



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

**Case Reference** : **LC – 2019 – 000826**

**Property** : **Telecoms Site at Queen’s Oak Farm,  
Potterspurty Lodge, Yardley Gobion,  
Towcester, Northamptonshire NN12 7LL**

**Claimant** : **On Tower UK Limited  
(formerly Arqiva Services Limited)**

**Representative** : **Kester Lees KC and Imogen Dodds  
instructed by Pinsent Masons LLP**

**Respondent** : **AP Wireless II (UK) Limited (1)  
Icon Tower Infrastructure Limited (2)**

**Representative** : **Wayne Clark KC and Fern Schofield  
instructed by Freeths LLP**

**Application** : **Electronic Communications Code**

**Hearing** : **23<sup>rd</sup> and 24<sup>th</sup> March 2026  
Centre City Tower, Birmingham**

**Tribunal** : **Judge D Jackson  
Mrs J Rossiter MRICS**

**Date** : **1<sup>st</sup> April 2026**

---

**DECISION**

---

1. The Claimant (“On Tower”) seeks the imposition of a new agreement in respect of its telecommunications site at Queens Oak Farm (“the Site”) under Part 4 of the Code. By decision dated 29<sup>th</sup> October 2025 the First-tier Tribunal found, as a preliminary issue, that the Second Respondent (“Icon”) had failed to establish that it has an intention to redevelop the Site within the meaning of Paragraph 21(5) of the Code (“the FTT Decision”). Icon’s appeal against that decision was dismissed by HHJ Hodge KC on 27<sup>th</sup> February 2026 [2026] UKUT 89 (LC).
2. The parties have now agreed consideration payable under the new agreement and also terms to be contained therein with the exception of following two terms which remain in dispute:
  - (1) Clause 1.1: Landlord’s Break Date (“Landlord’s Break Date”). Icon seeks an immediate redevelopment break, alternatively from 2 years. On Tower seeks redevelopment break from 5 years only.
  - (2) Schedule 1 Part 1 Paragraph 1.3. Icon seeks a further proviso that at no time shall On Tower be permitted to replace the mast or increase the height of the installation above 22.5 metres until after the Landlord’s Break Date (“Height Restriction”)
3. The final hearing took place on 23<sup>rd</sup> and 24<sup>th</sup> March in Birmingham. On Tower was represented by Kester Lees KC and Imogen Dodds and Icon was represented by Wayne Clark KC and Fern Scofield.
4. The Tribunal received oral evidence from Lorna Broadbent (On Tower, LAM (Land Acquisition and Management) Special Projects Manager. Witness statement dated 6<sup>th</sup> February 2026) and Andrew Holloway (Icon, Director Tower Strategy. First witness statement dated 6<sup>th</sup> February 2026).
5. On 18<sup>th</sup> March 2026 Icon sought permission to rely on a second witness statement from Mr Holloway dated 17<sup>th</sup> March 2026. Permission was granted at the hearing subject to conditions: (1) evidence limited to Landlord’s Break Date only and (2) no evidence may be given that the FTT Decision was conditional and that those conditions have now been satisfied.

## **The Site**

6. The following description of the site is taken from paragraphs [11 and 12] of the FTT Decision:

*“Icon is the freeholder of the Site at Queens Oak Farm. The site is a rural greenfield site a little over 1 km from the village of Yardley Gobion to the east and approximately 6 km from Towcester. The surrounding area is predominantly agricultural with scattered residential and commercial uses. The site extends to approximately 2,800 sq. m. The site is surrounded by agricultural fields and is accessed off a single track lane running from the nearby A5. Land to the north is in equestrian use beyond which is a menage. There is also a solar farm located to the north. To the south of the site is agricultural land beyond which is Potterspurty Lodge School, White Rose Farm and Brookfields Farm. To the west is a yard and buildings*

*associated with Queens Oak Farm. To the east there is land laid to grass and a bund beyond which are a number of paddocks. The site is set well back from the A5.*

*The On Tower Site is at the southwestern corner of the Site. The On Tower Mast is 22.5m in height. There is another mast (20m in height), approximately 30 m to the east of the On Tower Site which is operated by Airwave who provide communications coverage to the emergency services.”*

## **The Dale Park Test**

7. The test to be applied when considering terms to be imposed in a new agreement, the Dale Park Test, has most recently been restated by the Upper Tribunal in **Ewefields Farm** (On Tower UK Limited v AP Wireless II (UK) Limited [2025] UKUT 280 (LC)) at [15 -16]:

*“15. Also important is what has become known as the “Dale Park test”, formulated by the Tribunal in On Tower UK Limited v JH and FW Green Limited [2020] UKUT 348 (LC) (“Dale Park”). It is not a “test”, but a statement of the approach the Tribunal (and the FTT) will take to disputed terms, in paragraphs 62 to 64 of the decision:*

*“62. First, the Tribunal should consider the term the operator seeks and the reason why it needs the term in question in order to pursue the business for whose purposes it received its Ofcom direction and in light of the public interest in a choice of high quality telecommunications services.*

*63. Second, the Tribunal will consider the concerns or objections raised by the respondent and whether in order to minimise loss or damage in accordance with paragraph 23(5) the term should not be imposed or should be imposed to a limited or qualified extent.*

*64. If those concerns do not prevent the imposition of the term and do not require its qualification, then the Tribunal will consider whether, in imposing that term, it should also impose further terms to minimise loss or damage.”*

*16. That description of the approach to be taken starts from the premise that the term in question is one that the operator wants; some adaptation is needed where the term is one that the site-provider wants.”*

8. Two further principles emerge from **Ewefields Farm**. The first is that a site provider will need to produce evidence of loss or damage [56 -57] and secondly any loss or damage must be caused by the exercise of Code rights [103-104].

## **Landlord’s Break Date**

9. Mr Clark submits that landlord’s redevelopment break clauses are a special case to which the Dale Park Test is not directly applicable. Mr Clark’s submission rests on the words used in Dale Park itself that adaptation is required where, as here, the terms are ones that the site provider wants. Further Mr Clarke submits that landlord’s

redevelopment break clause require a distinct approach because Paragraph 23(8)(a) of the Code provides:

*“The court must determine whether the terms of the agreement should include a term—*

*(a) permitting termination of the agreement (and, if so, in what circumstances);”*

10. Mr Clark submits that the better approach is that taken under the Landlord and Tenant Act 1954 as summarised by the learned commentators in Reynolds and Clark at 8-090:

*(2) The court, in considering what term should be granted to the tenant, must strike a reasonable balance between two conflicting considerations: (a) that so far as reasonable the lease should not prevent the landlord from using the premises for redevelopment; (b) a reasonable degree of security of tenure should be provided to the tenants.*

*(4) The function of the court to strike a fair balance between the two competing aspirations necessarily presupposes that the landlord may have to wait for some time (though not so long as to prevent redevelopment) before being able to regain possession: ...Thus albeit the landlord may satisfy the court that the break should be incorporated in the new lease the court may defer the date from which the break is to operate as part of the balancing exercise.*

11. Mr Lees did not demur from that proposition. The Dale Park Test is in essence a balancing exercise. Indeed, the Upper Tribunal recognised as much in **Vache Farm** (EE & H3G v AP Wireless II (UK) Ltd [2024] UKUT 216 (LC)) at [22] (with this Tribunal’s emphasis):

*“The real issue is therefore whether APW should have the right to terminate the new lease for redevelopment sooner than at the end of the term in ten years’ time. The answer involves **balancing** the need of the operator for a reasonable period of security, with the entitlement of the site provider to have the opportunity to redevelop the site if it can obtain the necessary consents and can persuade the Tribunal at the appropriate time that its intention to do so is genuine. In answering the question we must also have regard to the direction in paragraph 23(5) of the Code that the terms of the new lease should ensure the least possible loss and damage is caused by the exercise of the Code rights conferred by the new lease to those who own interests in the Site.”*

12. In **Vache Farm** (EE & H3G v AP Wireless II (UK) Ltd [2024] UKUT 216 (LC)) the Upper Tribunal considered the relevance of authorities under the 1954 Act and the approach to be taken to landlord redevelopment break clauses at [20-25]:

*“20. Although the security of tenure provided by the Code is modelled to some extent on the Landlord and Tenant Act 1954, it is important not to take that analogy too far. The grounds on which a landlord may object to the renewal of a business tenancy under section 30(1) of the 1954 Act are broader than those allowed by paragraph 31(4) of the Code. In particular, a site provider cannot rely on an intention to carry on its own business from the site as a ground of opposition. Under the Code, in the absence of some default on the part of the operator, the operator’s right of renewal*

*will in practice be limited only by an owner's intention to redevelop the site. Mr Watkin KC relied on observations by Vos J in Humber Oil Terminals Trustee Limited v Associated British Ports [2011] L&TR 27, Ch at paragraph [143] but those observations were made in the context of the 1954 Act and are not directly applicable.*

*21. Nevertheless, as Stephenson shows, it is not the policy of the Code to stand in the way of the redevelopment of sites. Provided the intention is genuine, we can see no reason why a different approach should be taken where the intended redevelopment is for a telecommunications use, even if the net result is that a particular operator may in future enjoy less favourable terms at that site than if its previous lease of the land had continued. That is consistent with the approach taken in the 1954 Act cases to which we were referred. If, at the end of the full ten year term of the new lease, APW opposed a renewal because it intended to redevelop the Site with a new mast, EE/H3G would not be entitled to complain that the new mast would be owned and managed by APW or an associated company. All that would matter would be whether APW could prove the necessary intention.*

*22. The real issue is therefore whether APW should have the right to terminate the new lease for redevelopment sooner than at the end of the term in ten years' time. The answer involves balancing the need of the operator for a reasonable period of security, with the entitlement of the site provider to have the opportunity to redevelop the site if it can obtain the necessary consents and can persuade the Tribunal at the appropriate time that its intention to do so is genuine. In answering the question we must also have regard to the direction in paragraph 23(5) of the Code that the terms of the new lease should ensure the least possible loss and damage is caused by the exercise of the Code rights conferred by the new lease to those who own interests in the Site.*

*23. As to the need for a period of secure occupation, the Site has been in operation for well over 15 years and we assume the initial investment in establishing it has long since been recouped. Although a general ambition to upgrade to 5G was referred to by Mr Lester, we were not presented with evidence of any particular intention to invest in the Site in the short term and the only costs which he referred to were those of EE/H3G decommissioning their own apparatus and relocating to an APW mast if the break became exercisable. Mr Radley-Gardner KC referred in his written argument to maintaining the service rather than extending or improving it (although no doubt occasional upgrading will occur). Whether the unquantified costs of decommissioning the current site are incurred in five years rather than ten years does not seem to us to be a matter of particular significance.*

*24. We also infer from EE/H3G's own proposal for a five year break clause that a minimum term of that duration would satisfy its own business requirements.*

*25. Taking these matters into account, we can see no good reason to limit the break clause agreed in principle so that it is exercisable only if the intended redevelopment is for some purpose other than for a telecommunications use. On the other hand, perpetual dispute should not be encouraged, and a reasonable period should be allowed before any redevelopment opportunity can be exploited. There was no evidence that APW, or Icon, will be in a position to implement a redevelopment scheme at this Site in the short term. Termination should therefore not be permitted earlier than the fifth anniversary of the term and to provide a degree of certainty for*

*both parties it should be exercisable by not less than 18 months' notice expiring on that date or on any subsequent anniversary (rather than at any time, as proposed by APW)."*

13. Mr Clark forcibly reminded the Tribunal of the underlying policy of the Code as set out in **Pendown Farm** (EE and H3G v Stephenson [2022] UKUT 180 (LC)) at [47]:

*"If in principle the Site were to be capable of being developed for a more profitable use by APW, then it is not the policy of the Code to stand in the way of such a redevelopment.... In circumstances where the site provider is not entitled to share in the economic benefits realised by the use of its land for telecommunications purposes, it would be unfair and inappropriate for it to be prevented from making an alternative use of its land by the imposition of long-term Code rights which cannot be terminated. The fact that the inclusion of a redevelopment break clause may introduce a degree of uncertainty in the investment decisions made by an operator does not seem to me to be a reason for refusing such a clause."*

Mr Clark also pointed out, as he did in **Pendown Farm** at [48], that *"the inclusion of a redevelopment break clause will not prevent the operator from applying to the Tribunal for a new lease, putting the site provider to proof of its intention to redevelop the Site if it wished to resist such an application"*.

14. Mr Clark sought to rely on a number of authorities on landlord redevelopment break clauses under the 1954 Act including **Reohorn v Barry Corporation** [1956] 1WLR 845, **National Car Parks Ltd v The Paternoster Consortium Ltd** [1990] 15 EG 53 and **B&M Retail Ltd v HSBC Bank Pension Trust (UK) Ltd** [2023] EWHC 2495 (Ch). However, in the light of the detailed consideration given to landlord redevelopment break clauses by the Upper Tribunal in **Vache Farm** we do not consider that the citing of further authorities under the 1954 Act to be of assistance.

## **Business Needs**

15. Uncertainty as to the future was recognised by the Court of Appeal in **Dale Park** ([2022] 4 WLR 27) at [66]:

*"While, moreover, inability to share this particular site might not be fatal to On Tower, the Tribunal was obviously correct to see ability to share as key to On Tower's business as a neutral host. Uncertainty as to the future is, here, not a bar to On Tower being given the rights it asks for but, to the contrary, affords a compelling basis to accede to its application."*

16. In **Ewefields Farm** the Upper Tribunal said at [25]:

*"In every case the operator will need to show a business need for the terms it wants, and there will need to be consideration of the possible loss and damage to the site provider. A business need may be current or it may be future. The operator needs to provide evidence of need but does not have to establish a compelling case. Compton Beauchamp is not authority for the idea that consideration of the operator's future business needs can be deferred because the operator can come back and ask for more; that would just store up costly negotiation and litigation for the future."*

17. At paragraphs 21 and 22 of her witness statement Lorna Broadbent sets out On Tower's position in respect of business needs in respect of "Landlord's Break":

*21. OTUK disputes the provision sought by Icon which would allow Icon to terminate the Lease at any time with no conditions. OTUK needs certainty of tenure so that it can make investment decisions about future potential upgrading opportunities and requirements at the Site. Our customers also have to make decisions about investing in new equipment on the Site. These decisions need to be made with a degree of certainty over the future security of the Site, and without the certainty of at least a 5-year term that becomes very difficult.*

*22 Whilst there is no pending upgrade project on the Site now, that could change at any time. If the Site is at ongoing risk of an NTQ from the landowner then this could impact the services available at the Site, should OTUK or its customers deem the Site unworthy of investment for this reason.*

18. During cross examination Ms Broadbent when asked about the roll out of 6G said "we don't know at this stage". She was also asked about future spectrum auctions: "nobody is aware of what is going to happen in the next two years".

19. At paragraph 36 of his first witness statement Andrew Holloway confirms that Icon is not aware of any current plans for upgrades at the site:

*"However, I understand that comments made in the second witness statement of Mr Frederick Ansell (Asset Protection Manager for On Tower) confirmed that On Tower have stated that there are no customer demands for future upgrades at Queen's Oak or any requirement to alter the height of the mast."*

20. During cross examination Mr Holloway agreed that the merger of Vodafone and Three is "something that is likely to stimulate some kind of activity on the site at some point in time". Mr Holloway also confirmed that "There are lots of things happening in the industry that may stimulate some kind of upgrade activity" but "we just don't know".

21. Icon's primary position is that it should be entitled to an immediate break exercisable on 18 months' notice with a fallback position of 18 months prior notice to take effect from the second anniversary of the term. We are not persuaded that either proposal provides On Tower with a reasonable period of security of occupation. As the First-tier Tribunal observed in **Ewefields Farm** to allow an immediate, or second anniversary, break would render the process of renewal (albeit in this case by way of the imposition of a new agreement under Part 4) "entirely pointless". We find that On Tower's business needs require the certainty of minimum term of 5 years before any break is exercisable by Icon. We find that On Tower has established its future business needs. As the Court of Appeal observed in **Dale Park**, On Tower is a neutral host and uncertainty as to future events is a compelling reason to allow a minimum term of occupancy of 5 years.

## Loss and Damage

22. Icon's case on loss and damage rests on its redevelopment intention. The key findings in the FTT Decision in respect of Icon's redevelopment intention were:

*We find that Icon has established a firm and settled intention to carry out its redevelopment as set out in the SCIP approved by the Radius Investment Committee [124]*

*We find on the balance of probabilities that the most likely outcome is that the MNOs will not migrate to Icon's new tower. Icon has failed to demonstrate that there is a reasonable prospect that MNOs will migrate to its new tower. We therefore find that Icon does not have a reasonable prospect of being able to carry out its redevelopment. [138]*

*Icon has failed to establish that it has an intention to redevelop within the meaning of Paragraph 21(5) of the Electronic Communications Code (Schedule 3A to the Communications Act 2003). Accordingly, Icon cannot rely upon Paragraph 21(5). [159]*

23. Icon relies on Minutes of a Board meeting of its parent company AP Wireless (UK) Limited held remotely on 16<sup>th</sup> March 2026 at 17:30 and the Minutes of its own Board also held remotely on 16<sup>th</sup> March 2026 at 17:30. The summary of the strategic discussions and resolutions are identical in both sets of Minutes:

### **STRATEGIC DISCUSSION – REDEVELOPMENT AND SPECULATIVE BUILD STRATEGY**

*6.8 In summary, the Board confirms that the redevelopment of the Queen's Oak Farm site forms part of the Company's and Icon's wider, established programme of speculative infrastructure development across their portfolios, and that such programme is pursued to optimise long-term asset management and value creation. The Board further noted that, as an inherent consequence of developing and operating owned infrastructure, certain projects (including Queen's Oak Farm) may result in the displacement or replacement of third-party infrastructure where this is commercially justified, lawful and consistent with normal competitive market dynamics.*

### **RESOLUTIONS**

#### **IT WAS RESOLVED**

*b) **Proceeding without an MNO** – the Board confirms that the authorised redevelopment of the Queen's Oak Farm site is not, nor was it, conditional upon the securing of any MNO, and that the absence of an MNO commitment does not affect the Company's commercial rationale, redevelopment strategy or intention to proceed at the Queen's Oak Farm Site.*

24. Mr Lees invites us to treat those Board Minutes with considerable scepticism. Mr Holloway is not a decision maker; he is not a Board member of either company and

was not present at either meeting. Accordingly, Mr Lees has not had the opportunity to test the evidence contained within the Board Minutes. The Board met on the evening of 16<sup>th</sup> March 2026. The Board Minutes were filed, by way of exhibit to the second witness statement of Mr Holloway, on Wednesday 18<sup>th</sup> March prior to the hearing commencing on Monday 23<sup>rd</sup> March. Mr Lees therefore submits that the Board Minutes were created for the purposes of this litigation and filed 'at the last minute' only a few days before trial.

25. Mr Holloway was asked whether the resolution of the respective Board was a new decision in respect of redevelopment. He initially said "*Well, it's a new decision in the sense in the light of the appeal, I suppose. But it's consistent with the decision from the start, which is that we are going to redevelop the site and build our own tower. I mean, that hasn't changed.*" He then said the resolutions were a "*restatement*". On reflection he said that "*Icon has now reconfirmed its decision*" would be a better choice of words. Finally, he said that Icon had resolved to "*reassess the situation in the light of the appeal and again reiterate, reconfirm*". It was clear to the Tribunal that Mr Holloway was uncertain as to whether or not the decision of either Board was a new decision. Mr Holloway was, however, able to tell us that Icon has not approached any of the MNOs presently on site in connection with its proposed redevelopment as to do so would be "*too premature.*" It would therefore appear that Icon has made no progress in respect of MNOs migrating to its proposed new tower. Icon, therefore, still does not have a reasonable prospect of being able to carry out its redevelopment as set out in the FTT Decision.
26. We find that the resolution of the Boards of APW and Icon made on 16<sup>th</sup> March 2026 are new decisions. With effect from 16<sup>th</sup> March 2026 Icon now intends to proceed without an MNO. However, we are unpersuaded as to the fixity of that new intention. It is clear that the Board convened 'at the last minute', very shortly before the hearing. In addition, there is absolutely no supporting evidence as to the settled nature of Icon's new proposal for redevelopment without an MNO. Mr Holloway told us "*No, we don't have a written-down business plan within Icon, no.*" We find that it is wholly improbable that a business of the size of Icon and the wider APW group would decide to proceed with any business proposal without a business plan being in place. In addition, despite this being a new proposal, there is no new SCIP (site candidate information pack), TRM (tower return model) or IRR (internal rate of return). IRR is particularly important bearing in mind that the IRR referred to in the FTT Decision was based on three "carriers" – EE (EE and H3G combined), CTIL (VF and VMO2) and Anglian Water whereas the new proposal is to proceed without any MNOs or carrier revenue. It is therefore unsurprising that Icon has not sought the approval of the Radius Investment Committee for its new plans. Mr Holloway did tell us that there is a budget for development but there has been no disclosure of any such document.
27. Mr Clark submits that a settled intention on behalf of Icon is not required at this stage. The Tribunal should not predetermine Icon's intentions at the present hearing. All that is being sought by Icon is the opportunity of establishing, earlier rather than later, that it has an unconditional intention to redevelop. To use Mr Clark's words Icon is "biting at the bit" to do so.

## Planning

28. Icon also relies on the planning position at the site as evidence of loss and damage. Icon has permitted development rights. On 16<sup>th</sup> May 2025 Icon made application for Prior Approval. On 24<sup>th</sup> July 2025 West Northamptonshire Council confirmed that Prior Approval was not required for the proposed development. Mr Holloway sets out two concerns at paragraph 15 of his second witness statement. The first is that the planning decision will expire in 5 years. Icon will need to factor in time to obtain vacant possession of the site including, if necessary, an application for removal of On Tower's ECA under Part 6 of the Code. The second concern is that "*costs of building the new tower will only increase over time and the earlier we are able to do the development the more cost effective it will be.*"
29. Mr Lees again raised his concern that the planning issue had only been raised at the 'last minute'. The Claimant has not had the opportunity to obtain expert planning evidence. However, as the Upper Tribunal explained in **Ewefields Farm** at [56-57] it is for the Respondent to show that it will suffer any loss or damage. During cross examination Mr Holloway conceded: "*It's always possible we'd secure it again, but at the moment we have certainty that the development we propose is possible*" and "*There's no reason to think that we wouldn't, couldn't get it again in the future.*"
30. We find that the Respondent has not shown that it would not be possible to use its permitted development rights to obtain further confirmation that Prior Approval is not required. Notwithstanding the expiry of the present planning consent, we find that there is no reason why the Respondent could not obtain further consent should it choose to exercise landlord's redevelopment break after the 5 years proposed by the Claimant. In any event in the fast-moving telecoms field, it is quite likely that Icon may wish to revise its site, antenna and equipment layout. In respect of rising costs, we adopt Mr Lee's submission that with other projects available to it Icon would be able to use funds earmarked for Queens Oak Farm for those other projects to net-off any loss. Beyond the modest costs of having to reapply for Prior Approval Icon will not suffer any loss or damage as a result of being unable to utilise its existing confirmation that Prior Approval is not required.

## Decision – Landlord's Break Date

31. We agree with Mr Clark that what is required is a balancing exercise. In carrying out that balancing exercise we have regard to the policy of the Code that where the site provider is not entitled to share in the economic benefits, it is unfair and inappropriate that Icon be prevented from making an alternative use of its land. We also bear in mind Mr Clark's caution that we are not to prejudge Icon's intentions at this stage but merely to give it the opportunity it seeks to put forward its plans at the time it exercises landlord's redevelopment break rights.
32. We are satisfied that On Tower has established future business needs requiring a minimum term of occupancy of 5 years. We are mindful that the FTT Decision was only issued in October of last year and that "*perpetual dispute should not be encouraged*". We have found that Icon's new redevelopment plans to proceed without an MNO are unevicenced other than by Board Minutes created at the 'last minute'.

Icon has not shown loss or damage in respect of the expiry of its 5 year confirmation that Prior Approval is not required. Icon has permitted development rights, and its only potential loss would be the costs of having to submit a further planning application. We are satisfied that the balance falls on the side of On Tower. Having obtained the FTT Decision that Icon has failed to establish that it has an intention to redevelop within the meaning of Paragraph 21(5) On Tower is entitled to a reasonable period of 5 years before Icon can give notice under clause 6.6 to terminate the agreement to be imposed in circumstances where Icon wishes to redevelop all or part of the Site or neighbouring land.

33. The Tribunal imposes the following wording in respect of Landlord's Break Date at clause 1.1 of the agreement to be imposed under Paragraph 20 of the Code:

*“any date falling after the fifth anniversary of the Term Commencement Date as specified in a notice given by the Landlord under Clause 6.6”*

### **Height Restriction**

34. Icon seeks a restriction that On Tower will not either replace its existing mast or increase its height above 22.5m until after the earliest Landlord's Break Date that could be specified by service of a notice pursuant to clause 6.6 of the lease.

35. Mr Lees accepts that On Tower has no current business need to increase the height of its mast and relies on its role as a neutral host and future uncertainty.

36. At paragraph 42 of his first witness statement Mr Holloway explains Icon's need for a height restriction:

*“This wording is required because there is another site nearby let to Airwave and because Icon desires to develop Queen's Oak for its own mast, in respect of which Icon are currently engaged in an appeal of the Queen's Oak Decision. I also understand that On Tower expressly stated in the proceedings that there are no customer demands for future upgrades at Queen's Oak or any requirement to alter the height of the mast”.*

37. In his evidence Mr Holloway explained Icon's position more fully:

*“From our perspective, there is a commercial opportunity there if and when we build our new tower, we may invite Airwave to come along and share that tower, you know, we want to be able to benefit from that commercial opportunity, obviously. You know, potentially, it could also be open to your client, but I suppose we're being a little bit selfish in saying, actually, we would – if that opportunity were ever to be there, that we would – we would like to benefit from it.”*

38. Accordingly, the loss and damage put forward by Icon is loss of a commercial opportunity. We are not persuaded that the absence of a Height Restriction will cause any loss or damage to Icon for three reasons. Firstly, the commercial opportunity is speculative. Mr Holloway told us that Icon have not yet has any commercial

discussions with Airwave. Second, as set out in the FTT Decision at [82] future income from Airwave is unlikely beyond the next 2 or 3 years:

*“Mr Kay said that he had discounted any income from Airwave because the emergency service contract had long since expired and, for investment purposes, future income could not be assumed beyond the next 2 or 3 years.”*

Third, as Mr Lees submits loss of a commercial opportunity is not loss caused by the exercise of Code rights.

39. We find that Icon has not established any loss and damage in relation to On Tower’s proposed term allowing On Tower to replace or increase the height of its mast without restriction.

### **Decision – Height Restriction**

40. The Tribunal imposes the following wording at Schedule 1 Part 1 Paragraph 1.3 of the agreement to be imposed under Paragraph 20 of the Code:

*“The right to erect install and operate the Installation for the Permitted Use and thereafter maintain relocate repair replace alter renew upgrade and remove the Installation and to remove all or any part of the Installation at any time PROVIDED THAT any restriction on the rights granted by this paragraph in accordance with the Telecoms Lease shall apply to the rights until either:*

- (i) the Tenant has obtained the consent of the Telecoms Tenant to the removal or alteration of those restrictions (with a copy provided to the Landlord); or*
- (ii) an order is imposed by a court binding the rights (or such rights as the court determines) on the Telecoms Tenant”.*

D Jackson  
Judge of the First-tier Tribunal

Either party may appeal this Decision to the Upper Tribunal (Lands Chamber) but must first apply to the First-tier Tribunal for permission. Any application for permission must be in writing, stating grounds relied upon, and be received by the First-tier Tribunal no later than 28 days after the Tribunal sends its written reasons for the Decision to the party seeking permission.