold that On Tower was also barred from serving a valid notice under paragraph 20 while its tenancy was being continued by the 1954 Act. On that basis its Part 4 claim was commenced without a valid request under paragraph 20 having first been made and without the required time for consideration of the request by the Council having elapsed."*

49. The Judge then dealt with Preliminary Issue 4. In order to understand what the Judge decided in this respect, it is necessary to give a brief explanation of how Preliminary Issue 4 arose. The 2023 Notice, pursuant to which the Reference was made, was given on or around 7th March 2023. The Code was amended, with effect from 7th November 2023, by the Product Security and Telecommunications Infrastructure Act 2022 (**"the 2022 Act"**).

In particular, Section 69 of that Act added the following sub-paragraph (2A) to paragraph 20 of the Code (**"sub-paragraph 2A"**):

> *"(2A) The notice must also—*
> *(a) contain information about the availability of alternative dispute resolution in the event that the operator and the relevant person are unable to reach agreement, and*
> *(b) explain the possible consequences of refusing to engage in alternative dispute resolution."*

50. The 2023 Notice did not contain the information prescribed by sub-paragraph (2A), which was not in force when the 2023 Notice was given. The Reference was made on 6th August 2024, after sub-paragraph (2A) had been brought into force. The Appellant argued, by Preliminary Issue 4, that the service of a valid notice pursuant to paragraph 20 of the Code was a pre-condition of the right to make the Reference and that, by the time the Reference was made, the 2023 Notice could not qualify as a valid notice by reason of the fact that it did not contain the information prescribed by sub-paragraph (2A).

51. The Judge rejected this argument, at Paragraph 98, on the basis that the amendments introduced by Section 69 of the 2022 Act did not require the re-service of existing notices which had been valid when they were served:

> *"98. I am grateful to Mr Read for referring me to Lipton and another v BA Cityflyer Ltd [2024] UKSC 24 an authority that was not cited in Patricroft. The amendments introduced by section 69 of 2022 Act do not require valid existing notices to be reserved. Statutory amendments are not to be construed as operating retrospectively without clear language to that effect. In Lipton Lord Lloyd-Jones said at [196]:*
> > *"My starting point is the general principle of the common law that conduct and events are normally governed by the law in force at the time at which they took place. As a result, subsequent legislative changes in the law are not generally given retrospective effect. Evidence of a clear contrary intention would be required before they could be given retrospective effect, for example by disturbing accrued rights. There is a general presumption at common law that legislation is not retrospective in the sense that it alters the legal consequences of things that happened before it came into force (Chitty on Contracts, 35th ed (2023), para 1-031A; Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), sections 7.13, 7.14). This general rule reflects public expectations and notions of fairness and legal certainty."*

52. The Judge also went on to decide that even if the Appellant was right in its argument, so that the 2023 Notice was required to include the information required by sub-paragraph (2A), the failure to include this information was not such as to render the 2023 Notice invalid. The Judge explained his decision in the following terms, at Paragraphs 99-100:

> *"99. There is a further reason why the notice is not invalid. The leading authority on the consequences of failing to comply fully with statutory procedures concerning property rights is **A1 Properties (Sunderland) Limited v Tudor***

Studios RTM C0. Limited *[2024] UKSC 27. At paragraph 61 Lord Briggs and Lord Sales set out the correct approach:*

> *"to move away from a rigid category-based approach to evaluating the consequences of a failure to comply with a statutory procedural requirement and to focus instead on (a) the purpose served by the requirement as assessed in light of a detailed analysis of the particular statute and (b) the specific facts of the case, having regard to whether any (and what) prejudice might be caused or whether any injustice might arise if the validity of the statutory process is affirmed notwithstanding the breach of the procedural requirement"*

100. The purpose of subparagraph 2A is to provide information about ADR and to explain the consequences of refusing to engage. Both parties before me are sophisticated litigators with deep pockets and access to the very best legal advice. The parties will be aware of the provisions concerning ADR in FTT Rule 4. The most recent version of the OFCOM Code of Practice published 15th April 2024 specifically deals with resolving disputes and the role of ADR (see paragraphs 1.81– 1.88). The Respondent is well aware of ADR and the costs consequences of failing to engage. I am quite satisfied that, to the extent I am wrong about retrospective invalidity, the Respondent has suffered no prejudice or injustice."

53. This left Preliminary Issue 5, which engaged a further ground of challenge to the validity of the 2023 Notice on the basis that the wording of paragraph 16 of the 2023 Notice differed from the wording in the notice prescribed by Ofcom, pursuant to paragraph 88(2) of the Code. The Judge rejected this argument, for the reasons which he gave at Paragraphs 102-107.

54. On the basis of his decisions on the Preliminary Issues, the Judge concluded, at Paragraph 108, that the Respondents were tenants at will, that the 2023 Notice was valid for the purposes of paragraph 20 of the Code, and that the FTT had jurisdiction to entertain the Reference:

> *"108. The Claimants occupy the rooftop site at Equipoint as tenants under a tenancy at will. The Notice served under Paragraph 20 of the Code on 7th March 2023 is valid. The Tribunal has jurisdiction under Part 4 of the Code."*

The Appeal

55. The Appeal is confined to the Judge's decisions on Preliminary Issue 1 and Preliminary Issue 4.

56. So far as Preliminary Issue 1 is concerned the Appellant contends, for a number of reasons, that the Judge was wrong to conclude that the occupation of the Site by the Respondents was as tenants at will. The grounds of appeal, as set out in the original application to the FTT for permission to appeal, are fairly lengthy, and have been subsumed into the written and oral arguments put forward by the Appellant at the hearing of the Appeal. In these circumstances I will not attempt to summarise the Appellant's arguments in support of the Appeal, so far as Preliminary Issue 1 is concerned, at this stage. I shall do so when I come to my analysis and determination of this part of the Appeal.

57. So far as Preliminary Issue 4 is concerned, the Appellant contends that the Judge was wrong to find that the 2023 Notice was valid and effective. The Appellant's argument, in summary, is that sub-paragraph (2A) (of paragraph 20 of the Code) introduced a pre-condition to the making of a reference pursuant to paragraph 20. If the relevant notice did not contain the information required by sub-paragraph 2A, and regardless of when the notice was served, the pre-condition was not satisfied and the reference could not be made. The question of whether the notice, if served before the introduction of sub-paragraph (2A), satisfied the prescribed requirements for such a notice at the time when it was given was irrelevant. What were relevant were the pre-conditions existing at the time when the reference was made.

58. The Appellant contends (i) that the Judge failed properly to deal with this argument, (ii) that the Judge should have concluded, on the basis of this argument, that the Respondents could not rely on the 2023 Notice, and (iii) that the Judge should have concluded, in consequence, that in the absence of satisfaction of the required pre-condition in sub-paragraph (2A) the Respondents had not been entitled to make the Reference.

59. The Appellant further contends that even if, contrary to the Appellant's argument, the question was one which related to the validity of the 2023 Notice, as opposed to the question of whether the pre-condition had been satisfied, the validity of the 2023 Notice fell to be tested at the date when the Reference was made, by which time sub-paragraph (2A) had been brought into force. As such, the 2023 Notice was rendered invalid by its failure to include the information required by sub-paragraph (2A). In their written and oral submissions for this hearing the Appellant's counsel concentrated upon the argument outlined in my previous paragraph. I did not however understand that the further argument referred to in this paragraph was not being pursued, and I shall consider this further argument in my analysis and determination of the appeal on Preliminary Issue 4.

60. The Appellant also challenges the further conclusion of the Judge on Preliminary Issue 4; namely that if sub-paragraph 2A did apply to the 2023 Notice, the failure to include the information required by sub-paragraph (2A) was not fatal to the validity of the 2023 Notice. If, as the Appellant contends, compliance with sub-paragraph (2A) was required, the result of a failure to comply with this statutory requirement was, so the Appellant contends, invalidity. The failure was not one which fell into the category of statutory requirements failure to comply with which could be ignored, as not resulting in invalidity.

The Respondent's Notice

61. By the Respondent's Notice the Respondents maintained their two subsidiary arguments, in relation to Preliminary Issue 1, as follows:
    (1) The Respondents' occupation of the Site could not have been anything other than pursuant to a tenancy at will. No implied periodic tenancy could have arisen, by reason of Section 54(2) of the Law of Property Act 1925, because any such tenancy would not have been at the best rent which could reasonably be obtained without taking a fine.
    (2) If the Judge should have concluded that the Respondents' occupation of the Site was pursuant to an implied periodic tenancy arising after 28th December 2017, that tenancy would have been excluded from the protection of the 1954 Act as a tenancy falling within the terms of Section 43(4) of the 1954 Act. This is the argument which I am referring to as the Section 43(4) Argument.

62. In the event the Respondents elected not to pursue their argument on Section 54(2) at the hearing of the Appeal. Instead, and so far as the Respondent's Notice engaged Preliminary Issue 1, the Respondents confined themselves to the Section 43(4) Argument; that is to say the argument that, if they had an implied periodic tenancy, the tenancy was excluded from the protection of the 1954 Act as a tenancy falling within Section 43(4).

63. Beyond this, the Respondent's Notice engages Preliminary Issues 2 and 3. If, contrary to their case and contrary to the Judge's conclusion on Preliminary Issue 1, the Judge was wrong to conclude that the Respondents were tenants at will, and should have concluded that the Respondents had an implied periodic tenancy, the Respondents renew their arguments on Preliminary Issues 2 and 3, which were rejected by the Judge.

64. In relation to Preliminary Issue 2 the Respondents renew their argument that, even if they had an implied periodic tenancy, protected by the 1954 Act, they were still entitled to seek the imposition of a new code agreement pursuant to Part 4 of the Code.

65. In relation to Preliminary Issue 3 the Respondents renew their argument that, if they did have an implied periodic tenancy, there was no requirement to terminate that tenancy, by a common law notice, prior to making the Reference.

The appeal on Preliminary Issue 1 – analysis and determination

66. It is necessary to start with an identification of the appeal jurisdiction which I am exercising in relation to the appeal on Preliminary Issue 1. The Respondents' counsel contended, in their skeleton argument, that the appeal on Preliminary Issue 1 was an appeal on the evidence, and that the relevant findings of the Judge could only be interfered with if they were so unreasonable that no reasonable judge could have made them. The Respondents relied upon the decision of the Court of Appeal in *Volpi v Volpi* [2022] EWCA Civ 464 [2022] 4 WLR 48.

67. *Volpi v Volpi* is one of a long line of cases which stress that an appeal court should not interfere with findings of primary fact made by the trial judge unless satisfied that the trial judge was plainly wrong in the relevant findings. The relevant principles are summarised by Lewison LJ in this judgment, at [2]. I need only quote the following part of [2]:

> *"(i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.*
> *(ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."*

68. What was said by Lewison LJ in *Volpi* was drawn from his judgment in *Fage UK Limited v Chobani UK Limited* [2014] EWCA Civ 5, at [114], where Lewison LJ explained the position in the following terms:

> *"114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to*

do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: Biogen Inc v Medeva plc [1977] RPC1; Piglowska v Piglowski [1999] 1 WLR 1360; Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23 [2007] 1 WLR 1325; Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively McGraddie v McGraddie [2013] UKSC 58 [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include

i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.

ii) The trial is not a dress rehearsal. It is the first and last night of the show.

iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.

iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

69. It will be noted that while Lewison LJ was referring to appeals against findings of primary fact in the extract from his judgment in *Volpi* which I have quoted above, he made it clear, in *Fage*, that the warnings against appellate courts interfering with findings of fact by trial judges, unless compelled to do so, were not confined to findings of primary fact. They also applied to *"the evaluation of those facts and to inferences to be drawn from them"*.

70. This is important in the present case because the Judge made his findings, in relation to the nature of the Respondents' occupation of the Site, by reference to the Agreed Statement and the documentary evidence. Although the Judge also heard the evidence of the two witnesses, the Judge was clear in recording that the witnesses had no personal knowledge of the case, and that he was effectively left to decide the Preliminary Issues on the basis of the Agreed Statement; see Paragraphs 54-63, in particular at Paragraphs 57 and 63.

71. In these circumstances it seems to me that the Appellant's counsel were right to submit that the Judge, in making his findings on Preliminary Issue 1, was drawing inferences from the primary facts, which were themselves undisputed. As such, it seems to me that what was said in *Volpi v Volpi*, as quoted above, is not directly relevant to the findings of the Judge which are challenged in relation to Preliminary Issue 1. There is a distinction to be drawn between primary findings of fact and a secondary or inferential finding of fact. This distinction, and its effect upon the ability of an appeal court to interfere with findings made by the trial judge was explained in *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386 [2006] 1 CLC 582, by Moore-Bick LJ, in the following terms, at [51]:

"51. In that context it can be seen that the judge's finding that Mr Pawani was induced to enter into the contract by the statements previously made by Mrs Balasubramaniam

is in fact a conclusion based partly on his finding of what she had told him about the investment product and partly on his finding that Mr Pawani did not read the documents that were sent to him a few days later and so did not realise that the nature of the investment he was being offered was different from that which he expected. Those are all findings of primary fact based on the evidence of the witnesses and as such are findings with which this court should not in my view interfere, but the conclusion that Mr Pawani was induced to sign the documents by what Mrs Balasubramaniam had previously told him is a secondary finding reached by drawing an inference from the primary facts and as such I think we have greater freedom to review it."

72. It does not however follow from this that I am free to overturn the Judge's findings simply because I consider that I would have evaluated the evidence in a different way. Aside from the warnings referred to in *Fage*, this is clear from a number of authorities. In his oral submissions Mr Radley-Gardner drew my attention to several authorities which address the question of when an appellate court can interfere with the evaluation of the evidence by the trial judge. In *Todd v Adams* [2002] EWCA Civ 509 [2002] CLC 1050 the Court of Appeal were concerned with an appeal against a decision of Aikens J, by which he had determined certain preliminary issues in a case brought by the dependants of fisherman who had died when their trawler sank. The claims were brought against the owners of the trawler. The second of the preliminary issues was concerned with whether the fishermen had been on board the trawler pursuant to contracts of service with the owners. The Court of Appeal allowed the appeal of the owners against the decision of Aikens J that the fishermen had been employed on contracts of service. In his judgment, at [61], Neuberger J (as he then was), explained the circumstances in which the appellate court could interfere with the conclusion of the judge at first instance that there was a contract of service:

> *"61. Nonetheless, where there is a challenge to a first instance tribunal's conclusion at the second stage, namely, whether or not there is a contract of service, I do not consider that an appellate court faces a black or white choice, as it would on a point of law such as an issue of contractual or Statutory interpretation, between holding that the tribunal was right or wrong. The first instance decision may fall within a grey area, a sort of margin of appreciation, where an appellate court may, indeed should, conclude that the tribunal reached a conclusion which it was entitled to reach and with which the appellate court should not interfere. After all, the exercise on which the tribunal is engaged in a case such as this is weighing up various factors, some of which point one way and some of which point the other, and reaching a conclusion as to the side on which the balance ultimately comes down. In my judgment, in such a case, an appellate court should not interfere unless the first instance tribunal has misdirected itself on the law (either expressly or impliedly), has taken into account a factor which it ought not to have taken into account, has failed to take into account a factor which it ought to have taken into account, or has reached a conclusion which, in light of the primary facts, it could not properly have reached."*

73. In *Clin v Walter Lilly & Co. Limited* [2021] EWCA Civ 136 [2021] WLR 2753, Carr LJ (as she then was) explained in her judgment, at [86], the ability of an appellate court to interfere with an evaluation of primary facts in terms very similar to those of Neuberger J in *Todd*:

> *"86 An evaluation of the facts is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and appellate courts should approach them in a similar way. The appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the trial judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion."*

74. In *Datec v Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23 [2007] 1 WLR 1325 Lord Mance approved the following explanation of the distinction to be drawn between findings of primary fact and evaluation of those facts, given by Clarke LJ (as he then was) in *Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642 [2003] 1 WLR 577:

> *"15. In appeals against conclusions of primary fact the approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater that advantage the more reluctant the appellate court should be to interfere. As I see it, that was the approach of the Court of Appeal on a "rehearing" under the Rules of the Supreme Court and should be its approach on a "review" under the Civil Procedure Rules 1998.*
>
> *16. Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way."*

75. Drawing together the above authorities it seems to me that the position is as follows, in terms of my ability to interfere with the findings made by the Judge in relation to Preliminary Issue 1 which are challenged in the Appeal:
    (1) I am not concerned with a challenge to findings of primary fact made by the Judge.
    (2) I am concerned with a challenge to findings made by the Judge on the basis of his evaluation of the primary facts.
    (3) In considering that challenge it is not my role to carry out the evaluation exercise over again.
    (4) The greater freedom to interfere with secondary findings of fact, as opposed to primary findings of fact, referred to by Moore-Bick LJ in *Peekay*, has to be read subject to the limitations explained in *Todd*, *Clin* and *Datec*.
    (5) My role is to decide whether the Judge's evaluation of the evidence, in his relevant findings, was wrong by reason of some identifiable flaw in his treatment of the matter to be decided. Examples of such identifiable flaws, which are given in the case law which I have cited, are (i) a misdirection in law, (ii) a gap in the logic, (iii) a lack of consistency, (iv) a failure to take account of some material factor which undermines the cogency of the conclusion, (v) taking into account a factor which should have been left out of account, (vi) reaching a conclusion which, on the facts, the judge could not properly have reached.

76. The next step is to make reference to the relevant law which governed the question of the status of the Respondents' occupation of the Site, following the Term Date. For this purpose it is only necessary to make reference to four authorities.

77. I start with the decision of the Court of Appeal in *Javad v Aqil* [1991] 1 W.L.R. 1007. In *Javad* the plaintiff landlord allowed the defendant tenant into occupation of premises on payment by the tenant of £3,500, which was identified as three months' rent in advance. The intention of the parties was that they would agree the terms of a formal lease. A draft lease was prepared, and was the subject of negotiations between the parties. While the negotiations were in progress the tenant remained in possession of the relevant premises, apart from a brief period when the tenant vacated the premises following differences with the landlord. While in possession the tenant paid rent on a quarterly basis on two further occasions. Eventually negotiations between the parties broke down, and the landlord sought possession of the premises, on the basis that the tenant was a tenant at will. The tenant claimed to have a periodic tenancy. At first instance the judge held that it was not possible to infer a periodic tenancy, and that the tenant only had a tenancy at will. This decision was upheld by the Court of Appeal.

78. In his judgment in the Court of Appeal, with which Ralph Gibson and Mustill LJJ agreed, Nicholls LJ (as he then was) explained the correct approach to determining what interest the tenant had in the following terms, at 1012D-G:

> *"As with other consensually-based arrangements, parties frequently proceed with an arrangement whereby one person takes possession of another's land for payment without having agreed or directed their minds to one or more fundamental aspects of their transaction. In such cases the law, where appropriate, has to step in and fill the gaps in a way which is sensible and reasonable. The law will imply, from what was agreed and all the surrounding circumstances, the terms the parties are to be taken to have intended to apply. Thus if one party permits another to go into possession of his land on payment of a rent of so much per week or month, failing more the inference sensibly and reasonably to be drawn is that the parties intended that there should be a weekly or monthly tenancy. Likewise, if one party permits another to remain in possession after the expiration of his tenancy. But I emphasise the qualification "failing more." Frequently there will be more. Indeed, nowadays there normally will be other material surrounding circumstances. The simple situation is unlikely to arise often, not least because of the extent to which statute has intervened in landlord-tenant relationships. Where there is more than the simple situation, the inference sensibly and reasonably to be drawn will depend upon a fair consideration of all the circumstances, of which the payment of rent on a periodical basis is only one, albeit a very important one. This is so, however large or small may be the amount of the payment."*

79. In the present case the Judge was concerned with a situation involving a holding over, after the expiration of a lease, as opposed to negotiations in anticipation of the grant of a lease. The position where a tenant was holding over, following the expiration of a lease, was considered by Patten LJ in in *Barclays Wealth Trustees (Jersey) Ltd v Erimus Housing Ltd* [2014] EWCA Civ 303 [2014] 2 P.&C.R. 4. In this case the tenant was holding over from a lease, the term of which had expired. The lease was contracted out of the 1954 Act, and thus came to an end on the contractual term date. The parties were in

negotiations for a renewal of the lease, but terms were not agreed, and the period of holding over became prolonged. Somewhat unusually, it was the landlord which argued that the tenant had an implied annual tenancy, while the tenant said that it had only a tenancy at will. The reason for this reversal of roles was that the argument was concerned with whether the tenant had given adequate notice to terminate the tenancy, which in turn affected the amount of rent due to the landlord in respect of the period of holding over. The judge at first instance concluded that the parties had created a new yearly periodic tenancy when the original lease came to an end, which required six months notice of termination.

80. This decision was overturned by the Court of Appeal. In his judgment, with which Christopher Clarke and Longmore LJJ agreed, Patten LJ made reference to *Javad*, and summarised its effect in the following terms, at [23]:

> *"23. When a party holds over after the end of the term of a lease he does so, without more, as a tenant on sufferance until his possession is consented to by the landlord. With such consent he becomes at the very least a tenant at will and his continued payment of the rent is not inconsistent with his remaining a tenant at will even though the rent reserved by the former lease was an annual rent. The payment of rent gives rise to no presumption of a periodic tenancy. Rather, the parties' contractual intentions fall to be determined by looking objectively at all relevant circumstances. The most obvious and most significant circumstance in the present case, as in Javad v Aqil, was the fact that the parties were in negotiation for the grant of a new formal lease. In these circumstances, as in any other subject to contract negotiations, the obvious and almost overwhelming inference will be that the parties did not intend to enter into any intermediate contractual arrangement inconsistent with remaining parties to ongoing negotiations. In the landlord and tenant context that will in most cases lead to the conclusion that the occupier remained a tenant at will pending the execution of the new lease. The inference is likely to be even stronger when any periodic tenancy would carry with it statutory protection under the 1954 Act which could be terminated by the tenant agreeing to surrender or terminating the tenancy by notice to quit: see Cardiothoracic Institute v Shrewdcrest Ltd [1986] 1 WLR 368. This point is given additional force in the present case by the fact that the intended new lease, like the old lease, was to be contracted out."*

81. I should also make reference to the next paragraph of the judgment, at [24], where Patten LJ went on to consider what was required, in terms of negotiations. As he explained, the concept is a flexible one:

> *"24 The judge interpreted the reference by Nicholls LJ to the throes of negotiation as importing some requirement for a particular intensity of negotiations. But, in my view, it means no more than that the negotiations should be continuing in the sense that both parties remain of the intention that there should be a new lease on terms to be agreed. Mr Rosenthal for EHL accepted that one could have a case in which the negotiations either broke down or came to an end but the tenant was allowed to remain in occupation paying the rent and other outgoings. In time the correct inference in such a case might be that the parties had chosen to regulate their legal relationship by something other*

than the grant of a new long lease and a periodic tenancy might then be implied. An example of this sort of case is Walji v Mount Cook Land Limited [2002] 1 P&CR 13 where the parties reached agreement on the terms of a new lease but then did nothing further for years in terms of executing such a lease. The judge inferred that a periodic tenancy had come into existence and his decision was affirmed on appeal."

82. In this context it is also helpful to consider the decision of Knox J in *Cardiothoracic v Shrewdcrest Ltd* [1986] 1 W.L.R. 368, which was another case concerned with holding over after the expiration of a series of short term tenancies. The facts of this case were that the landlord, a medical institution, owned premises which enjoyed the prospect of redevelopment, at an uncertain point in the future. The tenant was in the business of providing students with hostel accommodation. There were changes of identity in relation to both the landlord and the tenant, but nothing turned on these changes of identity and the judge was able to ignore them. It suited both landlord and tenant, on three successive occasions, to enter into short term lettings, each of which was excluded from the protection of the 1954 Act. The last of these excluded tenancies came to an end on 31st October 1983, at which point the landlord was not ready to redevelop the premises. Negotiations therefore commenced for a fourth short term letting. During this period successive extensions were negotiated to the third letting, up to 15th September 1985. During the same period a monthly rent was also negotiated and paid, at successive rates higher than in the original third letting.

83. The judge found that each of these extensions had been negotiated subject to a condition that the extension should be the subject of a tenancy agreement approved by the court, excluding the operation of sections 24 to 28 of the Landlord and Tenant Act 1954, and that it was understood and intended by both parties that until such order was obtained there would be no legally binding agreement between them, leaving the parties free to resile from the negotiations if they so chose. The tenant sought to argue that it was a tenant, either under a concluded agreement for the grant of a tenancy, or pursuant to an implied periodic tenancy arising from the combination of continued possession after 31st October 1983, and the payment and acceptance of rent. On either hypothesis, the tenant's case was that it enjoyed the protection of the 1954 Act.

84. Knox J rejected both arguments. The judge considered that, during the period of holding over, when the successive extensions were agreed, the parties were in one of the classic circumstances for the existence of a tenancy at will; namely holding over pending agreement on the terms of a new tenancy. Nor was this result changed by the fact of rent having been given and received. As the judge explained, at 378B-C:

"In the typical case where the giving and receiving of rent leaves the court to infer the existence of a periodic tenancy it is on the footing that this is the interpretation which best fills the vacuum which the parties have left. Thus, in what used to be the ordinary, case of a tenancy unaffected by statutory prolongation or protection coming to an end, and the parties giving and receiving rent but not expressly agreeing on the creation of a new tenancy, the preferred solution that the law has adopted is a periodic tenancy, on the footing that that is what the parties must have intended or be taken to have intended. Ultimately it is the intentions of the parties in all the circumstances that determines the result of the giving and acceptance of rent."

85. The judge stated his conclusion at 379F-H:

> *"The tenant's interpretation of a concluded grant of a tenancy protected by the Landlord and Tenant Act 1954 seems to me less compatible with the intentions of the parties in agreeing upon tenancy subject to the approval of the court under section 38(4) and paying and accepting rent in accordance with the terms of those proposed tenancies before they came into force than is a tenancy at will. It is clearly established that it is legitimate to have regard to relevant statutory protection in determining whether or not the acceptance of rent is a factor from which a new tenancy could be created: see per Lord Scarman in Longrigg, Burrough & Trounson v. Smith (1979) 251 E.G. 847, 849. Once one takes into account the machinery of the Landlord and Tenant Act 1954 and the parties' knowledge of its operation it seems to me very clear that they did not intend to create a periodic tenancy pending the grant which both sides anticipated of a tenancy approved by the court under section 38(4). Nor do I see any compelling reason why the court should impute such an intention to them if, as is factually perfectly possible, they gave no serious thought to the legal repercussions of the payment and acceptance of rent."*

86. The issue of whether a tenancy at will or a periodic tenancy arises on the expiration of a fixed term lease was considered by the Upper Tribunal (Lands Chamber) in *Arqiva Services Ltd v AP Wireless II (UK) Ltd* [2020] UKUT 0195 (LC). In her decision, Judge Cooke cited the summary of the relevant law set out by Patten LJ in *Erimus*. Prior to doing so, at [37], Judge Cooke stressed the objective nature of the inquiry which has to be made, in ascertaining the intentions of the parties:

> *"The law on this point is well-established and is not in dispute. It is tempting to assume that when a fixed term lease expires and a tenant holds over, paying the same rent, it does so under a periodic tenancy on the same terms as those of the expired lease. But that is not necessarily the case and there is no presumption of a periodic tenancy. Rather, the parties' conduct has to be considered objectively so as to ascertain their intentions."*

87. I have spent some time setting out the relevant facts in *Javad*, *Erimus* and *Cardiothoracic* because, in each of these cases, the court rejected the argument that an implied periodic tenancy had come into existence, and either concluded or upheld the conclusion of the lower court that a tenancy at will had come into existence. The Appellant's case is that the facts of the present case were different, and could only justify a finding that an implied periodic tenancy had come into existence.

88. Bearing in mind both the nature of the appellate jurisdiction which I am exercising, as identified above, and the relevant law, as summarised above, I turn to the grounds of appeal in relation to Preliminary Issue 1. The grounds of this part of the Appeal are not organised in quite the same way, as between (i) the original grounds of appeal in support of the application for permission to appeal, and (ii) the written and oral submissions of the Appellant's counsel for this hearing. I find it easiest to take the grounds of appeal as they are set out in the Appellant's skeleton argument for this hearing.

89. In presenting the Appellant's arguments the Appellant's counsel divided the events under consideration into two separate periods. The first period (**"the First Period"**) runs from the Term Date to 12th April 2018, when EDL completed, by registration, its acquisition of the Freehold from Corbally. The second period (**"the Second Period"**) runs from 12th April 2018. No specific term date was given for the Second Period, but it was accepted by the Appellant that events following the giving of the 2023 Notice, on or about 7th March 2023, did not affect the analysis. The Appellant accepted that payment and acceptance of rent after 7th March 2023 did not affect the position, and that no periodic tenancy was created following the grant of the Reversionary Lease on 8th March 2024.

90. The logic behind the division of the relevant events into the First Period and the Second Period was that if a tenancy at will was created in the First Period, following the Term Date, such a tenancy at will could not have survived the transfer of the Freehold to EDL. As the Judge stated, at Paragraph 67, any tenancy at will which existed in the First Period would have been terminated, as a matter of law, by the disposal of the Freehold to EDL. I did not understand this to be in dispute between the parties. The Judge also proceeded with his own analysis on the basis that he should consider the evidence by reference to the First Period and the Second Period. In these circumstances I will adopt the same course in considering the Appellant's arguments in the appeal on Preliminary Issue 1.

91. In relation to the First Period the Appellant contended that the Judge had made errors falling into the following broad categories:
    (1) The Judge wrongly proceeded on the basis that, in order to conclude that the Respondents were periodic tenants, he needed to find a common intention that the parties intended to enter into a periodic tenancy. This was the wrong approach. The Judge was required to make an objective assessment of the evidence. Instead the Judge wrongly moved away from an objective assessment to a subjective analysis of the intentions of the parties.
    (2) The Judge went wrong in his analysis of the words *"without prejudice to expiry on 28/02/2015"* which appeared on the first two demands for the payment of rent served on the Respondents after the Term Date.
    (3) The Judge was wrong to derive support from the provisions of the Old Code for his conclusion that the Respondents were tenants at will in the First Period.
    (4) The Judge went wrong in his treatment of the 1954 Act and the question of 1954 Act protection, when considering what impact this had on the status of the Respondents' occupation of the Site during the First Period.

92. I will take each category or set of arguments in turn. I therefore start with the argument that the Judge wrongly moved away from an objective assessment of the evidence to a subjective analysis of the intentions of the parties.

93. In my judgment this argument is plainly wrong, both when considered at the general level and when considered by reference to the evidence which, so the Appellant contends, was mishandled by the Judge in this way.

94. So far as the argument at the general level is concerned, as I understand the Appellant's case, it is not suggested that the Judge misdirected himself as to the law. The Judge cited Patten LJ in *Erimus*, at [23], and Judge Cooke in *Arqiva*, at [37]. I have cited above the same extracts from the judgment of Patten LJ and the decision of Judge Cooke. Both extracts identify the need, in cases of this kind, for an objective assessment of all the relevant

evidence, in order to ascertain the intention of the parties. It is quite clear, from these citations in the Decision, that the Judge had well in mind the need for an objective assessment of all the evidence which he was considering. Even if there were any doubt in this respect, it is quickly dispelled by reading the remainder of the Decision. In considering the evidence and in reaching his conclusions the Judge stated, repeatedly, that he was conducting an objective assessment of the evidence; see, by way of examples, Paragraphs 26, 33, 38, 40 and 70. In relation to Paragraph 70 it is worth repeating what the Judge said, at the end of that Paragraph, by way of his conclusion in relation to the Second Period:

> *"Looking objectively at all the relevant circumstances I find that the Claimants remained in occupation as tenants at will."*

95. The fact that the Judge directed himself correctly as to the need for an objective assessment of the evidence, and stated repeatedly that he was conducting an objective assessment of the evidence does not necessarily mean that the Judge did carry out an objective assessment of the evidence. There remains the possibility that the Judge, in considering a particular part or particular parts of the evidence, moved away from an objective assessment of the evidence, as alleged by the Appellant, to a subjective analysis of the intentions of the parties.

96. In an attempt demonstrate this, the Appellant relies upon the Judge's treatment of the dealings which took place between GVA (**"GVA"**), acting for the Respondents, and Stephens McBride (**"SB"**), acting for Corbally. The dealings commenced with an email from GVA to SB sent on 21st November 2016, and concluded with an email sent on 19th October 2017. Although this is quite a lengthy period of time, there are only a few emails, in the course of which GVA were looking to agree with SB the terms of a new lease of the Site to be granted to the Respondents. The first email in the chain attached heads of terms which identified that the lease was to be in the Respondents' standard form, and set out the principal terms of the intended lease, which was to have a term of ten years. The email exchanges disclose that negotiations for the grant of this new lease never got going, because Corbally appears to have been unwilling to engage. Ultimately, by the email sent on 19th October 2017 SB advised GVA that the Building was in the process of being sold, so that they could not progress the matter. SB advised that they would send the heads of terms provided by GVA over to the potential purchaser, together with contact details for GVA.

97. The Judge reviewed the evidence of these dealings at Paragraphs 27-33. The Judge set out his findings at Paragraphs 32 and 33 (the underlining is mine):

> *"32. The Tracker supports Mr Clark's submissions that there were in fact no real negotiations. The reason is clear from the Tracker. "Simple maths" explains why EDL were uninterested in coming to the negotiating table when facing a "massive rent reduction".*
>
> *33. I find that there were no consensual negotiations during the period of ownership by St Francis and that the parties were not in negotiation for the grant of a new lease. The subjective intentions of the parties are not relevant. I therefore do not take into account the instructions given by the Claimants to GVA. However the Claimants wish to negotiate, once communicated to EDL on 21st November 2016, crosses the line and becomes a relevant circumstance. <u>It is an objective fact that the Claimants wished to negotiate and were met by stonewalling from EDL. In view of the Claimants express wish to negotiate it is</u>*

not possible for me to find objectively on the evidence that the parties had a common intention to enter into a periodic tenancy."

98. The Appellant seizes on the underlined section of Paragraph 33 and accuses the Judge of asking the wrong question. It is asserted that it is not a question of whether one can spell out an intention to enter into a specific periodic lease. It is a question of whether a periodic tenancy is the right inference to draw from the conduct of the parties and the circumstances of, in particular, the continuing occupation and the demand and payment of an annual sum.

99. I find this submission difficult to understand. The Judge found, in the present case, that the dealings between the Respondents and Corbally, by their agents, had not amounted to *"real negotiations"*. The facts of the present case were not therefore on all fours with *Javad* or *Erimus*. This was not a case where the parties were, by their dealings, *"in* [the] *throes of negotiating larger terms"*, to use the language of Nicholls LJ in *Javad*. Nevertheless, the task for the Judge was to determine the contractual intentions of the parties *"by looking objectively at all the relevant circumstances"*; see Patten LJ in *Erimus* at [23]. A relevant circumstance, looked at objectively, was the fact that the Respondents, at least, were looking to enter into a new ten year lease during at least part of the First Period. The fact that their attempts to commence negotiations did not go anywhere does not alter that relevant circumstance. What the relevant circumstance shows is that, at least on the Respondents' side, it was not their intention, by their occupation of the Site and their payment of an annual rent, to occupy the Site pursuant to periodic tenancy.

100. I cannot see why the Judge was not entitled to take this relevant circumstance into account, as an objective fact, or why the Judge was not entitled to conclude, on the basis of this objective fact, that it was not possible to find a common intention to enter into a periodic tenancy. To my mind, the Judge was carrying out the exercise prescribed by *Javad* and *Erimus*; that is to say seeking to determine the contractual intention of the parties by looking objectively at all the circumstances.

101. In this context the Appellant sought to rely upon the decision of Sales J (as he then was) in *Mann Aviation Group (Engineering) Limited v Longmint Aviation Limited* [2011] EWHC 2238 (Ch) 2011 WL 274332, at [34]:

> *"34. In circumstances where the owner of land and the person who occupies that land intend their relationship to be one of landlord and tenant (rather than a relationship of landowner and licensee, whether contractual or otherwise), and substantial periodic rental payments are made, the law is clear. A periodic tenancy will be found to arise by implication from those circumstances: Street v Mountford [1985] 1 AC 809 , 818E-F. In my view, the position is the same whether one is looking at occupation of a residential property or at occupation of a commercial property: London & Associated Investment Trust Plc v Calow [1986] 2 EGLR 80 ; Woodfall's Law of Landlord and Tenant, para. 1.022, fn. 4, para. 1.023."*

102. It seems to me that this statement has to be read in its proper context. If one reads the whole of the judgment of Sales J, it is apparent that the principal issue in that case was whether the claimant was occupying three aircraft hangars and related buildings as a licensee or as a tenant. If the claimant was occupying as a tenant, it appears to have been accepted that this occupation was as a tenant under an implied periodic tenancy, with the benefit of 1954 Act

protection. There does not appear to have been any dispute over the type of tenancy held by the claimant, if there was a tenancy, and it does not appear that *Javad* was cited. In these circumstances I do not think that it would be right to regard Sales J as having laid down any rule that where a relationship of landlord and tenant is intended and rent is paid, the result is necessarily an implied periodic tenancy. It is clear from *Javad* that such is not the law.

103. Equally, I cannot see any basis for an argument, on the basis of this authority, that the Judge was bound to find a periodic tenancy in the present case. It was for the Judge to determine, on the evidence, what relationship fitted the gap left by the parties in a sensible and reasonable manner. The fact that the relationship was one of landlord and tenant, and involved the payment of rent, in no way compelled the conclusion that an implied periodic tenancy had come into existence.

104. The next question is whether the Judge went wrong in his analysis of the words *"without prejudice to expiry on 28/02/2015"* which appeared on the first two demands for the payment of rent given to the Respondents after the Term Date.

105. The Judge considered the rent demands which were made following the Term Date at Paragraphs 20-26. As he noted, at the Term Date the agents acting for Corbally were Workman LLP (**"Workman"**). Workman raised an invoice for rent, for the period from 1st March 2015 to 29th February 2016, on 26th June 2015. Workman raised a further invoice for rent, for the period from 1st March 2016 to 28th February 2017, on 9th February 2016. Each of these invoices (**"the Workman Invoices"**) was headed, in bold print:

"Without prejudice to expiry on 28/02/2015"

106. The management of the Building then transferred to SB. In respect of the First Period SB sent out demands for rent dated 21st December 2016 and 21st December 2017. In each case the Description section of the demand described what was being demanded as *"Rent w/o prejudice"*. SB adopted the same practice with a further demand dated 10th December 2018. Thereafter EDL sent out its own invoices for the rent, on the same annual basis, using the same *"Rent w/o prejudice"* description.

107. The key findings of the Judge were at Paragraphs 24-26 (the underlining is mine):

> *"24. <u>The addition of the words "to expiry on 28th February 2015" are significant. They go beyond unthinking use. I find that those additional words do not support the Respondent's case that a periodic tenancy has arisen.</u>*
>
> *25. In 2017 St Francis changed agents and instructed Stephens Mc Bride ('SMB'). SMB simply adopt "rent w/o prejudice". The mere repetition of the without prejudice mantra does not seem to me to be of significance. There are many examples of unthinking business practice which are not to be taken as a party's view on precise legal status. For example SMB use the terms 'landlord' and 'tenant' in their demands [343 and 344]. It cannot be suggested that the use of such terms is in any way determinative. Another example arose upon consideration of email correspondence from Mr Michael Ihringer of GVA Grimley (who will feature later in this decision). Mr Ihringer's emails contain a footer inexplicably marked "without prejudice and subject to contract" [456 and 458]. That is an example of unthinking business practice.*

> *26. Demands by Workman LLP, marked "without prejudice – to expiry on 28/02/2015", for the period March 2015 to February 20217 do not support the Respondent's case. Subsequent demands issued by SMB, marked "rent w/o prejudice", do not assist me, one way or another, in looking objectively at all relevant circumstances."*

108. As can be seen, the Judge gave weight only to a part of the evidence of the rent invoices and demands. In relation to the Workman Invoices, the Judge considered that the heading on each invoice was significant. In relation to the subsequent demands, the Judge did not consider that the without prejudice heading assisted him, one way or the other.

109. The Appellant accuses the Judge of failing to state what significance the heading on the Workman Invoices had. This accusation seems to me unjustified. The Judge's conclusion was that the heading on the Workman Invoices did not support the Appellant's case that there was a periodic tenancy. The Judge said so, in terms, in Paragraph 24. It was therefore clear what significance the Judge was attaching to this heading.

110. The Appellant also argues that the Judge was wrong to attach significance to this wording which, so it is asserted, said nothing either about what effect the demand for rent was having or as to what the relationship of the parties was to be going forward. I do not agree. It seems to me an obvious inference that the wording was intended to hold the ring between the parties, following the expiration of the Lease and pending formal agreement between the parties as to the Respondents' occupation of the Site going forward. It seems to me an equally obvious inference that, as part of this holding the ring, it was intended to avoid the Respondents arguing, on the basis of these demands for rent, that a periodic tenancy of the Site had arisen. In my view the Judge was both entitled, and correct to attach significance to this wording, and to conclude that the wording did not support the Appellant's case for a periodic tenancy. Equally, and while this finding is not of course the subject of objection by the Appellant, it seems to me that the Judge was right to consider that words *"Rent w/o prejudice"* constituted unthinking business practice, and did not assist him.

111. In support of this part of its argument the Appellant made reference to the decision of the FTT in *EE & H3G v Wandsworth LBC (Castlemaine)* BIR/00CN/ERO/2024/0613, at [52], where the FTT made the following findings (I have included [51] for the relevant context):

> *"51. With regard to the wording on the invoices, neither party was able to produce any invoices prior to May 2019, and as the managing agents had changed in the intervening period, there was no evidence as to what may have been detailed on such invoices. The Tribunal found the inclusion of the words "LEASE EXPIRED, HOLDING OVER" and/or "WITHOUT PREJUDICE LEASE OUTSTANDING RENT REVIEW" and "WITHOUT PREJUDICE LEASE EXPIRED", on invoices issued after 26 November 2018 to be of little assistance in knowing what wording may have been detailed in the previous invoices.*
>
> *52. In addition, the Tribunal found the inclusion of such wording, which followed the Claimants' email of 26 November 2018 and which did not mention what the Respondent considered the Claimants' present position to be, could have been used without thinking, as referred to by Judge Cooke in Arqiva. There was no evidence before the Tribunal that such wording had been used after careful consideration of the current position between the parties."*

112. I do not think that the decision in *Castlemaine* assists in the present case. As is apparent from the extract from the decision which I have just quoted, the findings made by the FTT in *Castlemaine* were findings made on the evidence in that case. They did not, and do not compel an equivalent finding in the present case, in relation to the significance of the heading on the Workman Invoices. The finding which the Judge made on the Workman Invoices was a finding made after careful consideration of the evidence which he was reviewing in Paragraphs 20-26.

113. The next question is whether the Judge was wrong to derive support from the provisions of the Old Code for his conclusion that the Respondents were tenants at will in the First Period.

114. In the relevant part of the Decision, at Paragraphs 47-53, the Judge considered what he referred to as the statutory framework. The Judge identified, at Paragraph 48, two potentially relevant statutory regimes; namely the 1954 Act and the Code. It is clear from what followed in the Decision that the Judge was including, in his reference to the Code, its statutory predecessor; namely the Old Code. The key findings of the Judge, in relation to the Code and the Old Code, are to be found in Paragraphs 51-53:

> *"51. It is important to be clear about what protection the Claimants had under both the Old Code and the Code. Under the Old Code following expiry of the Agreement the Claimants no longer had an agreement in writing conferring rights for the statutory purposes under Paragraph 2. What they did have was protection under Paragraph 21 when faced with an application for removal of their electronic communications apparatus and the ability to apply for conferral of new rights under Paragraph 5.*
> *52. The Code came into force on 28th December 2017. The Claimants had protection against removal of ECA under Paragraph 40(8), pending determination of a Paragraph 20(3) application for the imposition of a new agreement. In addition the Claimants could apply for temporary code rights under Paragraph 27(1)(c). However, the Claimants did not have a code agreement.*
> *53. The protections enjoyed by the Claimants are therefore essentially defensive in nature. Nevertheless those protections are substantial. I am satisfied that the conduct of the parties post expiry of the Agreement is referrable to the statutory protections afforded to the Claimants by the Old Code and the Code. I am careful in my treatment of the 2018 Agreement because the views of the parties are subjective and mistaken as to the existence of a code agreement. Nevertheless the 2018 Agreement is evidence before me that the parties regarded their relationship as being governed by the Code. The absence of any reference whatsoever in correspondence or dealings between the parties to the 1954 Act and/or a periodic tenancy is also a relevant circumstance. Considering all the circumstances of the case, including the annual rental payments, I find that the parties had not reached an agreement for a periodic tenancy."*

115. The Appellant argues that the Judge was wrong to rely on the provisions of the Old Code. It is asserted that the Old Code gave no protection of the kind referred to by the Judge. It is also asserted that there is no evidence that the parties considered the Old Code at all.

116. It seems to me that there are a number of problems with this argument.

117. First, and starting with the Old Code, it did provide a measure of protection in relation to the ECA; see paragraph 21 of the Old Code. The Judge identified this protection in Paragraph 51. I cannot see that the Judge went wrong in characterising this as a protection which is defensive in nature.

118. Second, it seems to me wrong to separate out the Judge's treatment of the Old Code from the remainder of the evidence the Judge was reviewing in this part of the Decision. The Judge was considering the protection offered to the Respondents by the Old Code and the Code. The Judge was also considering the 2018 Agreement. The Judge treated the 2018 Agreement with appropriate care, because the views of the parties were subjective and because they were mistaken as to the existence of a code agreement. The Judge was however satisfied that the conduct of the parties following the Term Date was referable to the statutory protections afforded to the Respondents by the Old Code and Code. Given the evidence before the Judge, I cannot see how the Judge's finding in this respect can be faulted. The Judge, correctly, looked at the evidence as a whole. The Appellant's argument proceeds on the footing that the position in relation to the Old Code should be looked at in isolation. This is plainly the wrong approach, but in any event does not reflect the Judge's approach.

119. Third, it is asserted by the Appellant that there was no evidence that the parties considered the Old Code at all. This seems to me to be a dubious assumption, given that the parties clearly had the provisions of the Code well in mind, when they negotiated and entered into the 2018 Agreement. It strikes me as highly unlikely that the parties would not have had the provisions of the Old Code in mind, following the Term Date. Independent of this point however, this part of the Appellant's argument assumes that, in cases of this kind, the existence or absence of statutory protection can only be taken into account if there is positive evidence that the parties had this in mind at the relevant time. It seems to me that no rule of this kind is to be found in the relevant authorities. In his judgment in *Javad*, Nicholls LJ reviewed the history of the relevant case law. He noted the move away, in the authorities, from the old common law presumption of a tenancy from the payment and acceptance of rent. The old common presumption was no longer appropriate, as Nicholls LJ explained, at 1017C-D:

> *"Ormrod L.J.'s statement of the relevant question does not differ from what I have sought to set out above. The thrust of his trenchant observation, that the authorities make it clear that the "presumption is unsound and no longer holds," was, if I understand him aright, that the circumstances in which the presumption will operate will seldom, if ever, arise in present day conditions. Whether the correct view is that, having regard to the statutory controls, the so-called "old common law presumption" no longer exists, or is that the cases in which it will operate in practice are very few and far between, seems to me to be a peculiarly arid issue on which it is not necessary to express an opinion. At the end of the day it will always be for him who asserts he enjoys an interest in another's land to make good his claim."*

120. As *Javad* makes clear, the application of the old common law presumption, in an era of considerable statutory control over relationships between landlord and tenant, is not appropriate. Where, by way of example, the implication of a periodic tenancy would carry with it protection under the 1954 Act, that is a factor to be taken into account and may serve to strengthen the inference that a periodic tenancy was not intended; see Patten LJ in *Erimus*,

at [23]. It was not suggested, either in *Javad* or *Erimus*, that the existence of a factor such as the possibility of 1954 Act protection could only be taken into account, as a relevant factor, if there was positive evidence that the parties had taken this factor into account. In the present case, as I have said, it seems to me that there was such evidence, but I cannot see that the absence of such positive evidence prevented the Judge from taking the protections provided by the Old Code and the Code into account as a factor. Indeed, it seems to me that this was an obvious and important factor for the Judge to consider, which, as the Judge found, militated against the implication of a periodic tenancy.

121. The final question, in relation to the First Period, is the question of the Judge's treatment of the 1954 Act. The Judge's findings in this respect are to be found in Paragraphs 49-50:

> *"49. The 1954 Act has some disadvantages for both sides. St Francis (aka Corbally) is, as its full name suggests a property investment business. EDL is a developments business. St. Francis owned the property for around 3 years, from 2015 to 2018. It realised its investment and sold to EDL who redeveloped a 60's office block into 247 apartments. One can readily appreciate why, from a landlord's point of view, the Agreement was contracted out of 1954 Act protection. A landlord would not want any investment potential/redevelopment fettered by 1954 Act control. The operators who entered into the Agreement were content to contract out of 1954 Act regime.*
>
> *50. It is clear that when negotiating the Agreement the original contracting parties had taken care to contract out of the protections of the 1954 Act. It seems surprising that the parties would subsequently acquiesce to a periodic tenancy which would be protected. A Tribunal will require some persuasive evidence to find that parties to a contracted out agreement subsequently agreed to 1954 Act protections after expiry of that agreement. As was said by Nicholls LJ application of the common law presumption where statutory control exists will be 'few and far between'."*

122. In this context the Appellant repeats its argument that the Judge misapplied the required objective assessment. In my view that argument is wrong, for the reasons which I have already given. It is clear that the Judge had well in mind the requirement for an objective assessment of the evidence, and I cannot see that the Judge departed from this requirement in his consideration of the question of 1954 Act protection.

123. The Appellant also contends, for a variety of reasons, that the Judge reached the wrong conclusion. What the Judge should have concluded, so it is argued, was that it was in the interests of both parties that the Respondents' occupation of the Site should be protected by the 1954 Act, as a periodic tenancy.

124. In its argument the Appellant seeks to contrast what the Judge said at Paragraph 50, in relation to statutory protection, with what the Judge said in Paragraph 53, in relation to statutory protection:

> *"53. The protections enjoyed by the Claimants are therefore essentially defensive in nature. Nevertheless those protections are substantial. I am satisfied that the conduct of the parties post expiry of the Agreement is referrable to the statutory protections afforded to the Claimants by the Old Code and the Code. I am careful in my treatment of the 2018 Agreement because the views of the parties*

are subjective and mistaken as to the existence of a code agreement. Nevertheless the 2018 Agreement is evidence before me that the parties regarded their relationship as being governed by the Code. The absence of any reference whatsoever in correspondence or dealings between the parties to the 1954 Act and/or a periodic tenancy is also a relevant circumstance. Considering all the circumstances of the case, including the annual rental payments, I find that the parties had not reached an agreement for a periodic tenancy."

125. The Appellant says that this is inconsistent, in the sense the Judge was, on the one hand, suggesting that the absence of reference to the 1954 Act militated against a finding that a periodic tenancy was intended (Paragraph 53), while also saying that the existence of the security which would be conferred upon a periodic tenant was a factor which militated against a finding that there was a periodic tenancy (Paragraph 50). I do not agree that there is any such inconsistency. At Paragraph 50 the Judge expressed his doubts, on the evidence, that the parties would have acquiesced to a periodic tenancy with statutory protection. At Paragraph 53 the Judge was reinforcing his earlier doubts. The Judge found that the absence of reference to the 1954 Act and/or to a periodic tenancy confirmed the doubts which he had earlier expressed in Paragraph 50, and supported his finding, on the evidence, that the parties should not be taken to have had the intention to enter into a periodic tenancy.

126. The Appellant also argues that any suggestion that an absence of reference to the 1954 Act and/or a periodic tenancy militates against the drawing of the inference of a periodic tenancy is inconsistent with the decision of the Court of Appeal in *Walji v Mount Cook Land Limited* [2002] 1 P.&C.R. 13, and with what was said by Patten LJ in *Erimus* at [23]-[24].

127. The decision in *Walji* seems to me to be instructive in this context. In that case the claimants were allowed to remain in occupation of shop premises, paying rent, following agreement with their landlord on the terms of a new lease. The Court of Appeal upheld the decision of the trial judge that these circumstances had given rise to an implied periodic tenancy. Key elements of this decision were that terms had been agreed for the grant of the new lease, that there were no continuing negotiations between the parties, and that there was no evidence that the landlord had been concerned that the claimants might, by virtue of their occupation and payment of rent, obtain statutory protection. Charles J, with whose judgment Mance and Aldous LJJ agreed, summarised the position in the following terms, at [31] (the underlining is my own):

> *"31 In short, in my judgment the points that (i) the Walji brothers had been in occupation and had been paying the rent for some time, (ii) in May 1995 Romula Ltd were told that Fads Ltd (the tenant under the Underlease) no longer existed, (iii) with that knowledge and on that basis Romula Ltd permitted the Walji brothers to remain in occupation and accepted rent from them, (iv) the terms of the proposed new underlease to the Walji brothers were agreed subject to contract or lease, (v) there were no continuing negotiations and neither side pressed for the grant of the lease and (vi) there is no indication that Romula Ltd were concerned (as would often be the case where a landlord lets someone into possession during negotiations for a lease) that the Walji brothers should not be tenants with statutory protection, lead to and support the conclusion reached by the judge that, applying the underlying principle confirmed and identified in Javad v. Mohammed Aqil, the claimants have a periodic tenancy of the Shop Premises."*

128. There are two relevant points to be made in relation to *Walji*. The first is that, as the judgment demonstrates, cases of this kind are fact sensitive. The factual situation in *Walji* bears no relation to the present case. Second, and concentrating on the question of statutory protection, the finding on the evidence in *Walji* was that the landlord had not been concerned with the question of whether the claimants would be tenants with statutory protection. In most cases the factual position in this respect will be different. In the present case the Judge's evaluation of the evidence in this respect, for the reasons which he gave, was different. There is nothing in *Walji* to undermine the Judge's evaluation of the evidence in the present case.

129. I have already quoted what Patten LJ said in *Erimus*, at [23]-[24]. There is nothing there to undermine the legitimacy of the Judge's treatment of the question of statutory protection in the present case, on the basis of the evidence in the present case.

130. Beyond this, the Appellant seeks to argue that the Judge went wrong in his evaluation of the evidence in relation to the question of statutory protection. The Appellant argues, for various reasons, that the Judge was wrong to attach weight to the fact that the Lease had been contracted out of the protection of the 1954 Act and had been wrong to conclude that 1954 Act protection would have had *"some disadvantage for both sides"* (Paragraph 49). It is contended that the Judge was wrong to consider that the 1954 Act was something which the parties would have wished to avoid. It is asserted that 1954 Act protection had advantages for both parties, and its existence was no reason not to infer a period tenancy.

131. I do not regard it as necessary to go into the individual arguments of the Appellant in this respect. To do so would involve my putting myself into the place of the Judge, and carrying out my own evaluation of the evidence, without the benefit of having read all the evidence which was before the Judge, and all the argument on that evidence which was put to the Judge. My role is to review the Judge's evaluation of the evidence. The essential problem confronting the Appellant in this respect is that it is clear from the Decision that the Judge considered and had in mind the various matters which, so the Appellant contends, should have caused the Judge to conclude that the existence of statutory protection was no reason not to infer a periodic tenancy. The Judge's evaluation of the relevant matters was not the same as that of the Appellant. That is not a good reason for interfering with the Judge's evaluation of the evidence.

132. In summary, I cannot see how the Judge went wrong in his evaluation of the position in relation to the 1954 Act, in Paragraphs 49-50. In my view, the Judge was quite entitled to find, on the evidence before him, that 1954 Act protection had disadvantages for both sides, and to infer, on an objective assessment of the evidence, that it was not something which either party would have wanted. This being so, it was not appropriate to infer a periodic tenancy.

133. The Judge's treatment of the question of 1954 Act may be said to have been the opposite of the usual treatment of the question of 1954 Act protection in cases such as *Javad* and *Erimus*. In those cases it was assumed that a landlord would wish to avoid being saddled with 1954 Act protection. The impact of the 1954 Act, as a factor in cases of this kind, does however depend upon the facts of the particular case. The facts of the present case were not those of *Javad*, or *Erimus*, or *Walji*.

134. Drawing together all of the above analysis, I cannot see any ground on which I should interfere with the Judge's evaluation of the evidence in relation to the First Period. The Judge concluded that the Respondents remained in occupation of the Site as tenants at will following the Term Date. As it happens, and after hearing all the arguments in the appeal on Preliminary Issue 1, and taking into account all the evidence to which my attention has been drawn in this context, I agree with the Judge's conclusion. As the authorities which I have cited above show however, the question is not whether I agree with the Judge's conclusion, but whether there is some identifiable flaw in the Judge's treatment of the question which he had to decide in this context; namely on what basis the Respondents continued in occupation of the Site following the Term Date and during the First Period. In my judgment there is no identifiable flaw to be found in the Judge's conclusion that the Respondents had a tenancy at will during the First Period.

135. This then brings me to the Second Period. The Judge dealt with his conclusions in respect of the Second Period more shortly, at Paragraphs 68-70. I have already quoted these Paragraphs, but I repeat them, for ease of reference:

> *"68. Rent was paid annually in advance throughout this period [AF9.4 and 19]. At the time of EDL's acquisition of the site rent had already been paid in advance to St Francis having been demanded on 21st December 2017 [AF9.4]. The first demand by EDL was not made until 10th December 2018 [AF 19]. Accordingly no presumption of a periodic tenancy by reason of payment of rent could possibly have arisen until December 2018 at the earliest. Crucially this postdates the October 2018 Agreement.*
> *69. On acquisition of the freehold EDL moved quickly to terminate of the expired Agreement on redevelopment grounds. To that end a paragraph 31 notice was served in April 2018 [388-9] and counter notices in July 2018 [404-409]. The overwhelming inference must be that the parties did not intend to enter into any intermediate contractual arrangement. The tenant continued to occupy on sufferance. The landlord wanted to get possession.*
> *70. My finding is that for the period between EDL's acquisition of the freehold and the October 2018 Agreement nothing changed. The tenancy at will with St Francis terminated as a matter of law on EDL's acquisition of the freehold. However that does not mean that a periodic tenancy arose. By the time of the December 2018 demand both parties were operating under the (mistaken) belief that, following the coming into force of the Code, the Claimants had a code agreement that could only be terminated on redevelopment grounds. Looking objectively at all the relevant circumstances I find that the Claimants remained in occupation as tenants at will."*

136. The Judge then made separate findings in relation to the 2018 Agreement, at Paragraphs 71-72, which I have also already quoted, but which I also repeat for ease of reference:

> *"71. I repeat my findings at paragraphs 34 -42. The intention of the parties was that the legal basis of the Claimants occupation of the site would be governed by the statutory framework. As Mr Read submits that is the very antithesis of the parties intending to create a periodic tenancy (Claimants Skeleton Argument at paragraph 36). The 2018 Agreement did not create a periodic tenancy.*
> *72. For the period following the 2018 Agreement I repeat my findings at paragraphs 43-46. The parties continued on the footing of the 2018 Agreement*

namely, continuation of the existing agreement subject to the protections afforded to the Claimants by the Code. No periodic tenancy arose."

137. It is important to note that these conclusions, as the Judge indicated, followed from the findings which he had already made in relation to the 2018 Agreement, at Paragraphs 34-46. The finding made by the Judge, following his review of the circumstances and terms of the 2018 Agreement, was set out in Paragraph 46:

> *"46. My finding is that post the 2018 Agreement, until service of the Paragraph 20 Notice the subject of these proceedings, the legal basis of the Claimants occupation of the site continued on the footing agreed in the 2018 Agreement namely, continuation of the existing agreement. No periodic tenancy arose."*

138. The Appellant's arguments in relation to the Second Period are more limited, and I can deal with them more shortly.

139. The Appellant points out that, during the Second Period, rent continued to be demanded and paid on an unqualified basis. If a tenancy at will had existed during the First Period, it had concluded on the disposal of the Freehold to EDL. In any event, any such tenancy at will would have been concluded by the service of the notice on the Respondents by EDL pursuant to paragraph 31(1) of the Code. The 2018 Agreement was inconsistent with the existence of a tenancy at will. It would not have made commercial sense for the 2018 Agreement to have left the Respondents in the precarious position of tenants at will. The sensible and reasonable way to fill the gap, in respect of the Second Period, should have been for the Judge to find that an implied periodic tenancy came into existence.

140. Again, it seems to me that there are a number of problems with these arguments.

141. The first, and most obvious point to make is that the Judge concluded that nothing changed between EDL's acquisition of the Freehold and the entry of the parties into the 2018 Agreement; see Paragraph 70. If, as I have decided, the Judge's conclusion that the Respondents had a tenancy at will during the First Period cannot be challenged, it is difficult to see any good reason for a conclusion that, as from the termination of this tenancy at will by the disposal of the Freehold to EDL, an implied periodic tenancy came into existence.

142. At this point it becomes necessary to consider the 2018 Agreement. I have already, earlier in this decision, summarised the circumstances in which the 2018 Agreement came to be made. I have also set out the terms of the 2018 Agreement. While the parties were operating under the misapprehension that there was a code agreement in place, I cannot see that this prevents either the 2018 Agreement or the events which resulted in the 2018 Agreement from providing objective evidence as to the intentions of the parties in relation to the Respondents' occupation of the Site.

143. What is very clear, both from the events leading up to the 2018 Agreement and from the terms of the 2018 Agreement itself, is that neither party regarded the Respondents as occupying the Site pursuant to a periodic tenancy and that neither party intended that the occupation of the Respondents be on that basis.

144. What I have said in my previous paragraph reflects the findings of the Judge in Paragraphs 34-46, in particular at Paragraph 40:

> *"40. My finding is that the 2018 Agreement did not change the status quo ante. What was in existence beforehand continued. The parties believed that the Claimants had a Code agreement. In fact what the Claimants had was no more than rights under Part 6 of the Code to protect their ECA in response to a removal application. I find that the 2018 Agreement merely recognised the Claimants continuing occupation and their protection under the Code (albeit that the parties were mistaken as to the extent of that protection). Nowhere in the 2018 Agreement does it suggest that the Claimants were already in occupation under a periodic tenancy. Certainly no steps were taken by EDL to terminate the periodic tenancy it is now said by the Respondent to have existed. The intention of the parties, looked at objectively, was to deal with the situation in which they found themselves by way of continuation of their existing agreement governed by the terms set out in the expired Agreement."*

145. As the Judge noted, the parties thought that there was a code agreement in place, which was to continue. They were mistaken in that belief. In those circumstances it was necessary for the Judge to fill in the gap left by the mistaken belief of the parties, in a way which was sensible and reasonable. The Judge decided that the objective evidence of the intentions of the parties was inconsistent with the inference of a periodic tenancy, for the reasons which he explained in Paragraphs 67-72, and previously in Paragraph 40. I cannot see anything wrong with the relevant findings of the Judge, and I do not see how the conclusion which he reached, on the basis of those findings, can be faulted.

146. The Respondents' counsel made reference, in their skeleton argument, to *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386, In that case the result of the tenant's entry into the relevant land, pursuant to a lease which turned out to be void on the basis of the uncertainty of term, was an implied yearly periodic tenancy. The case was relied upon by the Appellant's counsel as authority for the proposition that a mistake of the parties as to the basis of their occupation is no bar to a periodic tenancy. The Appellant's counsel submitted that the question to be answered is what interest should be inferred, in the context of the void agreement and the intentions of the parties. As authority for this proposition, the Appellant's counsel cited the recent decision of the Court of Appeal in *AP Wireless II (UK) Limited v On Tower (UK) Limited* [2025] EWCA Civ 971.

147. I accept the principle that a mistake of the parties as to the basis of their occupation is no bar to the finding of a periodic tenancy. The finding of a periodic tenancy may be the appropriate way to fill the gap but, as the decision of the Court of Appeal in the *AP Wireless* case demonstrates, where a lease turns out to be void, contrary to the belief of the parties, there is no rule that a periodic tenancy must be implied. The correct analysis of what has in fact been created by or following the agreement which was intended to create a lease may turn out to be something different, such as the contractual licence which was found to exist in **AP Wireless**; see the judgment of Sir Geoffrey Vos MR at [47]-[53].

148. I should add, in this context, that it is necessary to exercise some caution in treating the *Prudential* case as any kind of general authority for the proposition that entry into land combined with the payment of rent, pursuant to a void lease, results in an implied periodic tenancy. *AP Wireless* was an appeal from a decision of my own, sitting, as in the present case, in my capacity as President of the Upper Tribunal (Lands Chamber). In my decision in *AP Wireless*, I had to consider the argument that the consequence of the relevant

agreement turning out to be void as a tenancy, by reason of the uncertainty of its term, was an implied periodic tenancy. In the context of that argument I made the point, in my decision in the Upper Tribunal, that the issue in *Prudential* was whether the restriction on the right to terminate the agreement in that case was repugnant to a tenancy. I noted that it was not clear, from the record of the arguments on behalf of the owners of the relevant land in *Prudential*, that the result of an implied periodic tenancy, if the agreement itself was void as a tenancy, was in issue. As I have said, the issue which was ultimately determined by the House of Lords in *Prudential* was whether the restriction on the right to terminate the agreement in that case had found its way into the implied periodic tenancy which took effect in place of the void lease.

149. Returning to the present case, it seems to me that the 2018 Agreement was in no way comparable to the agreement which was found to be a void lease in *Prudential*. The relevance of the 2018 Agreement, as the Judge found at Paragraph 70, was that it was inconsistent, looked at objectively, with the existence of an implied periodic tenancy.

150. Following the 2018 Agreement, as the Judge recorded at Paragraph 43, very little happened. It is clear that nothing occurred which could have had the effect of converting the tenancy at will, which the Judge had found to have existed at the time of the 2018 Agreement, into a periodic tenancy.

151. Drawing together all of the above analysis, my conclusions in relation to the Second Period are the same as those which I have reached in relation to the First Period. Again, I cannot see any ground on which I should interfere with the Judge's evaluation of the evidence in relation to the Second Period. The Judge concluded that the Respondents remained in occupation of the Site as tenants at will following the termination, by operation of law, of their previous tenancy at will. Again, I agree with the Judge's conclusion. Turning to the relevant question, in the exercise of my appellate jurisdiction, there is, in my judgment, no identifiable flaw to be found in the Judge's conclusion that the Respondents had a tenancy at will during the Second Period.

152. I therefore conclude that the Judge was correct to decide, in relation to Preliminary Issue 1, that the Respondents occupy the Site as tenants under a tenancy at will. It follows that the Appeal fails, so far as Preliminary Issue 1 is concerned.

The Section 43(4) Argument – analysis and determination

153. In the light of my decision on the appeal on Preliminary Issue 1 the Respondents do not need to rely upon the Section 43(4) Argument. It follows that the Section 43(4) Argument does not strictly arise for decision. I have come to the conclusion that, in circumstances where I do not have to decide the Section 43(4) Argument, I should not do so. I have reached this conclusion for the following reasons.

154. The working hypothesis, in relation to the Section 43(4) Argument, is that the Respondents have been in occupation of the Site as tenants pursuant to an implied periodic tenancy, protected by the 1954 Act.

155. This is not however the only hypothesis which is required for the purposes of considering the Section 43(4) Argument. Section 43(4) was brought into force by paragraph 4 of Schedule 3 to the Digital Economy Act 2017, and applies to tenancies granted after the

Code, as contained in Schedule 3A to the Communications Act 2003, was brought into force (28th December 2017). It follows that Section 43(4) would only be capable of applying in the present case if one assumes both that the Respondents occupy the Site pursuant to an implied periodic tenancy, and that the implied periodic tenancy in question was granted after 28th December 2017. The first of these assumptions simply requires one to assume that an implied periodic tenancy arose following the Term Date, contrary to the Judge's decision, which I have upheld, on Preliminary Issue 1. The second, and further assumption, requires one to assume that the implied periodic tenancy was granted after 28th December 2017. It is difficult to see how this assumption could be correct, on any view of the evidence in this case. This second hypothesis therefore requires the making of factual assumptions which do not appear to have been investigated and which, on the face of it, appear to be wrong.

156. There is then a further complication. The Section 43(4) Argument, as I understand it, proceeds on the basis that the primary purpose of the assumed implied periodic tenancy was to grant Code rights, notwithstanding that, by reason of the absence of writing, the implied periodic tenancy could not have been effective to grant Code rights; see paragraph 11 of the Code. If however the Respondents are right in that argument, it then becomes necessary, as I see it, to consider the terms of the implied periodic tenancy and to decide whether the primary purpose of the implied periodic tenancy was to grant Code rights. So far as I can see, these latter questions were not considered before the Judge. Nor were these questions explored, or properly explored in the argument at this hearing. In these circumstances, the Section 43(4) Argument requires, at least on the Respondents' case, investigation of factual questions which, so far as I can see, have not been properly addressed, either at first instance or in the Appeal.

157. The answer of the Appellant to the Section 43(4) Argument is straightforward. The Appellant argues that a tenancy is only capable of falling within the exception in Section 43(4) if it is a tenancy which is effective to grant Code rights. If the tenancy is not effective to grant Code rights it cannot fall within the exception, regardless of questions of primary purpose. If the Appellant is right, the factual questions identified in my previous paragraph do not have to be investigated. As I understand the Decision, the Judge accepted the Appellant's argument, in his decision on the Section 43(4) Argument.

158. The question of whether a tenancy which is ineffective to grant Code rights is not capable of falling within the exception in Section 43(4) is not an easy question to answer, given the purposive language of Section 43(4). Equally, if I was to conclude that the Appellant was wrong in this argument, questions of primary purpose would arise which I am not properly equipped to answer.

159. I was not cited any authority on the scope of Section 43(4), beyond the decision of the Judge. In my judgment the scope of Section 43(4) should be left for consideration and determination, at Upper Tribunal level, in a case where it is directly in issue, and where the factual questions which may arise have been properly investigated. I therefore conclude that I should not decide the Section 43(4) Argument, and I do not do so.

The Respondents' argument in relation to Preliminary Issue 2 – analysis and determination

160. The starting position in relation to the argument on Preliminary Issue 2 is the same as in relation to the Section 43(4) Argument. The Respondents do not need to demonstrate that the Judge was wrong in his decision on Preliminary Issue 2. It seems to me however that a

determination of Preliminary Issue 2 does not present the same problems as a determination of the Section 43(4) Argument. In these circumstances I will deal with the Respondents' challenge to the Judge's decision on Preliminary Issue 2, but relatively briefly.

161. The working hypothesis, in relation to the Respondents' argument, is, again, that the Respondents have been in occupation of the Site as tenants pursuant to an implied periodic tenancy, protected by the 1954 Act.

162. The Judge's decision on Preliminary Issue 2 is to be found at Paragraphs 82-89. I have already explained the problem which confronted the Respondents' argument on Preliminary Issue 2. The Supreme Court decided, in *Compton Beauchamp*, that an operator with a subsisting agreement (as defined in the transitional provisions in Schedule 2 to the Digital Economy Act 2017) which was protected by the 1954 Act did not have the option of renewing its rights in respect of electronic communications apparatus under Part 4 of the Code, but had first to exercise its rights of renewal under the 1954 Act. The Supreme Court also considered that the same principle should apply to an operator occupying pursuant to a tenancy, protected by the 1954 Act, which was not a subsisting agreement for the purposes of the transitional provisions because it was not in writing.

163. The Judge commenced his consideration of Preliminary Issue 2 by making reference to his own FTT decision in *On Tower UK Limited and On Tower UK2 Limited v AP Wireless II (UK) Limited (Patricroft and other sites)* LC-2023-000852 (and other case references). In that case the Judge had to decide, amongst other preliminary issues, whether the claimants were entitled to seek Code rights pursuant to Part 4 of the Code on the assumption that they occupied the relevant sites pursuant to periodic tenancies protected by the 1954 Act. In the relevant part of his decision in *Patricroft* the Judge quoted from the judgment of Lady Rose JSC in *Compton Beauchamp*. In her judgment in the Supreme Court, with which the other members of the Supreme Court agreed, Lady Rose said this, at [167] and [168]:

> *"167 I find the reasoning of the Upper Tribunal and the Court of Appeal in Ashloch as to why an operator with a subsisting agreement protected under the 1954 Act should not have the option of renewing the rights under Part 4 of the new Code to be persuasive. The intention of the Government, following the recommendation of the Law Commission, was that such an operator should not get the retrospective benefit of the new Code, in particular the substantial benefit of the no-scheme valuation of the rights.*
>
> *168 There is a difficulty here that, on the basis of the decision in On Tower, Cornerstone may not in fact have a subsisting agreement precluded by paragraph 6 of the transitional provisions from the benefit of Part 5 of the new Code because its agreement is not in writing. The absence of writing does not, however, affect its continued ability to apply to the County Court to renew its tenancy under Part 2 of the 1954 Act. My understanding is that that option was and is open to Cornerstone in respect of this site. I do not consider that the fact that Part 5 of the new Code may not be available to Cornerstone for the reason that its agreement is not in writing should mean that it is in a better position than a tenant whose agreement is in writing but who cannot rely on Part 5 because of paragraph 6 of the transitional provisions. Cornerstone must therefore use its rights under Part 2 of the 1954 Act to renew its lease; that lease will then be caught by section 43(4) of the 1954 Act so that when that lease expires, Part 5 will be available."*

164. Returning to *Patricroft* the Judge recorded, at [25], the argument of counsel for the claimants, to the effect that the position, as described by Lady Rose in *Compton Beauchamp*, was different in respect of periodic tenancies following the expiration of a contracted out 1954 Act tenancy. A tenant under such a tenancy could not initiate renewal proceedings under the 1954 Act because the tenant could not make a request for a new tenancy pursuant to Section 26 of the 1954 Act:

> *"25. Mr Kitson before me submits that the position is different in respect of any periodic tenancies which may have arisen following the expiry of a contracted out 1954 Act tenancy. In doing so Mr Kitson seeks to distinguish the position in Ashloch which* [w]*as* ***not*** *contracted* [out]*. Periodic tenancies arising on the expiry of a contracted out 1954 Act tenancy are not subsisting agreements because they are not in writing (see* ***Queen's Oak*** *at [84]) and therefore Part 5 is not available. A periodic tenancy is protected under Part 2 of the 1954 Act and has security of tenure. However the right to renew such a tenancy is qualified. A request for a new tenancy can only be made under section 26(1) where the current tenancy is a tenancy granted for a term of years certain exceeding one year. Accordingly a periodic tenant can only apply to the court for an order for the grant of a new tenancy if the landlord has given notice under section 25 to terminate the tenancy (see section 24(1)(a)). Mr Kitson therefore argues that as the Claimant, under the assumed protected periodic tenancy, cannot initiate renewal under the 1954 Act and cannot access Part 5 it must, a fortiori, be able to access Part 4. A "black hole" is, Mr Kitson submits, contrary to the policy of the Code. This follows what was said by Lewison LJ in Ashloch in the Court of Appeal at [105]:*
>
> > *"The effect of the definition of "subsisting agreement" in the transitional provisions may have left some operators out in the cold: notably those who occupy under tenancies at will not recorded in writing; and possibly those holding under periodic tenancies protected by Pt II of the Landlord and Tenant Act 1954 who cannot take the initiative to renew their tenancies under that Act."*

165. The Judge did not accept this argument in *Patricroft*. After citing the decision of the Deputy Chamber President (Martin Rodger KC) in *Gravesham Borough Council v On Tower UK Limited* [2024] UKUT 151 (LC), the Judge reached the following conclusion, at [27]-[28]:

> *"27. In addition I am not persuaded that the Claimant in such circumstances is "left out in the cold". It has security of tenure. Its apparatus is on site and cannot be removed without the Landlord seeking to terminate under paragraph 25 at which point the tenant can apply for a new tenancy.* ***Compton Beauchamp*** *allows access to Part 4 for additional rights should that become necessary. The only disadvantage to the Claimant is that it cannot access "the greater prize" of the substantial benefit of the no-scheme valuation.*
>
> *28. On the assumption that the Claimants occupy the sites pursuant to periodic tenancies protected by Part II of the Landlord and Tenant Act 1954 I find that the Claimants are not entitled to seek Code rights pursuant to Part 4 of the Code."*

166. Returning to the present case the Respondents argued before the Judge that, by reason of the absence of an ability on the part of a periodic tenant to request a new tenancy pursuant to a Section 26 notice, and in the absence of a Section 25 notice served by the landlord, there was no dual route available to the tenant, both under Part 4 of the Code and under the 1954 Act. The tenant could only seek renewal of its rights pursuant to Part 4 of the Code, and did not thereby infringe the policy, identified in the cases referred to by the Judge, against a tenant being able to renew its rights under the 1954 Act and the Code.

167. The Judge found this argument superficially attractive, but ultimately was not persuaded, for the reasons set out in Paragraphs 87 and 88, which I have already quoted, but repeat for ease of reference:

> *"87. Superficially Mr Read's argument is attractive. An operator under Mr Read's solution is not seeking to use Part 4 when it can achieve its renewal under the 1954 Act. However, such a solution would be unworkable in practice. For example what would happen if following a Part 4 reference a site provider issued a section 25 notice and subsequently a claim either for a new tenancy or termination in the County Court? The solution proposed by Mr Read would lead to a dual regime with both the Tribunal and County Court having jurisdiction over the same dispute with no mechanism to determine where priority lies. The Tribunal cannot allow its jurisdiction to be accessed based on the whim of a site provider as to whether or not it decides to issue 1954 Act notices.*
>
> *88. A line has to be drawn somewhere. As Lewison LJ observed in **Ashloch** those holding under periodic tenancies protected by Part II of the 1954 Act who cannot take the initiative to renew their tenancies under that act may be "out in the cold". However as I observed in **Patricroft** the operator has protection of its ECA under Part 6 and can apply for additional rights under Part 4. The only disadvantage is that it cannot obtain a new rent on a no-network assumption."*

168. At this hearing the Respondents renewed their argument that the logic of what was said by Lady Rose in *Compton Beachamp* does not apply to a periodic tenant. There is no route of renewal which is subverted by the periodic tenant being able to renew its rights pursuant to Part 4 of the Code, because neither Part 5 of the Code nor the 1954 Act are available. A claim under Part 4 of the Code would be a genuine claim for new rights, because those rights could not be accessed by any other means.

169. I am not persuaded by the Respondents' arguments, for a number of reasons.

170. First, it seems to me that a periodic tenant with 1954 Act protection is not correctly classified as having no rights of renewal. The tenant does have such rights of renewal under the 1954 Act, but their exercise depends upon the landlord taking the initiative and serving a Section 25 notice. They are however still rights of renewal, albeit of a conditional or inchoate nature.

171. Second, I do not think that the fact that the rights of a periodic tenant to renew under the 1954 Act are conditional upon the landlord serving a Section 25 notice takes such a tenant outside the logic of what Lady Rose was saying in *Compton Beauchamp*, at [167]-[168]. Lady Rose noted that a tenant which could not access Part 5 of the Code, by reason of not having an agreement in writing, should not be in a better position than a tenant whose agreement was in writing but which could not rely upon Part 5 of the Code by reason of

paragraph 6 of the transitional provisions in Schedule 2 to the Digital Economy Act 2017. It seems to me to be clearly inconsistent with the reasoning of Lady Rose, in the relevant parts of her judgment in *Compton Beauchamp*, to allow tenants with implied periodic tenancies, protected by the 1954 Act, to access Part 4 of the Code.

172. Third, if the Respondents are right in their argument, obvious practical problems arise. The Respondents' argument puts tenants with periodic tenancies, protected by the 1954 Act, into a special category, separated from tenants with fixed term tenancies protected by the 1954 Act. Leaving aside the question of whether, as a matter of principle, such a separate category is justified, there is also the question, as the Judge pointed out, of what would happen if, following a reference pursuant to Part 4 of the Code, the landlord served a Section 25 notice on the periodic tenant. On that hypothesis the dual routes of renewal would be engaged, with proceedings in the County Court and the FTT. What would then happen? Would the arrival of the Section 25 notice take the periodic tenant out of Part 4, and confine the tenant to renewal under the 1954 Act? If not, how would the dual routes operate? The Respondents' arguments did not provide any solution to problems of this kind.

173. Problems of the kind identified in my previous paragraph seem to me to expose the fallacy of categorising a tenant with a periodic tenancy protected by the 1954 Act as a tenant having no right of renewal under the 1954 Act. The reality is that a tenant does have such a right, but on the conditional basis which I have identified above. The conditional nature of the right does not justify allowing a periodic tenant dual access to renewal under Part 4 of the Code and renewal under the 1954 Act. Nor does it justify subverting the policy, which is clearly established in the relevant case law, of not permitting such dual access.

174. Fourth, although *Patricroft* is a decision of the FTT and, as such, only persuasive authority, I find the reasoning of the Judge in that case, as referred to above, to be compelling. In particular, as the Judge pointed out, both in *Patricroft* and in the Decision, a tenant occupying a site pursuant to an implied periodic tenancy is not left *"marooned"* (an expression used by the Respondents' counsel in their skeleton argument) by an inability to access Part 4 of the Code for the purposes of renewing its rights. The tenant in this position can apply for additional rights under Part 4, as was established in *Compton Beauchamp*; see the judgment of Lady Rose at [169]. What the tenant cannot do is renew its existing rights pursuant to Part 4 of the Code. The tenant has the protection for its electronic communications equipment provided by Part 6 of the Code. The tenant has the protection of the 1954 Act. The practical reality is that what the tenant does not have, in this situation, is the benefit on renewal of paying a rent determined pursuant to the valuation provisions in paragraph 24 of the Code. In particular, the tenant thereby misses out on the benefit of the rent being assessed on the assumption that the right that the transaction relates to does not relate to the provision or use of an electronic communications network; see paragraph 24(3)(a) of the Code. Instead, on a renewal of the tenancy under the 1954 Act, the tenant will suffer what is likely to be the financial disadvantage of having the rent on renewal determined pursuant to the valuation provisions in Section 34 of the 1954 Act. In my judgment that financial disadvantage falls well short of offering any justification for putting tenants occupying sites pursuant to periodic tenancies protected by the 1954 Act into a special category, in terms of the ability to use Part 4 of the Code to renew their rights.

175. Drawing together all of the above analysis I conclude that the Judge reached the correct decision on Preliminary Issue 2, for the reasons which he gave. It follows that the

Respondents' challenge to the Judge's decision on Preliminary Issue 2, by the Respondent's Notice, falls to be dismissed.

The Respondents' argument in relation to Preliminary Issue 3 – analysis and determination

176. The position in relation to the argument on Preliminary Issue 3 is the same as in relation to the Section 43(4) Argument and Preliminary Issue 2. The Respondents do not need to demonstrate that the Judge was wrong in his decision on Preliminary Issue 3. As with Preliminary Issue 2, it seems to me that a determination of Preliminary Issue 3 does not present the same problems as a determination of the Section 43(4) Argument. In these circumstances I will also deal with the Respondents' challenge to the Judge's decision on Preliminary Issue 3, but relatively briefly.

177. The working hypothesis, in relation to the Respondents' argument, is, again, that the Respondents have been in occupation of the Site as tenants pursuant to an implied periodic tenancy, protected by the 1954 Act. The further working hypothesis, so far as Preliminary 3 is concerned and contrary to the decision of the Judge on Preliminary Issue 2, is that if the Respondents had a periodic tenancy protected by the 1954 Act, they also had the right to seek a renewal of their rights pursuant to Part 4 of the Code

178. On the basis of these two hypotheses the Respondents' argument, in relation to Preliminary Issue 3, is that it was not necessary, prior to the giving of the 2023 Notice, to effect a termination of the periodic tenancy at common law, by the service of a tenant's notice to quit.

179. It seems to me that the answer to this argument is settled by the decision of the Deputy Chamber President in *Gravesham*. The question which fell to be decided in that case was whether a telecommunications operator which had unsuccessfully applied to the court pursuant to the 1954 Act for a new tenancy of a mast site, could then ask the tribunal for an order imposing a new tenancy of the same site pursuant to Part 4 of the Code. The Deputy Chamber President answered this question in the negative, at [45]:

> *"45. I am therefore satisfied that the proper interpretation of the Code requires that an operator which has exhausted its rights of renewal under the 1954 Act is prevented from making a further application for rights under Part 4 of the Code. In my judgment the FTT did not have jurisdiction to entertain On Tower's reference under Part 4 and should have struck it out under rule 9(2)(a) of the FTT Rules."*

180. The Deputy Chamber President also went on to consider the question, which arose under a separate ground of appeal, of whether the tenant, On Tower, would have been entitled to serve its notice under paragraphs 20 and 27 of the Code at a time when, by virtue of the operation of Section 64 of the 1954 Act, the tenant's existing tenancy was still continuing. The Deputy Chamber President concluded, at [72], that the notice could not have been served prior to the final determination of the tenancy:

> *"72. I have already rejected Mr Radley-Gardner's analysis of the rights of an operator which has lost its opportunity to renew under the 1954 Act. It is clear that, on the view I take of the status of the proceedings after the failure to serve the claim form in time, On Tower was not entitled to serve a notice under*

paragraph 27 to secure temporary rights because its tenancy was still continuing. Even if I am wrong about the first ground of appeal, I would nevertheless hold that On Tower was also barred from serving a valid notice under paragraph 20 while its tenancy was being continued by the 1954 Act. On that basis its Part 4 claim was commenced without a valid request under paragraph 20 having first been made and without the required time for consideration of the request by the Council having elapsed. That is a further, free standing ground for dismissing the reference under rule 9(3)(a) of the FTT's Rules."

181. The Judge followed this part of the decision in *Gravesham*, in his decision in *Patricroft*, at [31]:

> *"31. In light of my decision that periodic tenants with 1954 Act protection are not able to access Part 4 it is not strictly necessary for me to consider the position further in respect of such tenants. However in* ***Gravesham*** *the Claimant was barred from serving a valid notice under paragraph 20 whilst its tenancy was being continued by the 1954 Act [72]. Under such circumstances I find that a periodic tenant cannot access Part 4 without first having given notice to terminate the periodic tenancy and such notice having expired."*

182. It seems to me that I should follow the decision of the Deputy Chamber President in *Gravesham*. There was no argument put before me which would justify my departing from that decision. Even if however the question was not settled by *Gravesham*, I would not accept that it can be open to an operator to seek the renewal of rights pursuant to Part 4 of the Code, without terminating its existing agreement. If this was not the position, there would be nothing to stop an operator, during the contractual life of the existing agreement, simply disregarding its existing contractual agreement and seeking a new agreement pursuant to Part 4 of the Code. It seems to me that the provisions of Part 4 of the Code cannot have been intended to operate in that fashion.

183. The Respondents' argument in this context is that no termination at common law was required because the imposition of a new agreement under Part 4 would affect a surrender by operation of law of the existing periodic tenancy and the re-grant of the new agreement pursuant to Part 4 of the Code. In any such renewal case, a surrender by operation of law will bring the existing tenancy to an end.

184. It seems to me that this is not an answer to the problems which are created, if it is open to operators to seek the imposition of a new agreement pursuant to Part 4 of the Code while their existing agreements are continuing, either by virtue of the contractual provisions of the agreement or by virtue of statutory extension of the existing agreement. Surrender by operation of law is a doctrine of law which is based upon estoppel. The parties, by their conduct, are deemed to have estopped themselves from denying that they have replaced an existing tenancy with a new tenancy. The operation of the doctrine was explained by Peter Gibson J, as he then was, in *Tarjomani v Panther Securities Ltd* (1983) 46 P.&C.R. 32, at page 41:

> *"In my judgment, it is indeed estoppel that forms the foundation of the doctrine. The doctrine operates when the tenant is a party to a transaction that is inconsistent with the continuation of his tenancy, but in my judgment the conduct of the tenant must*

unequivocally amount to an acceptance that the tenancy has been terminated. There must be either relinquishment of possession and its acceptance by the landlord or other conduct consistent only with the cesser of the tenancy, and the circumstances must be such as to render it inequitable for the tenant to dispute that the tenancy has ceased."

185. I have difficulty in seeing how there is any opportunity for this doctrine to operate in circumstances where an order is made for the imposition of a new agreement pursuant to Part 4 of the Code. Where an order is made for a new agreement pursuant to paragraph 20 of the Code, the agreement is imposed upon the parties by order of the court (now the FTT). The imposition of the agreement does not depend upon the conduct of the parties, but upon the jurisdiction of the court to impose the agreement. I cannot see how a doctrine based upon estoppel can operate in these circumstances. It seems to me, contrary to the argument of the Respondents, that surrender by operation of law has no part to play in the process by which a new agreement is imposed upon parties pursuant to Part 4 of the Code. This conclusion, in turn, reinforces the argument that a tenant under a periodic tenancy, with rights of renewal under Part 4 of the Code, must first effect a common law termination of that tenancy, before being entitled to serve a notice pursuant to paragraph 20 of the Code.

186. In this context the Respondents sought to rely upon the decision of the Upper Tribunal (the Deputy Chamber President and Peter McCrea FRICS) at first instance in *Cornerstone Telecommunications Infrastructure Limited v Compton Beauchamp Estates Limited* [2019] UKUT 0107 (LC). This was one of the three cases which were considered by the Supreme Court in *Compton Beauchamp*. In their decision, at [82], the Upper Tribunal said this:

> *"82. We agree with Mr Seitler that rights may be conferred on an operator who is already in occupation, and that in such a case the person who confers the rights (voluntarily or by compulsion) may not have been in occupation when the notice was given to them under paragraph 20(2). But in such a case there are no third-party rights in play and therefore no obstacle to the grant of new rights in substitution for those which already exist. The effect of the same parties entering into a new agreement on different terms will be that the previous agreement will be terminated by operation of law. Where the agreement is consensual, under Part 2, the operator will not be able to suggest that the site provider was not the occupier at the moment the agreement conferring the rights was entered into since otherwise paragraph 9 would prevent the agreement having effect at all. The position is the same under Part 4. The Tribunal can compel the grant of new rights by a site owner to an operator which is itself in occupation but it cannot compel the grant of rights by a person who is not in occupation to an operator who is not in occupation."*

187. It seems to me that what was said in this decision must be read subject to what was said by the Deputy Chamber President in his first instance decision in one of the other two cases which went to the Supreme Court in *Compton Beauchamp*. In his decision in *Cornerstone Telecommunications Infrastructure Limited v Ashloch Limited and AP Wireless II (UK) Limited* [2019] UKUT 0338 (LC), at [78], the Deputy Chamber President said this:

> *"78. Mr Seitler (and Arqiva) relied on what had been said by the Tribunal in its decision in Compton Beauchamp at [82], agreeing with his submission that rights may be conferred by an agreement under Part 4 on an operator who is*

already in occupation. But it is important to read that paragraph in context. The point which Mr Seitler had then been making, and which the Tribunal accepted, was identified at [81], and concerned applications under paragraphs 26 or 27. Moreover, to the extent that paragraph [82] might appear to differ from the analysis of the Court of Appeal, it is because it overlooked the importance of paragraph 34(8) and its general application to agreements between operators and site providers."

188. This seems to me to have represented some qualification to what the Upper Tribunal had said in their decision in *Compton Beauchamp*, at [82]. There is also of course, now the *Gravesham* decision. In my view there is no real support in the decision of the Upper Tribunal in *Compton Beauchamp* for the argument that the problem with imposing new code agreements upon parties to a continuing tenancy is avoided by the doctrine of surrender by operation of law.

189. I also find it unnecessary, in support of my rejection of the surrender by operation of law argument, to go into the rather convoluted argument which developed between Mr Clark and Mr Radley-Gardner, in their oral submissions, as to whether the Respondents' reliance upon the doctrine of surrender by operation of law was caught by Section 38 of the 1954 Act. Section 38 of the 1954 Act renders void, save as provided for by Section 38A of the 1954 Act, an agreement which provides for the surrender of the tenancy protected by the 1954 Act in the event of the tenant making an application or request for a new tenancy. In this context I was referred by Mr Clark to the decision of the Court of Appeal in *Rennie v Proma Ltd* (1990) 22 H.L.R. 12, a case which was concerned with the restriction, in Section 23(1) of the Leasehold Reform Act 1967, on agreements in relation to tenancies purporting to exclude or modify the right to acquire the freehold under the Leasehold Reform Act 1967. It seemed to me that Mr Radley-Gardner was correct to contend that the Respondents' analysis depended upon the hypothesis that the imposition of the new code agreement worked an actual surrender by operation of law, as opposed to an agreement to surrender capable of being caught by Section 38 of the 1954 Act. I do not however find it necessary to go further into this argument, because it seems to me, for the reasons which I have already set out, that the doctrine of surrender by operation of law is not available for the purpose for which the Respondents seek to rely on the doctrine.

190. The Judge followed *Gravesham* in deciding Preliminary Issue 3 against the Respondents. In my judgment he was right to do so, for the reasons which I have given. It follows that the Respondents' challenge to the Judge's decision on Preliminary Issue 3, by the Respondent's Notice, falls to be dismissed.

The appeal on Preliminary Issue 4 – analysis and determination

191. As I have explained, Preliminary Issue 4 is concerned with the question of whether the Respondents can rely on the 2023 Notice. The starting point is paragraph 20 of the Code, which provides as follows:

> ***"20 When can the court impose an agreement?***
> *(1) This paragraph applies where the operator requires a person (a "relevant person") to agree—*
> *(a) to confer a code right on the operator, or*

(b) to be otherwise bound by a code right which is exercisable by the operator.

(2) The operator may give the relevant person a notice in writing—

(a) setting out the code right, the land to which it relates and all of the other terms of the agreement that the operator seeks, and

(b) stating that the operator seeks the person's agreement to those terms.

(2A) The notice must also—

(a) contain information about the availability of alternative dispute resolution in the event that the operator and the relevant person are unable to reach agreement, and

(b) explain the possible consequences of refusing to engage in alternative dispute resolution.

(3) The operator may apply to the court for an order under this paragraph if—

(a) the relevant person does not, before the end of 28 days beginning with the day on which the notice is given, agree to confer or be otherwise bound by the code right, or

(b) at any time after the notice is given, the relevant person gives notice in writing to the operator that the person does not agree to confer or be otherwise bound by the code right.

(4) An order under this paragraph is one which imposes on the operator and the relevant person an agreement between them which—

(a) confers the code right on the operator, or

(b) provides for the code right to bind the relevant person.

(5) Before applying for an order under this paragraph, the operator must, if it is reasonably practicable to do so, consider the use of one or more alternative dispute resolution procedures to reach agreement with the relevant person.

(6) The operator or the relevant person may at any time give the other a notice in writing stating that the operator or the relevant person (as the case may be) wishes to engage in alternative dispute resolution with the other in relation to the agreement sought by the operator."

192. Paragraph 20(3) refers to applications to *"the court"*. This expression was however defined to mean the Upper Tribunal (Lands Chamber) and also the FTT, where an application was transferred by the Upper Tribunal to the FTT, by Regulation 3 of the Electronic Communications Code (Jurisdiction) Regulations 2017 (SI 2017/1284). Following amendment of Regulation 3, applications can now be made direct to the FTT.

193. Sub-paragraph (2A) was added to paragraph 20 of the Code, with effect from 7th November 2023, by Section 69 of the 2022 Act (the Product Security and Telecommunications Infrastructure Act 2022). There were no transitional or saving provisions in relation to Section 69 of the 2022 Act, so far as notices served prior to 7th November 2023 were concerned.

194. The 2023 Notice was given on or around 7th March 2023. The Reference, which was expressed to be made pursuant to paragraph 20(3) of the Code, was made on 6th August 2024. The 2023 Notice did not contain the information required by sub-paragraph (2A).

195. The Appellant's argument is a simple one. The Appellant says that it is a pre-condition to the making of a reference pursuant to paragraph 20 of the Code that a valid notice has been served by the operator on the relevant person, which complies with the requirements set out

in paragraph 20. In the present case this pre-condition was not satisfied because, by the time the Reference came to be made, sub-paragraph (2A) was in force, but had not been complied with in relation to the 2023 Notice. The 2023 Notice omitted the information set out in sub-paragraph (2A), which I will refer to as **"the ADR Information"**. As such, there was no valid notice on which the Respondents could rely at the time when they made the Reference. I will refer to this argument as **"the Pre-Condition Argument"**.

196. As I have explained earlier in this decision, when outlining the terms of the Appeal, the Appellant also contended, in its original grounds of appeal in support of the application for permission to appeal, that even if the question was one which related to the validity of the 2023 Notice, as opposed to the question of whether the pre-condition had been satisfied, the position was still the same, in the sense that the validity of the 2023 Notice fell to be tested at the date when the Reference was made. As such, so the argument went, there was still a requirement that the 2023 Notice comply with sub-paragraph (2A). In their written and oral submissions for this hearing the Appellant's counsel concentrated upon the Pre-Condition Argument. I did not however understand that the further argument to which I have just referred was not being pursued, and I shall consider this further argument as part of my consideration of the Pre-Condition Argument.

197. If the Appellant is right in the Pre-Condition Argument or in the additional argument, it then becomes necessary to consider the Respondents' argument that the 2023 Notice can still be treated as a valid notice, as at 6th August 2024, notwithstanding that it did not contain the ADR Information. If the 2023 Notice was required to contain the ADR Information, the omission of the ADR Information, so the Respondents contend, did not invalidate the 2023 Notice. I will refer to this argument as **"the Validity Argument"**.

198. I will take the Pre-Condition Argument first. In doing so I will assume that the Appellant is right in contending that, if the 2023 Notice was required to contain the ADR Information, the omission of the ADR Information was fatal to its validity.

199. The Appellant argues that the Judge did not properly deal with the Pre-Condition Argument, but wrongly treated the issue as one concerned with whether sub-paragraph (2A) applied, on a retrospective basis, to the 2023 Notice.

200. It is clear that the Judge understood that he was dealing with the Pre-Condition Argument. The Judge made express reference to the Pre-Condition Argument at Paragraph 96:

> *"96. The Respondent's case is that service of a valid notice is a precondition, under Paragraph 20(3) for the making of a reference to the Tribunal. Subparagraph 2A requires that a valid notice must contain information about ADR. The reference before me was made under Paragraph 20 on 6th August 2014 [1-13] [AF30]. It is common ground that the Notice relied on was served on 7th March 2023 [235-283] [AF 22] and did not contain information about ADR."*

201. The Judge rejected the Pre-Condition Argument for two related reasons.

202. First, the Judge made reference, at Paragraph 97, to his own decision in *Patricroft*. In *Patricroft* what appears to have been the same argument was advanced, and was rejected by the Judge, as can be seen from the decision in *Patricroft* at [65]-[66]:

"65. The case advanced by Mr Watkin at the hearing, as predicated by Preliminary issue (v), is whether the Claimant can rely on those Notices. Mr Watkin submits that, absent any transitional provisions in the 2022 Act, the Notices were no longer valid as at the date that the references were made. Mr Watkin submits that the Claimant has "sidestepped" the rights of the Respondent to have any dispute resolved by ADR. The Claimant could and should have served a fresh Notice containing information about ADR and the consequences of refusing to engage. The delay from the perspective of the Claimant would have been only the requirement to wait for the period of 28 days to elapse before a reference could be made.

66 I do not accept Mr Watkin's submission. The Notices were valid when served. They did not become invalid on 7th November 2023. There is no concept of retrospective invalidity. Accordingly references could validly be made under Paragraph 20 after 7th November 2023 reliant on valid Notices served prior to that date."

203. Second, the Judge made reference to *Lipton v BA Cityflyer Ltd* [2024] UKSC 24 [2025] AC 154 as authority for the proposition that the amendments introduced by Section 69 of the 2022 Act did not require valid existing notices under paragraph 20 of the Code to be re-served. The Judge relied upon the principle that statutory amendments are not to be construed as operating retrospectively without clear language to that effect. The principle was articulated by Lord Lloyd-Jones in *Lipton*, at [196], in the following terms:

> *"196 My starting point is the general principle of the common law that conduct and events are normally governed by the law in force at the time at which they took place. As a result, subsequent legislative changes in the law are not generally given retrospective effect. Evidence of a clear contrary intention would be required before they could be given retrospective effect, for example by disturbing accrued rights. There is a general presumption at common law that legislation is not retrospective in the sense that it alters the legal consequences of things that happened before it came into force (Chitty on Contracts, 35th ed (2023), para 1-031A; Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), sections 7.13, 7.14). This general rule reflects public expectations and notions of fairness and legal certainty."*

204. For these reasons, and also by reason of his acceptance of the Validity Argument, the Judge reached the following conclusion on Preliminary Issue 4, at Paragraph 101:

> *"101. The Notice in the present reference was served on 7th March 2023. It did not become invalid on 7th November 2023. Accordingly a reference could validly be made under Paragraph 20 on 6th August 2024 reliant on the Notice served on 7th March 2023."*

205. It seems to me that there is a fundamental, and obvious flaw in the Pre-Condition Argument. I accept the Appellant's argument that it is a pre-condition to the making of a reference pursuant to Paragraph 20(3) that a notice must have been given. This is apparent from paragraph 20(3), which identifies the pre-conditions to the making of a reference, in sub-paragraphs (a) and (b). The situation which must exist, in the case of each of these pre-conditions, involves the giving of *"the notice"*. The reference to *"the notice"* must be a reference back to the notice in writing referred to in paragraph 20(2).

206. So far, so good. It seems to me however that the Pre-Condition Argument fails to separate out two separate questions. The first question is whether the circumstances set out in sub-paragraph (a) or sub-paragraph (b) exist. In answering that question, and in the case of each sub-paragraph, it must be demonstrated that a notice has been given to the relevant person. The second, and separate question is what requirements the relevant notice was required to meet in order to be a valid notice for the purposes of paragraph 20. This requires consideration of what is said in paragraph 20. It is also necessary to consider paragraph 88 of the Code, which contains general requirements for notices given under the Code, although the requirements of paragraph 88 are not directly in issue, in relation to the Pre-Condition Argument.

207. In answering the second of the questions identified in my previous paragraph, it seems to me that one must look at the relevant requirements in paragraph 20 as they existed at the time when the relevant notice was given. To do otherwise seems to me to engage an obvious breach of the principle that subsequent legislative changes in the law are not generally given retrospective effect. Evidence of a clear contrary intention is required before a change in legislation can be given retrospective effect. The general presumption at common law is that legislation is not retrospective in the sense that it alters the legal consequences of things that happened before it came into force.

208. In the present case sub-paragraph (2A) did not exist when the 2023 Notice was given. There was nothing in Section 69 of the 2022 Act and there is nothing in paragraph 20 of the Code or elsewhere in the Code to suggest that the introduction of sub-paragraph (2A) was intended to have retrospective effect. Clear wording would have been required to achieve this result, and such clear wording is not to be found in the relevant legislation.

209. Support by analogy for this approach can be found in the decision of the Court of Appeal in *Liverpool CC v Doran* [2009] EWCA Civ 146 [2009] 1 WLR 2365. The case was concerned with a claim for possession by the council against the occupier of a caravan pitch. The caravan pitch was occupied pursuant to a licence granted by the council. The defendant occupier challenged the possession order on the basis that the council's decision to issue the notice to quit and commence possession proceedings had been unlawful, as a matter of public law. An argument which was advanced on behalf of the defendant occupier was that even if the council's decision to serve a notice to quit and seek a possession order was not unreasonable when it was made, on the basis of what the council knew or ought reasonably to have known at that time, a court could find the decision to be unreasonable if, after full consideration of the evidence and the making of findings of fact, the court was to conclude that no reasonable council could have made the decision. This argument was firmly rejected by Toulson LJ, with whose judgment Aikens and Jacob LJJ agreed, at [58]:

> *"58 In my judgment the argument is unsound in principle and on authority. As a matter of principle, if the decision to issue a notice to quit was not unlawful at the time of the service of the notice, the notice was valid. I cannot see a principled basis on which a notice valid at the time of service could be retrospectively invalidated by reason of later developments."*

210. As I have said, it seems to me that the same reasoning can be applied, by analogy to the 2023 Notice in the present case.

211. The oral submissions in support of the Appellant's case on Preliminary Issue 4 were presented by Ms Schofield. Despite her best efforts, in a clearly presented set of submissions, I was not persuaded that the Pre-Condition Argument does not engage any question of retrospectivity. In my judgment it clearly does. The Pre-Condition Argument begs the question of what requirements the 2023 Notice had to satisfy, in order to function as a notice which engaged one or other of the circumstances set out in sub-paragraphs (a) and (b) of paragraph 20(3), and thereby to permit the Reference to be made. This, in turn, requires scrutiny of what was required of the 2023 Notice by paragraph 20. If one answers that question, as the Appellant seeks to do, by looking at the 2023 Notice at the date of the Reference, one is necessarily applying sub-paragraph (2A) to the 2023 Notice on a retrospective basis.

212. Putting the matter another way, it seems to me that the Pre-Condition Argument is an attempt to disguise what is, in reality, the retrospective application of sub-paragraph (2A) to the 2023 Notice. Once this is appreciated, it is apparent that sub-paragraph (2A) cannot be applied in this retrospective fashion. As I have explained, such retrospective application would breach a fundamental principle of statutory interpretation.

213. Returning to the Decision, I do not accept either that the Judge did fail to deal adequately with the Pre-Condition Argument or that the Judge asked himself the wrong question. The reality is that the Pre-Condition Argument does seek to impose the requirements in sub-paragraph (2A) on a retrospective basis. The Judge was right to reject the Pre-Condition Argument for the reasons which he gave. Those reasons do not seem to me to differ from the reasons which I have given for rejecting the Pre-Condition Argument. Whether or not I am correct in this perception, it follows, from the reasons which I have given, that I am unable to accept the Pre-Condition Argument.

214. It also follows from my reasoning that I am not able to accept the Appellant's further argument, to the extent that it was maintained, to the effect that if the question was one of the validity of the 2023 Notice, the validity of the 2023 Notice fell to be considered as at the date of the Reference, by reference to the requirements in paragraph 20 of the Code, as they existed at the date of the Reference. In my judgment this further argument is plainly wrong, for the reasons which I have given, and equally engages a breach of the principle that, in the absence of a clear indication to the contrary, legislation is not to be construed as having retrospective effect.

215. I therefore conclude that the Judge was correct in his decision on Preliminary Issue 4. The Respondents were entitled to make the Reference on 6th August 2024, on the basis of the 2023 Notice. The 2023 Notice was not deprived of its effect, for the purposes of Paragraph 20, by reason of the omission of the ADR Information. It follows that the Appeal fails, so far as Preliminary Issue 4 is concerned.

216. This is sufficient to dispose of the appeal on Preliminary Issue 4. As however the Validity Argument was before me, and was argued, I will consider the Validity Argument. For the purposes of the Validity Argument I will assume, contrary to the decision of the Judge (which I have upheld), that sub-paragraph (2A) did apply to the 2023 Notice, and that the 2023 Notice was thereby required to contain the ADR Information.

217. The Judge concluded that if the inclusion of the ADR Information in the 2023 Notice had been required, its omission would not have invalidated the 2023 Notice. The Judge

identified the decision of the Supreme Court in *A1 Properties (Sunderland) Ltd v Tudor Studios RTM Co. Ltd* [2024] UKSC 27 [2024] 3 WLR 601 as the leading authority on the consequences of failing to comply fully with statutory procedures concerning property rights. The Judge quoted from the joint judgment of Lord Briggs and Lord Sales JJSC in *A1*, with which the other members of the Supreme Court agreed, at [61]. The Judge then expressed his conclusion on the Validity Argument in the following terms, at Paragraph 100:

> *"100. The purpose of subparagraph 2A is to provide information about ADR and to explain the consequences of refusing to engage. Both parties before me are sophisticated litigators with deep pockets and access to the very best legal advice. The parties will be aware of the provisions concerning ADR in FTT Rule 4. The most recent version of the OFCOM Code of Practice published 15th April 2024 specifically deals with resolving disputes and the role of ADR (see paragraphs 1.81 – 1.88). The Respondent is well aware of ADR and the costs consequences of failing to engage. I am quite satisfied that, to the extent I am wrong about retrospective invalidity, the Respondent has suffered no prejudice or injustice."*

218. The leading authority in this context, as the Judge correctly identified, is the Supreme Court decision in *A1*. It is necessary to provide a short summary of what was decided in *A1*. The case was concerned with a claim by the resident tenants of a block of flats, by which they sought to acquire the right to manage their block, pursuant to the right to manage provisions in the Commonhold and Leasehold Reform Act 2002. The relevant issue in the case, for present purposes, was whether the failure to serve the claim notice on one of the relevant landlords, an intermediate landlord in respect of the block, had invalidated the claim. The Supreme Court decided, for the reasons given by Lords Briggs and Lord Sales in their joint judgment, that the failure to serve the claim notice on the intermediate landlord had not invalidated the claim.

219. In their joint judgment Lord Briggs and Lord Sales explained, by reference to the decision of the House of Lords in *R. v Soneji (Kamlesh Kumar)* [2005] UKHL 49, that the correct approach to a failure to comply with a statutory provision, requiring that some act be done before a power was exercised, was to ask whether it was a purpose of the legislature that an act done in breach of that provision should be invalid. As they explained, at [68]:

> *"68 In our view the correct approach in a case where there is no express statement of the consequences of non-compliance with a statutory requirement is first to look carefully at the whole of the structure within which the requirement arises and ask what consequence of non-compliance best fits the structure as a whole. Here the provisions of sections 78 and 79 call for a two stage process of notification of the RTM proposal to persons with an interest in the building to which the right to manage is (if validly exercised) to be applied."*

220. It will be noted that this correct approach, derived from *Soneji*, only applies where there is no express statement of the consequences of non-compliance with the relevant statutory requirement. It follows that what I will refer to as the *Soneji* approach is only available where there is no such express statement.

221. In the present case the primary argument of the Appellant, in response to the Validity Argument, is that there is such an express statement of the consequences of non-compliance. The Appellant points to paragraph 88 of the Code, which provides as follows:

> ***"88 Notices given by operators***
> *(1) A notice given under this code by an operator must—*
> *(a) explain the effect of the notice,*
> *(b) explain which provisions of this code are relevant to the notice, and*
> *(c) explain the steps that may be taken by the recipient in respect of the notice.*
> *(2) If OFCOM have prescribed the form of a notice which may or must be given by an operator under a provision of this code, a notice given by an operator under that provision must be in that form.*
> *(3) A notice which does not comply with this paragraph is not a valid notice for the purposes of this code.*
> *(4) Sub-paragraph (3) does not prevent the person to whom the notice is given from relying on the notice if the person chooses to do so.*
> *(5) In any proceedings under this code a certificate issued by OFCOM stating that a particular form of notice has been prescribed by them as mentioned in this paragraph is conclusive evidence of that fact."*

222. In the case of a notice given pursuant to paragraph 20(2) of the Code there is a current version of this notice prescribed by Ofcom. The requirements of sub-paragraph (2A) are accommodated by the following prescribed wording (the ADR Information) in the notice:

> *"ALTERNATIVE DISPUTE RESOLUTION*
> *13A. Before applying for an order under paragraph 20(4) [and paragraph 27(2)] of the Code, we must, if it is reasonably practicable to do so, consider the use of one or more alternative dispute resolution procedures to reach agreement with you.*
> *13B. Either you or we may at any time give the other a notice in writing stating that you or we (as applicable) wish to engage in alternative dispute resolution with the other in relation to the agreement we are seeking under this notice. If either you or we unreasonably refuse to engage in such alternative dispute resolution before an application is made to the court, the court must have regard to this when deciding on the appropriate costs order or, in Scotland, expenses.*
> *13C. For more information on the availability of alternative dispute resolution, please see the supplementary information at the back of this notice."*

223. On the face of it, I find it difficult to see how the *Soneji* approach is available in the present case. By paragraph 88(2) of the Code, where Ofcom has prescribed a form of notice which may or must be given by an operator under a provision of the Code, the notice given by the operator under that provision *"must be in that form"*. If the relevant notice does not comply with paragraph 88, paragraph 88(3) states, in terms that it *"is not a valid notice for the purposes of the Code"*. Ofcom has prescribed a form of notice to be given under paragraph 20 of the Code and, if desired, also under paragraph 27 of the Code. Where sub-paragraph (2A) applies, the relevant notice is required to contain the ADR Information. This is clearly a requirement. The word used in sub-paragraph (2A) is *"must"*. Ofcom has prescribed the form of wording which constitutes the ADR Information and is required to be included in a paragraph 20 notice. If sub-paragraph (2A) applied to the 2023 Notice, the 2023 Notice had

to include the ADR Information. It did not do so. If this had the consequence that the 2023 Notice was not in the form of the paragraph 20 notice prescribed by Ofcom, it is difficult to see why this was not a failure of compliance with paragraph 88 of the Code, or why this did not have the further consequence that the 2023 Notice was rendered invalid by paragraph 20(2A) of the Code. This appears, on the face of it, to be a case where, to use the language of the judgment in *A1*, at [68], there is an "*express statement of the consequences of non-compliance with a statutory requirement"*, which thereby rules out the *Soneji* approach.

224. The oral submissions in support of the Respondents' case on Preliminary Issue 4 were presented by Mr Andrews-Tipler. These submissions were also clearly presented but, on the hypothesis that the 2023 Notice had been required to contain the ADR Information, Mr Andrews-Tipler had difficulty in identifying any good reason why invalidity was not the consequence of the omission of the ADR Information from the 2023 Notice, given the terms of paragraph 88(3) of the Code.

225. Mr Andrews-Tipler referred me to the decision of the Court of Appeal in *Avon Freeholds Limited v Cresta Court E RTM Company Ltd* [2025] EWCA Civ 1016. This was another right to manage (RTM) case, where the relevant issue, for present purposes, was whether the RTM claim in this case was invalidated because a person who was said to be a qualifying tenant had not been served with a notice inviting her to participate in the RTM claim. The other issue in the case was whether the relevant person was a qualifying tenant. Both issues were before the Court of Appeal, on the appeal from the decision of Judge Cooke in the Upper Tribunal (Lands Chamber). For the reasons set out in the judgment of Sir Launcelot Henderson, with which Jeremy Baker and Newey LJJ agreed, the Court of Appeal upheld the decision of the Judge Cooke that the relevant person was a qualifying tenant, but allowed the appeal on the issue of whether the failure to serve the participation notice on the relevant person invalidated the claim. As Sir Launcelot Henderson explained in his judgment, the relevant legislation contained a statement by Parliament of the consequence of a failure by the RTM company to give all the participation notices which were required to be given. That consequence was the invalidity of the notice of the RTM claim. This left no room for the *Soneji* approach in respect of the relevant failure.

226. Sir Launcelot Henderson summarised the position in his judgment, at [77]-[78]:

> *"77. At the risk of stating the obvious, it is worth spelling out why the distinction drawn in A1 Properties must in my judgment be correct. When construing a statutory scheme, the task of the court or tribunal is to seek the meaning of the words used by Parliament in accordance with the principles of interpretation laid down in the case law. Those principles were authoritatively restated by the Supreme Court in R (O) v Secretary of State for the Home Department [2022] UKSC 3, [2023] AC 255 at [29] to [31] per Lord Hodge (with whom Lord Briggs, Lord Stephens, Lady Rose JJSC and Lady Arden agreed). That guidance emphasises that "the words which Parliament has chosen to enact as an expression of the purpose of the legislation" are "the primary source by which meaning is ascertained" ([29]), and although external aids to interpretation play a secondary role, "none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity" [30]. Further, the "intention of Parliament" is an objective concept, not subjective, and "is a shorthand reference to the intention which the court reasonably*

imputes to Parliament in respect of the language used" ([31], citing the speech of Lord Nicholls in the Spath Holme case [2001] 2 AC 349, 396). It follows that where the language used by Parliament to state the consequence of non-compliance with a procedural requirement is clear, unambiguous and does not produce absurdity, it is the duty of the court or tribunal to interpret and apply that language accordingly. That is what the rule of law requires, and the court or tribunal would be overstepping its constitutional boundaries if it attempted to substitute for the language of Parliament an interpretation which in its view would produce a more reasonable result on the facts of the individual case before it.

78. By the same token, it is only where Parliament has not expressly stated the consequences of non-compliance that there can be any room for a Soneji analysis designed to determine objectively what intention should be imputed to Parliament to fill the gap left by its silence on the point."

227. I was told that permission to appeal to the Supreme Court has been granted in *Cresta Court*. So far as I am aware the appeal has not yet been decided. Accordingly, I must apply the law as it is stated in the decision of the Court of Appeal.

228. The Respondents argued that reading paragraph 88(3) of the Code as having the same consequences as the legislation under consideration in *Cresta Court* did produce absurdity. It was argued that if paragraph 88(3) had this effect, it would produce the absurd result that the omission of a full stop from the prescribed form for a paragraph 20 notice would invalidate the notice. It was also argued that if paragraph 88(3) had this effect, it would cause serious problems for operators, who could find themselves sent back to the starting gate of the procedure under paragraph 20 of the Code. This might not be thought that serious in itself, given the 28 day period in paragraph 20(3)(a) after which the operator can make an application to the FTT. It would however be a much more serious problem in a case involving the giving of a notice pursuant to paragraph 33 of the Code. Paragraph 33 of the Code now includes a sub-paragraph (3A), which requires the inclusion of the ADR Information in a notice given pursuant to paragraph 33. An application to the FTT under paragraph 33 of the Code can only be made after six months have elapsed from the giving of the notice, without agreement on the proposals in the notice; see paragraph 33(4) and (5). Sending the operator back to the starting gate in the case of a notice given pursuant to paragraph 33 would therefore have much more seriously disruptive consequences. More serious problems still would arise for an operator giving a counter-notice pursuant to paragraph 32 of the Code, in response to a notice given under paragraph 31 of the Code. Such a counter-notice is also required to contain the ADR Information. If the omission of the ADR Information invalidated the counter-notice, the consequences would be serious for the operator.

229. I am not persuaded by these arguments. Going back to the guidance on statutory interpretation given by Sir Launcelot Henderson in *Cresta Court*, at [77], it seems to me that the terms of paragraph 88(3) are clear and unambiguous. So far as absurdity is concerned, I cannot see that my construction of paragraph 88(3) produces absurd results. I can see that this reading of paragraph 88(3) is capable of producing onerous results, at least in the case of a notice given pursuant to paragraph 33 of the Code or a counter-notice given pursuant to paragraph 32 of the Code, even if not in a case concerning a notice given pursuant to paragraph 20 of the Code. These considerations seem to me however to fall a long way short of the absurdity referred to by Sir Launcelot Henderson. Turning to the full

stop example, it seems to me that this is not a realistic example. Paragraph 88(2) requires that where Ofcom has prescribed a form, the relevant notice must be *"in that form"*. I do not think that a missing full stop would prevent the relevant notice from being *"in that form"*. I can see that there will be an area, in terms of mistakes or omissions in the relevant form, where argument is likely as to whether the relevant form is *"in that form"*. Leaving aside the fact that I do not think that a missing full stop would bring the relevant notice into the zone of argument which I have just identified, the invalidity of a notice which is judged not to be *"in that form"* is not an absurdity, but an unfortunate and inevitable by-product of the fact that, where Parliament decides that a notice must be in a particular form, mistakes will be made by parties in relation to the form of the notice.

230. Drawing together all of the above analysis, my conclusion, in relation to the Validity Argument, is that if it is assumed that the 2023 Notice was required to contain the ADR Information, the consequence of the omission of the ADR Information is that the 2023 Notice was invalid. For the reasons which I have explained, there is no room for the operation of the *Soneji* approach in relation to the Validity Argument. By express statutory provision, the consequence of the omission of the ADR Information from the 2023 Notice, on the assumption that it was required to be included, was invalidity.

231. This conclusion renders it unnecessary, in relation to the Validity Argument, to consider the question of whether, applying the *Soneji* approach, the consequence of the omission of the ADR Information would not have been invalidity. I should however state briefly what my conclusion would have been, if the *Soneji* approach had been available; that is to say on the hypothesis that there is no express statement, in the relevant legislation, of the consequences of a failure to include the ADR Information in a notice served pursuant to paragraph 20 of the Code. I adopt this hypothesis for the purposes of considering this part of the Validity Argument.

232. The *Soneji* approach is explained in *A1*, and summarised in the joint judgment in *A1* at [68]. It requires one, first, to look carefully at the whole of the structure within which the relevant requirement arises, and to ask what consequences of non-compliance best fit with the structure as a whole. In *A1*, the outcome of this exercise was a conclusion that the consequences of failure to give a claim notice to a visible landlord or other stakeholder was that the failure rendered the transfer of the right to manage voidable at the instance of the relevant landlord or other stakeholder, but not void. The transfer was voidable up to the point when the tribunal approved the transfer scheme, assuming that such approval was obtained.

233. In the present case the purpose of the introduction of sub-paragraph (2A) into paragraph 20 of the Code was, plainly, to ensure that those receiving notices pursuant to paragraph 20 were made aware of the availability of ADR as an alternative to tribunal proceedings, and to highlight the possible consequences (including costs sanctions) of refusing to engage in ADR. In fact, I take this description of the legislative purpose of sub-paragraph 2A from the Respondents' skeleton argument for this hearing. I would however add to this description that it was also plainly the intention of Parliament that the availability of ADR and the explanation of the possible consequences of refusing to engage in ADR should be communicated to the recipient of the notice before matters reached the stage, and expense of what are now, in terms of jurisdiction, tribunal proceedings.

234. If the consequences of non-compliance with sub-paragraph 2A are that the relevant notice remains valid, the statutory purposes which I have just identified are defeated and the recipient will not receive the ADR Information. In the absence of agreement to the terms proposed in the relevant notice, a reference will be made to the FTT without the ADR Information having been provided. This may not matter in the case of a sophisticated and well-advised recipient of the notice. There can however be no guarantee that all recipients will fall into this class. It is to be assumed, from the introduction of sub-paragraph (2A), that Parliament was not satisfied that it could safely be assumed that recipients of notices pursuant to paragraph 20 of the Code would be aware of the ADR Information, or of the importance and availability of ADR. Indeed, anyone with any experience of litigation will be well aware of the importance of informing, or at least reminding even the most sophisticated and well-advised parties of the importance of ADR.

235. The considerations set out in my previous paragraph lead me to think, at least as a preliminary view, that allowing a notice given pursuant to paragraph 20 of the Code to retain its validity, notwithstanding the omission of the ADR Information, does not fit well with the relevant structure. The Respondents dispute this however, for several reasons, which I shall now consider.

236. The Respondents argue that if any prejudice is caused to the recipient of the notice by the omission of the ADR Information, and it is not conceded that there is much, if any risk of prejudice, the prejudice is said to be remediable because the FTT has the case management powers, or previously the Upper Tribunal or the court had the case management powers to stay the reference to allow ADR to take place.

237. The Respondents also point, again, to the problems which will arise in cases involving references to the FTT pursuant to paragraph 33 of the Code, where the ADR Information is omitted from the relevant notice, if the consequence of the omission is invalidity. It was pointed out that this outcome will force the relevant operator back to the starting gate, to their considerable prejudice. The parties may have spent months negotiating the terms of the modified or new agreement but, in the absence of a valid paragraph 33 notice, the operator will be forced to start again. There are also the consequences referred to above, in relation to a counter-notice given pursuant to paragraph 32 of the Code, if the omission of the ADR Information from the counter-notice results in invalidity.

238. I am not persuaded by these arguments, for two reasons.

239. First, I am not myself persuaded that the prejudice which Parliament intended to avoid, by the compulsory inclusion of the ADR Information in notices and counter-notices required or authorised to be given by the Code, can be treated as avoided by the case management powers of the FTT. The FTT can only exercise those powers once the reference has been made, and the proceedings are under way. It is a common experience of litigation that it is much more desirable if parties can settle their differences by ADR before they become committed to the expense and time of contested proceedings. It seems to me that the prejudice which Parliament intended to avoid, by the inclusion of the ADR Information, is not correctly treated as remediable simply because the FTT can use its case management powers to direct the parties towards ADR after the relevant reference has been made, and proceedings are under way.

240. Second, the Respondents' argument assumes that the question of prejudice falls to be considered on a bilateral basis, as between giver and recipient of the relevant notice. In my view, where ADR is concerned, this approach is incomplete. There is also another interest to be considered, which is the interest of the FTT, as the jurisdiction now exists, and, by extension therefrom, the public interest. The stress which is now laid by courts and tribunals upon ADR, and the need for parties consider ADR, is not an accident. It exists because of the benefits which accrue not only to the parties involved in the relevant dispute, but also to the relevant court or tribunal if a dispute can be resolved with the necessity for expensive proceedings, or the continuation of expensive proceedings. Where a dispute is resolved by ADR the dispute either never reaches a court or tribunal or, if proceedings have already been commenced, the resolution of the dispute does not require further court or tribunal time, and does not require a trial. The public benefit in all of this is obvious.

241. If one is asking what consequences of non-compliance best fit with the structure in which the requirement to include the ADR Information arises, such structure being the requirement for the relevant notices and counter-notices given pursuant to the relevant provisions of the Code to contain the ADR Information, I find it hard to see how the public benefit, which Parliament can be taken to have had in mind in imposing this requirement, is served by treating this requirement as one which carries no sanction for non-compliance. If that is the position, so that the inclusion of the ADR Information in the relevant notice or counter-notice effectively becomes voluntary, the Parliamentary purpose is defeated.

242. In *A1* the Supreme Court were able to conclude that a failure to serve a visible relevant landlord or other stakeholder with the claim notice rendered the claim voidable, but not void. In the present case it is worth bearing in mind that paragraph 88(4) of the Code does provide that paragraph 88(3), which contains the sanction of invalidity where a notice is not in the prescribed form, does not prevent the recipient of a notice from relying on the notice, *"if the person chooses to do so"*. If however there is no such choice made in a particular case, I do not think that a failure to include the ADR Information in a relevant notice or counter-notice can be dealt with in the same way as in *A1*. The relevant legislation is not on all fours with the legislation which was being considered in *A1* and, in my judgment, the application of the *Soneji* approach produces a different outcome.

243. Finally, in relation to the question of the consequences of the omission of the ADR Information, I should mention that I was referred, in the submissions, to the decision of the Deputy Chamber President in *Atesheva v Halifax Management Ltd* [2024] UKUT 314 (LC) [2025] HLR 6. In that case a notice of increase of rent had been served on an assured periodic tenant by her landlord. The question before the Deputy Chamber President was whether the tenant had made an application to the FTT, referring the notice of increase in the rent to the FTT, prior to the deadline for making such an application. The deadline was the date specified in the notice as the date from which the increase in rent would take effect. The tenant failed to make the application to the FTT in the prescribed form by this deadline. This raised the issue of whether the failure to make the application in the prescribed from was fatal to the ability of the FTT to consider the proposed increase in the rent, or whether the tenant could rely on an email which she had sent to the FTT, before the expiration of the deadline. The Deputy Chamber President concluded that the email, although not in the prescribed form or in a form substantially to that effect, had been sufficient to refer the notice of increase to the FTT.

244. I was referred specifically to the decision of the Deputy Chamber President, at [76]:

> *"76 Fifthly, the 1988 Act itself does not lay down the detail of the required application. That is left to the Secretary of State in making order prescribing the form. In other words, the statute requires a prescribed form but not necessarily this prescribed form, which suggests that the contents of the form are of lesser significance. Although the Supreme Court in A1 Sunderland did not agree entirely with the approach taken by the Court of Appeal in Elim Court RTM Co Ltd v Avon Freeholds Ltd [2017] EWCA Civ 89, it quoted extensively from the judgment of Lewison LJ and did not express any disagreement with the following passage, at paragraph [52]:*
>
> > *"The intention of the legislature as to the consequences of non-compliance with the statutory procedures (where not expressly stated in the statute) is to be ascertained in the light of the statutory scheme as a whole: […]. Where the notice or the information which is missing from it is of critical importance in the context of the scheme the non-compliance with the statute will generally result in the invalidity of the notice. Where, on the other hand the information missing from the statutory notice is of secondary importance or merely ancillary, the notice may be held to have been valid: […]. One useful pointer is whether the information required is particularised in the statute as opposed to being required by general provisions of the statute. In the latter case the information is also likely to be viewed as of secondary importance. Another is whether the information is required by the statute itself or by subordinate legislation. In the latter case the information is likely to be viewed as of secondary importance. In this connection it must not be forgotten that while the substantive provisions of a bill may be debated clause by clause, a draft statutory instrument is not subject to any detailed Parliamentary scrutiny. It is either accepted or rejected as a whole. A third is whether the server of the notice may immediately serve another one if the impugned notice is invalid. If he can, that is a pointer towards invalidity."*

245. The argument of the Appellant, derived from what was said by Lewison LJ in *Elim Court RTM Co Ltd v Avon Freeholds Ltd [2017] EWCA Civ 89*, was that one of the pointers, in determining whether a procedural irregularity can be disregarded, is whether the relevant procedural requirement is contained within primary legislation, as opposed to secondary legislation; see the extract from the judgment of Lewison LJ in *Elim Court*, as quoted by the Deputy Chamber President. In the present case sub-paragraph (2A) is contained within primary legislation, not secondary legislation. As such, so the Appellant argued, the conclusion should be that compliance with sub-paragraph (2A) was not something which should be disregarded.

246. While I note that the distinction between primary and secondary legislation is only to be regarded as a useful pointer, it does seem to me that the fact that sub-paragraph (2A) and other equivalent provisions in the Code are to be found in primary legislation does offer some support for my reasoning above. It does bear out my view that the requirement to include the ADR Information is of considerably more importance than the Respondents allow in their arguments.

247. Drawing together all of the above analysis I conclude, consistent with my preliminary view, that allowing a notice served pursuant to paragraph 20 of the Code to retain its validity,

notwithstanding the omission of the ADR Information, does not fit well with the relevant structure. If, contrary to the decision which I have made on this question, the *Soneji* approach is available in relation to a notice given pursuant to paragraph 20 of the Code which omits the ADR Information, the outcome of the *Soneji* approach is that the notice is rendered invalid by this omission.

248. Although, as I have said, the Validity Argument does not strictly arise for decision, I can summarise my conclusions on the Validity Argument in the following terms:
    (1) If it is assumed that the 2023 Notice was required to contain the ADR Information, the consequence of the omission of the ADR Information is that the 2023 Notice was invalid. For the reasons which I have explained, there is no room for the operation of the *Soneji* approach in relation to the Validity Argument. By express statutory provision the consequence of the omission of the ADR Information from the 2023 Notice, on the assumption that it was required to be included, was invalidity.
    (2) If, contrary to the decision which I have made on this question, the *Soneji* approach is available in relation to a notice given pursuant to paragraph 20 of the Code which omits the ADR Information, the outcome of the *Soneji* approach is that the notice is rendered invalid by this omission.
    (3) On either of the bases set out above, the 2023 Notice would have been rendered invalid by the omission of the ADR Information, if it had been required to include the ADR Information.

249. It also follows, although this does not affect my conclusion that the Judge reached the correct decision on Preliminary Issue 4, that I find myself in respectful disagreement with the Judge's reasoning in Paragraph 100. As I read Paragraph 100 the Judge concluded that the *Soneji* approach was available to him, in relation to the omission of the ADR Information from the 2023 Notice. For the reasons which I have given, I do not agree with this conclusion, if one assumes that the 2023 Notice was required to contain the ADR Information. In my view the consequence of the omission of the ADR Information was that the 2023 Notice was invalid, by reason of paragraph 88(3) of the Code, with no room for the *Soneji* approach. If however the *Soneji* approach was available, the question which the Judge asked himself was whether there was any prejudice to the Appellant, by reason of the omission of the ADR Information from the 2023 Notice. In my judgment that was the wrong question to ask. The question required a wider inquiry, the outcome of which, as I have explained, is that a notice which omits the ADR Information cannot be saved from invalidity by the application of the *Soneji* approach even if, contrary to my view, the *Soneji* approach is available.

250. For the reasons which I have set out in this section of this decision, I reach the following conclusions in relation to the appeal on Preliminary Issue 4:
    (1) The Judge was correct to decide, in relation to Preliminary Issue 4, that the Respondents were entitled to rely on the 2023 Notice. The fact that the 2023 Notice did not contain the ADR Information did not affect the validity of the 2023 Notice or the Reference. The 2023 Notice was not required to contain the ADR Information.
    (2) It follows that the Appeal fails, so far as Preliminary Issue 4 is concerned.
    (3) If I had concluded that the 2023 Notice was required to contain the ADR Information, I would have found myself in respectful disagreement with the conclusion of the Judge in relation to the Validity Argument. I would have decided, on that hypothesis, that the consequences of the omission of the ADR Information from the 2023 Notice were (i) that the 2023 Notice was invalid, and (ii) that the Respondents had not been

entitled to make the Reference. The further consequence, on the same hypothesis, is that the Appeal would have been allowed, in relation to Preliminary Issue 4.

The outcome of the Appeal and the issues raised by the Respondent's Notice

251. For the reasons set out in this decision the outcome of the Appeal and the issues raised by the Respondent's Notice is as follows:
    (1) The Appeal fails on both Preliminary Issue 1 and Preliminary Issue 4. Accordingly, the Appeal falls to be dismissed.
    (2) By reason of the outcome of the appeal on Preliminary Issue 1, the Section 43(4) Argument does not strictly arise for decision. I have concluded, for the reasons which I have given, that I should not make a decision on the Section 43(4) Argument, and I have not done so.
    (3) By reason of the outcome of the appeal on Preliminary Issue 1, the challenge of the Respondents to the decisions of the Judge on Preliminary Issues 2 and 3 does not strictly arise for decision. I have however concluded that the Judge was correct in his decisions on Preliminary Issues 2 and 3. Accordingly, the challenge to these decisions, by the Respondent's Notice, falls to be dismissed.

Mr Justice Edwin Johnson
The Chamber President

9th February 2026

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.