



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

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

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

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

Representative : **Kester Lees KC, Richard Harwood 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, Matthew Henderson
and Fern Schofield instructed by
Eversheds Sutherland (International) LLP**

Application : **Electronic Communications Code**

Hearing : **29th, 30th September,
1st, 2nd, 6th and 7th October 2025
Birmingham Civil Justice Centre**

Tribunal : **Judge D Jackson
Mr RP Cammidge FRICS**

Date : **29th October 2025**

DECISION

Background

1. This reference has a long and distinguished history. Its original title was **Arqiva Services Limited v AP Wireless II (UK) Limited** [2020] UKUT 0195 (LC). Notice seeking an order under Paragraph 20 of the Code was served on 2nd July 2019 [A48-78]. A reference was made to the Upper Tribunal on 20th August 2019. On 19th June 2020 Upper Tribunal Judge Cooke gave her decision on two preliminary jurisdictional issues. Judge Cooke found that Arqiva was a tenant at will. However, based on the decision of the Court of Appeal in **Compton Beauchamp** Judge Cooke held that the Tribunal had no jurisdiction to make an Order under Paragraph 20 of the Code.
2. The Claimant, Arqiva Services Limited, changed its name to On Tower UK Limited (“On Tower”) in July 2020. The reference, by then titled, **On Tower UK Limited (formerly known as Arqiva Services Ltd) v AP Wireless II (UK) Ltd** [2022] UKSC 18, proceeded by way of leapfrog to join the appeal to the Supreme Court in **Compton Beauchamp**. The Supreme Court handed down judgement on 22nd June 2022. The Supreme Court held that On Tower could seek imposition of code rights under Part 4 of the Code
3. The reference was thereafter remitted back to the Upper Tribunal and on 10th May 2024 Judge Cooke transferred the reference to the FTT. By that time the Respondent had transferred the site to its sister company, Icon. On 18th July 2024 the FTT added Icon as Second Respondent. In respect of the First Respondent the FTT directed:

“The First Respondent shall remain as a party to the Reference for the purpose of compliance with directions relating to disclosure and in respect of any residual costs to be determined post judgment.”

4. On 15th August 2024, following a case management hearing, the FTT ordered:

“The FTT will determine whether an agreement should be imposed under paragraph 20 of the Code by determining the following as preliminary issues:

- (a) whether the Claimant can satisfy the first condition of paragraph 21 of the Code, namely: *“that the prejudice caused to the relevant person by the order is capable of being adequately compensated by money”*
- (b) whether the Claimant can satisfy the second condition of paragraph 21 of the Code, namely: *“...the public benefit likely to result from the making of the order outweighs the prejudice to the relevant person. in deciding whether the second condition is met, the court must have regard to the public interest in access to a choice of high-quality electronic communications services”*
- (c) *whether the Second Respondent intends to redevelop all or part of the land to which the code right would relate, or any neighbouring land, and could not reasonably do so if the order were made.”*
5. At a PTR held remotely on 4th September 2025 Icon withdrew Preliminary Issues (a) and (b). Accordingly, the only matter for remaining for determination is Icon’s intention to redevelop.
 6. The remaining Preliminary Issue was heard in Birmingham on 29th September – 7th October 2025. Kester Lees KC, Richard Harwood KC and Imogen Dodds appeared for On Tower. Wayne Clark KC, Matthew Henderson and Fern Schofield appeared for Icon. We are grateful to Kester Lees KC and Imogen Dodds for their Skeleton Argument on behalf of the Claimant dated 22nd September 2025 and to Wayne Clark KC, Matthew Henderson and Fern Schofield for Second Respondent’s Skeleton Argument also dated 22nd September 2025. The Tribunal has considered Bundles of documents [A 1-243, B 1-790, C 1-45, D 1-138, E 1-392, F 1-82, G 1-53 and H 1- 477].
 7. The Tribunal received oral evidence from Roger Kay (Acquisitions Director at Icon – Witness Statements dated 28th April 2025 [C17-24] and 27th August 2025 [C32-40]) and Ralph Freemantle (Head of Structural Design at Icon –Witness Statement dated 28th April 2025 [C25-31]). The Tribunal also received oral evidence from Simon Robinson (Head of Infrastructure at On Tower –Witness Statements dated 28th April 2025 [C6-16] and 15th September 2025 [H12-15]). Frederick Ansell (Asset Protection Manager for On Tower) has made two Witness Statements (28th April 2025 [C2-5] and

27th August 2025 [C41-45). Frederick Ansell’s evidence was agreed, and accordingly he did not give oral evidence at the hearing.

8. By Directions dated 15th August 2024 the FTT gave permission for parties to rely on expert evidence, one expert for each party, in the fields of planning and technical telecommunications. On 30th May 2025 the Tribunal ordered that the parties’ experts respond to questions.
9. The Tribunal received expert planning evidence from Richard Morison (Panning Director at Pegasus Group – report dated 31st July 2024 [D81-121]) on behalf of On Tower and Sarah Cox (Group Partner at Carter Jonas LLP – report dated August 2025 [D48-80]) on behalf of Icon. Both planning experts gave oral evidence at the hearing. The planning experts have prepared a Joint Statement dated 2nd September 2025 [D122-138].
10. In respect of technical telecommunications On Tower relies on the expert evidence of Alistair Head (Head of Build and Construction at WHP Telecoms Ltd – report dated 1st August 2025 [D15-42] and Supplementary Evidence dated 12th September 2025 [H6-11]). Icon relies on the expert evidence of John Staves (Director at Michael Aubrey Partnership Limited – report dated 31st July 2025 [D2-14]). The technical telecommunications experts have prepared a Joint Statement dated 1st September 2025 [D43-47].

The parties ultimately reached broad agreement on the technical evidence and neither Mr Head nor Mr Staves gave oral evidence at the hearing.

Conventions

- **On Tower** – Claimant
- **Cellnex** – parent company of On Tower
- **Icon** – Second Respondent
- **APW** - AP Wireless (UK) Limited; parent company of Icon and the First Respondent (AP Wireless II (UK) Limited)

- **Radius** – Radius Global Infrastructure Inc. overall parent company of APW and Icon
- **WIP** – wholesale infrastructure provider
- **The Site** – Telecommunications Site at Queen’s Oak Farm, Potterspury Lodge, Yardley Gobion, Towcester, Northamptonshire NN12 7LL registered at HMLR Title Number NN329963 [B12-15] as shown edged red on the plan at [B17]
- **The On Tower Site** – edged blue on plan at [B385]
- **The On Tower Mast** – the existing 22.5m mast on the On Tower site
- **The Airwave Site** – edged pink on plan at [B385] lying approximately 30m to the east of the On Tower Mast
- **The Icon Site** – edged green on plan at [B385] lying approximately 100m to the east of the On Tower mast
- **EE** – EE Limited
- **H3G** – Hutchison 3G UK Limited
- **VF** –Vodafone Limited (merged with H3G to form VF3 in 2025)
- **VMO2** – Telefonica UK Limited trading as O2 UK and Virgin Media UK
- **MNOs** – Broadband Mobile Operators (EE, H3G, VF and VMO2)
- **CTIL** – Cornerstone Telecommunications Infrastructure Limited. WIP, acting as agent at this site for VF and VMO2
- **MBNL** – Mobile Broadband Network Limited (agents for EE and H3G)
- **Arqiva** Limited – a sharer of the On Tower mast on behalf of Anglian Water. On Tower (under its previous name of Arqiva Services Limited) was a part of the Arqiva Group until 2021 when On Tower was acquired by Cellnex.
- **LPA –West Northamptonshire Council**
- **2024 Prior Approval** – relating to Icon’s proposed redevelopment of the Icon Site. Granted on 2nd September 2024
- **2025 Prior Approval** – Icon’s revised redevelopment of the On Tower Site involving removal of the On Tower Mast and replacement with Icon’s own 25m mast. On 24th July 2025 LPA determined that Prior Approval was not required.
- **Undertaking** – a Unilateral Undertaking given by Icon to the LPA in connection with the 2025 Prior Approval

The Site

11. 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 Potterspury 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.
12. 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.

Title

13. The On Tower Site comprises land demised by three leases granted in 1997, 2000 and 2005. By lease dated 14th January 1997 made between Ian Keith Osborne and Janet Barbara Osborne (1) and Mercury Personal Communications part of the On Tower site was demised for a term of 20 years from 21st October 1996 [B18-34]. The lease was assigned to On Tower (at that time known as Crown Castle UK Limited) on 26th April 2000 [B35-44]. By a Supplemental Lease dated 11th December 2000 made between Mr and Mrs Osborne (1) and Crown Castle UK Limited (2) an additional part of the On Tower Site was demised for the residue of the term [B53-58]. On Tower acquired the final part of its site by a further Supplemental Lease dated 4th July 2005 again made between Mr and Mrs Osborne (1) and Crown Castle UK Limited (2) [B79-86].

14. Each of the On Tower Leases were contracted out of 1954 Act protection. The contractual term expired on 20th October 2016. As held by Judge Cooke in her 2020 decision, On Tower occupies the On Tower Site as a tenant at will.
15. The First Respondent acquired the freehold of the Site by transfer dated 30th October 2014 [B87-95]. The First Respondent transferred the site to Icon by transfer dated 9th May 2024 [B96-102].
16. Accordingly, Icon is On Tower's landlord. The passing rent is £6,402.12 (exclusive of VAT), in addition to which the lease contains provisions for payaway at 30% of the net annual income received from third parties.

The On Tower Site

17. On Tower is part of the Cellnex Telecoms group. Cellnex operates approximately 9,000 sites in the UK. On Tower hosts all four MNOs. On Tower is an operator pursuant to a s106 OFCOM direction.
18. The On Tower Site measures 27.1m x 7.9m. The On Tower infrastructure is used by EE, H3G, VF and VMO2. The original mast at the On Tower Site was 15m in height and built around 1997. The present 22.5m mast was built in 2002 following grant of planning permission. EE and Telefonica carried out upgrade works in 2022. EE has deployed base 5G configuration for a rural site and Telefonica have implemented 5G capacity. There is no pending demand, in terms of customer enquiries, for new sharers.
19. Simon Robinson, Head of Infrastructure at On Tower, explains in his Witness Statement that there are two maintenance regimes: Reactive Maintenance and Planned Preventative Maintenance. Greenfield sites are considered medium risk and are inspected every two years. Maintenance is carried out by Facilities Management Partner (MML), Inspection Partner (RJC) and Structural Engineering Partner (MITIE).

20. The most recent inspection in 2023/24 revealed “*Latchway/other fall arrest – rusty washers will need replacing with new flats springs and nuts, have treated rust as a temporary measure*”. By way of explanation the Latchway is a fall arrest system to ensure that the tower remains safe to climb. A new Latchway was installed in March 2023 [B191-193]. Surface corrosion, identified in 2023/24 was resolved by painting minor coatings over small outbreaks of surface corrosion. The next inspection is planned for October 2026. Overall Mr Robinson considers the mast to be in good condition.

Icon’s intention to redevelop

21. Icon is an operator for the purposes of paragraph 2 of the Code pursuant to a s106 OFCOM direction. Icon is a WIP. Icon is part of the AP Wireless Group which is a subsidiary of Radius Global Infrastructure Inc. Icon has approximately 50 sites across the UK.
22. Initially Icon had not found a “sufficient driver” in terms of increase demand for services to develop the Site. However, in 2024, following the “restart” of proceedings Icon became aware of “Telecommunications Infrastructure Calculation Report” prepared by GFO for Cellnex dated 9th August 2022 [B328-358]. The GFO report (although subsequently discredited) indicated that as the mast was constructed in 1996 and was coming to the end of its estimated 30 year lifespan. Accordingly, Icon identified a redevelopment opportunity.
23. Icon considered three potential redevelopment schemes. The first was to redevelop the On Tower Site. This is known as “going over”. The second scheme involved redeveloping the Airwave Site. The third option was to build a new Icon Site about 100m to the east of the On Tower Site.
24. Icon’s preferred development was to redevelop the On Tower site as that would “*maximise the likelihood of the MNO’s coming to our new mast.*” However, the legal advice received by Icon was that “going over” the On Tower site would not satisfy the legal test for redevelopment. Accordingly, Icon applied for planning permission to

build on the Icon Site 100m to the east of the On Tower Site. The 2024 Prior Approval was granted on 2nd September 2024 [B111-112].

25. Following the handing down of the decision in **Vodafone Limited v Icon Tower Infrastructure Limited (1) and AP Wireless II (UK) Limited** [2025] UKUT 00058 (LC) (“Steppes Hill Farm”) on 20th February 2025 the legal advice given to Icon was revisited. Icon was advised is that “going over” the On Tower Site would be sufficient for redevelopment under the Code. On 3rd March 2025 the Board of APW approved a change of strategy [B470-472]. Accordingly, Icon’s decided to construct a new 25m tower on the On Tower Site which would require the removal of the On Tower Mast. Icon obtained the 2025 Prior Approval to proceed on 24th July 2025 [B178-179].
26. On 4th August 2024 APW agreed to fund the redevelopment [B473-474]. The Radius Investment Committee approved the business case on 21st August 2025 [B449-450] and on 22nd August 2025 the Icon Board resolved to proceed with the redevelopment [B475-476]

Planning

27. We are grateful to Richard Harwood KC and Matthew Henderson of counsel, who attended various parts of the hearing, for their assistance in respect of planning matters.

2024 Prior Approval – Icon Site

28. Prior approval was granted on 2nd September 2024 by the LPA (application number 2024/3540/PA) in respect of the following development [B111-112]:

“The installation of new sharable 25m lattice mast, which is collocated with 1no. existing compound approximately 55m to the west and 1no. existing compound approximately 100m to the west. The development will include a base station, 2.4m high palisade fencing, 6no. operator cabinets, 1 no. meter cabinet, 6no. antennas and ancillary development thereto”

29. The application was recommended for approval as the site is a long way back from the A5 and would not appear overly prominent. The site is outside a conservation area. The ICNIRP certificate was acceptable to Environmental Health and there were no neighbour objections (see Delegated Report [B113-116])

2025 Prior Approval – On Tower Site

30. By application received on 16th May 2025, Icon sought prior approval for “going over” the On Tower Site. On 24th July 2025 the LPA (application number 2025/2005/PA) determined that prior approval was not required [B178-179] in respect of:

“The removal of existing 22.5m lattice mast and associated compound, and installation of 1no. lattice sharable mast (height 25m), antennas installed on headframes, operator cabinets & a multi-user electrical cabinet.”

The Unilateral Undertaking

31. The 2025 Prior Approval application was accompanied by a Unilateral Undertaking dated 27th May 2025 [B140-154]. Developer Covenants are set out at Schedule 1 to the Undertaking [B146]:

Developer Covenants

- 1. The Developer undertakes to the Council not to Implement the Original Prior Approval in the event that the Prior Approval relating to the Development as specified in the Prior Approval Application is granted and Implemented.*
 - 2. The Developer undertakes to the Council not to Implement the Prior Approval in the event that the Original Prior Approval has already been Implemented.*
32. The decision of 24th July 2025 of the LPA was made under delegated powers in accordance with a Delegated Report prepared by a planning officer dated 22nd July

2025 and authorised on 24th July 2025 [B180-185]. That report expressly took the Undertaking into account as a material planning consideration (see paragraphs 9.5, 9.6 and 9.11).

“To this end, the applicant has provided a Unilateral Undertaking that confirms if this application is approved then the mast approved in 2024 (ref: 2024/340/PA) would not be installed on the site, ensuring that there would only be two masts on site. Whilst this is a material consideration, this is a legal matter and would fall outside the realms of planning, however, the submitted plans for this application would supersede the previous application and such a development would unlikely be unimplementable.” (paragraph 9.5) [B183]

“Based on the fact this is an existing site used for telecommunications masts, the replacement mast is only 2.5m taller and the applicant has submitted a unilateral undertaking to ensure the mast granted permission under 2024/3540/PA is not installed. A 2.5m increase in height is not considered to have a material impact in visual terms and the increase would not be overly obvious. In any case a replacement mast of 25m is considered acceptable under the regulations.” (paragraph 9.6)

“It should be noted that the application for prior approval is made under Schedule 2, Part 16, Class A of the GPDO which sets out specific criteria against which applications for telecommunication mast and installations are assessed against. In this case the application is in effect a replacement of an existing mast which is 2.5m taller at 25m Schedule 2, Part 16, Class A allows for masts up to 25m, the application for a similar mast on a location nearby was granted last year for a mast of the same height and was considered acceptable. This application is supported by a Unilateral Undertaking that states in the event this current application is permitted and installed, the mast granted permission under 2024/3540/PA will not be implemented, thus preventing an over proliferation of masts on this site.” (paragraph 9.11) [B184]

Joint Planning Statement

33. The parties planning experts Richard Morison and Sarah Cox have prepared a Joint Statement dated 2nd September 2025 [D122-138]. The following determinative issues are agreed:
- (1) Icon has obtained the 2025 Prior Approval (to the effect that prior approval was not required). No further planning permissions are required (Question 2 [D131])
 - (2) There is no planning impediment to Icon proceeding with the construction of its proposed 25m mast (Question 8 [D133])
 - (3) It is necessary to remove the mast currently in situ on the On Tower Site in order for Icon to construct its proposed 25m mast (Question 7 [D133]).
34. By the date of the hearing the parties had narrowed the planning issues remaining in dispute:
- (1) There is no (relevant) conflict of opinion between experts on Q1, 2 and 5 - 10, and therefore no determination is needed by the Tribunal on those questions.
 - (2) There is a relevant conflict of opinion between the experts on Q3, 4 and Q11

Questions 3 and 4 – the Unilateral Undertaking and the 2025 Prior Approval

35. *Question 3: What is the effect, if any, on the prospects of Icon obtaining Prior Approval for the new 25m mast pursuant to the Site Prior Approval Application with the Proposed Undertaking?*

Joint Statement:

The UU had a positive effect on the prospects of Icon obtaining the 2025 Prior Approval.

The experts agree that the UU had a positive effect on the prospects of Icon obtaining the 2025 Prior Approval but disagree on the importance of the UU in the Council's decision-making process. [D132]

36. *Question 4: What is the effect, if any, on the prospects of Icon obtaining Prior Approval for the new 25m mast pursuant to the Site Approval Application without the Proposed Undertaking?*

Joint Statement:

It is agreed that the 2025 Prior Approval would, in all likelihood, have been granted. However, it is acknowledged that the decision would have been more finely balanced in the absence of the Unilateral Undertaking (UU).

Without the UU, the siting and appearance of the proposed mast would have constituted a materially weaker case.

The 2024 Other Site Approval establishes the acceptable principle of accommodating three masts within the field within which the 2025 site is located.

The experts agree that it is likely the 2025 Site Prior Approval Application would have been granted without the UU.

There is disagreement between the experts on the importance of the UU in the decision making process of the Council, specifically with regard to the amount of positive weighing that may have been attributed to the UU in the Council's planning balance exercise in determining the Site Prior Approval. [D132]

37. *The expert opinion of Icon's planning expert, Sarah Cox is the Undertaking constitutes a planning benefit which mitigates cumulative impacts and proliferation of masts in accordance with NPPF Paragraph 120:*

“The number of radio and electronic communications masts, and the sites for such installations, should be kept to a minimum consistent with the needs of consumers, the efficient operation of the network and providing reasonable capacity for future expansion. Use of existing masts, buildings and other structures for new electronic communications capability (including wireless) should be encouraged. Where new sites are required (such as for new 5G networks, or for connected transport and smart city applications), equipment should be sympathetically designed and camouflaged where appropriate.”

38. Richard Morison, On Tower’s planning expert, is of the opinion that Undertaking was not strictly necessary for approval of the application and in Mr Morison’s opinion the 2025 Prior Approval would have been granted without the Undertaking. In particular the grant of the 2024 Prior Approval demonstrates that even a third mast would be consistent with NPPF paragraph 120. The LPA decided in 2024 that three separate masts at Queens Oak Farm was acceptable in terms of “siting and appearance”.
39. The Undertaking is not referred to within the Decision Notice. It is however referred to in paragraphs 9.5, 9.6 and 9.11 of the Officer’s Report. Paragraph 9.5 is problematic. The following sentence is poorly expressed and contains an erroneous double negative:

“Whilst this is a material consideration, this is a legal matter and would fall outside the realms of planning, however, the submitted plans for this application would supersede the previous application and such a development would unlikely be unimplementable” [B183]

Clearly the officer was satisfied that the Undertaking was a material consideration. However, the officer has failed to appreciate the legal effect of the Schedule to the Undertaking. The effect of the Undertaking on the 2024 Prior Approval is that although it remains valid it is no longer capable of implementation at the same time as the 2025 Prior Approval. Icon can proceed under the 2024 Prior Approval or the 2025 Prior Approval but not both. The Undertaking provides for an either/or approach. It does not have the legal effect of rendering the 2024 Prior Approval “unimplementable”.

40. We find that the Undertaking was a material consideration in the decision making process. It was a good planning strategy and increased Icon's prospects of success. However, we find that lower weight should be accorded to the Undertaking as a planning benefit. At the time that the application was considered Icon already had the 2024 Prior Approval which potentially allowed for 3 masts at the site namely: the Icon Site, the On Tower Site and the Airwave Site. Siting and appearance were considered acceptable and consideration given to proliferation of masts. Whilst in the planning world the officer seems to have accepted that the 2025 Prior Approval would reduce the number of masts and therefore deliver a planning benefit the legal effect of the Undertaking was an either/or approach which meant that Icon could still implement the 2024 Prior Approval resulting in 3 masts at the Site.

Question 11 – On Tower and GPDO rights

41. *Question 11: What, if any, permitted development rights does On Tower currently enjoy in respect of its current installation?*

Joint Statement

It is agreed that rights are granted under Part 16 of the Town and Country Planning (General Permitted Development) (England) Order 2015, as amended.

Under these rights On Tower is entitled to undertake various forms of development, including (but not limited to) and also noting that there are conditions and criteria to comply with:

- The installation, alteration, or replacement of electronic communications apparatus, including antennae and equipment cabinets;*
- The installation of additional antennae on existing masts;*
- The installation of equipment cabinets, provided they do not exceed 2.5 cubic metres in volume, particularly when located outside designated compounds;*
- The installation or replacement of a mast, where the mast (excluding antennae) would not exceed:*
 - 30 metres above ground level on unprotected land; or*

- 25 metres above ground level on Article 2(3) land or land which is on a highway;
- The alteration or replacement of a mast, provided the new mast does not exceed the greater of the existing height or the above limits;
- The installation of antennas on buildings, subject to various factors;
- The installation of apparatus on masts, provided the total height (mast + apparatus) does not exceed the relevant limits;
- Minor ancillary works reasonably necessary for the operation of the apparatus;

There is agreement between the experts that OTUK enjoy permitted development rights at the site.

There is limited agreement on the extent of the use of these rights, specifically with regards to where a replacement mast can be situated and still qualify as permitted development. [D134-135]

42. Planning permission for telecommunications sites is granted as permitted development by the General Permitted Development Order ("GDPO") under Class A of Part 16 of Schedule 2 to the GDPO:

"Development by or on behalf of an electronic communications code operator for the purpose of the operator's electronic communications network in, on, over or under land controlled by that operator or in accordance with the electronic communications code, consisting of—

(a) the installation, alteration or replacement of any electronic communications apparatus ..."

43. The grant of planning permission under Class A of Part 16 is subject to conditions and limitations. For present purposes a summary will suffice:

- Mast up to 25m - outright permitted development subject to certain limitations on the width of the design. An operator is required to give a Code Notification to the LPA under Regulation 5 of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003

- Mast between 25m and 30m – prior approval of LPA required
 - Mast above 30m – full planning permission required
44. The requirement for prior approval of LPA is set out in paragraph A 3(4) of Part 16 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 (“the GPDO”):

“Before beginning the development described in paragraph A.2(3), the developer must apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to the siting and appearance of the development.”

45. Richard Morison (On Tower’s planning expert) relies on the absence of any controls in Part 16 as to where the replacement mast may be located (see paragraphs 116-123 of his Expert Report [D117-119]. He contrasts this with the position in Scotland which provides that Permitted Development Rights do not apply where *“the replacement mast would be situated more than 6 metres from the location of the original mast”*. The Code of Practice for Wireless Development in England merely refers to the situation where *“the existing coverage and capacity will be removed and as such a replacement site is needed within close proximity to where the existing site was located.”* Mr Morison’s approach is that the location of a replacement mast should be considered in the context of coverage and capacity. In his expert opinion it is the cell area which is the relevant geographic restriction. The purpose of the replacement is to provide coverage to the same customers in the same cell area. The current On Tower mast provides coverage for local demand at the A5 road network, the villages of Yardley Gobion and Alderton as well as the collection of buildings at Potterspury Lodge including the school. However, Mr Morison accepts that his approach is not set out in the GDPO. In practice his approach has been accepted by a number of LPA’s. Nevertheless, Mr Morison accepts *“LPAs will interpret the GPDO differently. Some may accept the above interpretation of permitted development rights whilst others, not.”* [D119]
46. Sarah Cox (Icon Planning Expert) accepted that On Tower may wish to exploit the vagueness of the GDPO in respect of location of a replacement mast to its commercial

advantage. However, the requirement to give a Code Notification under Regulation 5 would undoubtedly raise alarm bells with the LPA. The LPA would want to understand further what was being proposed as outright development and would undoubtedly be concerned about proliferation and NPPF 120.

47. There is also a timing issue. Once the On Tower mast has been removed and decommissioned On Tower would lose any rights it may have in respect of replacement. In those circumstances On Tower would be seeking to install a new mast. There is a clear distinction in the GDPO between the erection of a new mast and replacement of an existing mast. Prior approval would therefore be required for a new mast following decommissioning of the On Tower Site.
48. We find that On Tower only has outright permitted development rights for a replacement mast at the existing On Tower Site. Mr Morison's cell based approach is not supported by the GDPO and carries significant risk of being rejected by the LPA on receipt of a Regulation 5 Code Notification. We find that any replacement mast other than at the On Tower Site would require Prior Approval. In any event On Tower could only erect a replacement mast prior to decommissioning of its existing mast. A new mast on another site would require Prior Approval.
49. On Tower does not have outright permitted development rights other than in respect of a mast up to 25m at the existing On Tower Site prior to decommissioning. Any other replacement or new mast will require Prior approval. Any replacement or new mast above 30m will require full planning permission.

The Masts - Technical Telecommunications Experts

50. The parties' respective experts have prepared Joint Expert Technical Statement dated 1st September 2025 setting out the parties' respective positions in respect of Questions to Experts ordered by the Tribunal [D43-47].
51. As regards technical evidence, the parties are agreed that:

- (1) Neither party will be calling the technical telecommunications experts.
 - (2) Neither party will be relying on any part of the technical experts' evidence which is not agreed.
 - (3) Insofar as there are differences between the experts, the FTT need make no findings about them.
52. On Tower's mast is a 22.5m high modular design, open lattice structure. It is a Standard Square Tower Millenium New (SSTMN) designed by Crown Castle UK Limited (the former name of On Tower). The current ECA is mounted on the upper headframe. The lower headframe is not in use. The current concrete foundation is 6.5m x 6.5 m and approximately 1.0m-1.2m deep. The mast is constructed of 112mm x 112mm x 10 mm galvanised steel angle. On Tower's mast provides coverage for local residential properties including Potterspurty Lodge School. The mast serves the broader area of the A5 transport corridor and the surrounding villages of Yardley Gobion, Potterspurty, Paulerspury and Puxley. Typically, in rural areas signal travels up to about 4 miles.
53. Icon's proposed tower is a 25m Swann 5SH lattice tower. It will sit on a 6.4m x 6.4 m x 1.0m concrete base within a 10m x 10m compound. The tower has two headframes capable of carrying between them 4 operators with 6 antenna and 18 RRU each plus two microwave dishes. The proposed tower has been analysed with that equipment load for a wind speed of 25 m/s at a hill height of 100m AMSL. The windspeed for the Site is around 21.5 m/s and the hill height is 100m AMSL.
54. The agreed conclusions of Alistair Head and John Staves are [D44-47]:
- Icon's proposed new 25m mast can accommodate the existing ECA at the Site and any future upgrades – Q1
 - The experts are not wholly aligned as to whether there any material difference in capacity between the OTUK Mast and Icon's proposed mast – Q2
 - It is a reasonable assumption that the OT Mast (and the ECA installed thereon) currently facilitates network coverage – Q3

- The likely timescale of building a mast on the Icon site pursuant to the 2024 Prior Approval is from 12 weeks for completion of naked tower to 9 months to include for rigging works, power and transmission – Q4
- There is no technical reason why Icon could not build and operate a mast on the Icon Site pursuant to the 2024 Prior Approval with the OTUK Mast remaining in situ and continuing to support active ECA – Q5
- The likely timescale for Icon building its new mast on the On Tower Site pursuant to the 2025 Prior Approval is a total timescale of 12 weeks at best if re-using the existing base through to approximately 26 weeks if the foundation/base needs replacing and full decamp to temporary sites is not accepted by the MNOs – Q6
- Likely impact on MNOS – Q7
 - Icon site – 2024 Prior Approval
 - New ECA & transmission - No impact on network.
 - Moving existing ECA & transmission – Single outage up to 4 days impact on network.
 - New ECA & reuse of transmission – Single outage up to 2 days impact.
 - On Tower Site – 2025 Prior Approval
 - Temporary mast required.
 - Two outages (onto temporary mast and back to replacement tower).
 - Total outage duration to utilise existing ECA – up to 9 days impact on network (5 days & 4 days).
 - New ECA & transmission is provided for temporary mast and replacement tower - No impact on network.
 - Replacement alternative On Tower mast nearby
 - New ECA & transmission - No impact on network.
 - Moving existing ECA & transmission – Single outage up to 4 days impact on network.
 - New ECA & reuse of transmission – Single outage up to 2 days impact on network.

The Law

55. Paragraph 21(5) of the Code provides:

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

56. In reaching our decision we have been greatly assisted by the decision of the Chamber President, Mr Justice Edwin Johnson and Mrs Diane Martin TD MRICS in **Steppes Hill Farm**. That decision covers many of the legal issues arising before us. However, this Tribunal is not bound by what was said by the Upper Tribunal in making findings of fact. It is trite law that findings of fact are inadmissible in subsequent proceedings (**Rogers v Hoyle** [2015] Q.B. 265).

57. The Upper Tribunal considered Paragraph 21(5) in **EE Limited and Hutchinson 3G UK Limited v Sir James Chichester and others as Trustees of the 1968 Combined Trust of Meyrick Estate Management** [2019] UKUT 164 (LC) (“Meyrick”). At [38 and 39] the Upper Tribunal explained the approach to be taken to arguments based on the redevelopment provisions set out in the 1954 Act:

*“38. Paragraph 21(5) was explicitly modelled, by the Law Commission, on s.30(1)(f); the difference in wording is trivial and is dictated by its context (see [32] above). However, we agree with Mr Maclean QC that the case law associated with s.30(1)(f) is not binding authority in the context of the Code and of para.21(5). Clearly the Code, new as it is, must be looked at with a clean slate and as a fresh start. The principles applicable to the 1954 Act should be adopted where they are relevant, although we are mindful of the need to be aware of the different context in Code cases. Not all principles will be relevant and the factual background will have an effect on this; issues of timing, for example, need to be carefully considered. But we accept (as the respondents themselves argue) that where intentions have changed over time it is the intention at the date of the hearing that is relevant: *Betty’s Cafes Ltd v Phillips Furnishing Stores Ltd* [1959] A.C. 20. And it makes obvious sense to adopt the test imposed in *Cunliffe*. Parliament’s intention would be frustrated if the defence in*

para.21(5) could be made out where the relevant person did not have a firm intention to carry out the redevelopment plan, or where the plan was not something that that person has a reasonable prospect of being able to bring about of their own volition.

39.The test in S Franes Ltd is likewise equally relevant...”

58. The same approach was adopted in **Steppes Hill Farm** at [233]:

“Applying this approach, it seems to us that it is legitimate to consider authorities on Paragraph (f), in relation to Paragraph (c), subject to keeping in mind that the principles applicable to the 1954 Act should only be adopted where they are relevant. One principle which does seem to us to be relevant is the following statement of Balcombe LJ in Palisade Investments Ltd v Collin Estates Ltd [1992] 2 EGLR 94, at 97D, as quoted by Auld LJ in his judgment in Dolgellau Golf Club v Hett [1998] L.&T.R. 217 at page 228 of the report:

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

59. In **Meyrick** the Upper Tribunal adopted a two stage test for redevelopment [40] (following **Cunliffe v Goodman** [1950] 2 KB 237):

“Accordingly, whether the Respondents wish to build a mast or a housing estate, they can resist the Claimants’ application only if they can demonstrate both that they have a reasonable prospect of being able to carry out their redevelopment project and that they have a firm, settled and unconditional intention to do so.”

60. The two-stage test was confirmed in **Steppes Hill Farm** [279]:

“The test is very well-known and has been restated many times. There are two parts to the test, as it applies to Paragraph (c). The first part of the test is subjective. The site provider has to prove a firm and settled intention to carry out the relevant work

of redevelopment, which is not likely to be changed. The second part of the test is objective. The site provider has to prove a reasonable prospect of being able to bring about the relevant redevelopment by their own act or volition.”

61. It is common ground that Icon bears the burden of establishing the relevant intention under Paragraph 21(5). The principle was recently restated by Norris J (sitting in retirement) in **MVL Properties (2017) Limited v The Leadmill Limited** [2025] EWHC 349 (Ch.) at [10a]:

“The burden lies upon MVL17 to establish that it has the relevant intention: Cunliffe v Goodman [1950] 2 KB 237 at 254. Leadmill does not have to prove anything. Leadmill merely has to raise challenges which call for an answer from MVL17 in order that it may discharge the burden which lies upon it.”

62. Where intention has changed over time it is the intention at the date of the hearing that is relevant: **Betty’s Cafes Ltd v Phillips Furnishing Stores Ltd** [1959] AC 20 (see [38] of Meyrick). In **Steppes Hill Farm** [282] the Upper Tribunal confirmed:

“This date is often referred to as the date of the relevant hearing held to determine whether the intention exists but it is, strictly, the date on which this question comes to be determined by the relevant court or tribunal; see the speech of Lord Denning in Betty’s Cafes Ltd v Phillips Furnishing Stores Ltd [1959] AC 20, at page 51 of the report.”

63. There are five issues for us to determine:

- (1) Subjective test - intention
- (2) Objective test - reasonable prospects
- (3) Conditional intention – (**S Franeses v Cavendish Hotel (London) Limited** [2018] UKSC 62 (“Franeses”))
- (4) Reasonable time
- (5) The meaning of redevelop

Before determining those issues, we consider the evidence of the witnesses.

Evidence of Roger Kay

64. Icon first looked at redevelopment opportunities at Queens Oak Farm in 2022. At that time there was no business case to upgrade infrastructure. In his evidence Mr Kay told us that having regard to the rural nature of the site and the quality of the tower the Site was not a good redevelopment opportunity. No coverage drivers were identified in terms of new housing or local infrastructure projects. At that time Icon reviewed the APW portfolio of some 4,040 sites. As a result, 948 sites were identified as having potential, 170 sites got planning permission and 6 were built. Queens Oak Farm was not one of the 948 sites identified in 2022 as having potential. As Mr Lees put it in cross examination at that time Queens Oak Farm ranked below 948th in the list. Clearly Icon had no intention to redevelop the site in 2022.
65. The potential of the site was revisited in 2024. Mr Kay was very clear that the decision to look again at the site came from APW's lawyers. The Supreme Court had remitted the ongoing litigation back to the Upper Tribunal and the case was, to use Mr Kay's phrase "restarting". There is no documentary evidence of what was said by the APW lawyers, but Mr Kay's recollection was that most likely he was contacted by telephone.
66. The decision to look again was initiated by APW lawyers in 2024 as a result of obtaining a "Telecommunications Infrastructure Calculation Report" dated 9th August 2022 prepared by GFO Telecoms Ltd which had been prepared at the request of Cellnex [B328-358]. The report suggested that the On Tower Mast was nearing the end of its estimated 30 year life span. However, at the hearing Mr Kay confirmed that it was now accepted by Icon that the GFO report was inaccurate and "discredited". The report confirms the On Tower Mast as "**Structure:** ok" [B353].
67. In cross examination Mr Kay was asked why Queens Oak Farm had been fast tracked. Mr Kay described the decision as "*obvious*". APW owned the freehold of the Site and tower was at the end of its life. Icon decided to "*get cracking on*". Accordingly, Icon decided that it would build the Site out as the rent proposed by On Tower in the litigation was only £1750 p.a. In fact, it does not appear that an offer of £1750 p.a. was actually made by On Tower. That figure is the likely outcome of the reference based on the code rent for a greenfield site, absent alternative use value, as determined by the

Upper Tribunal in **Vache Farm**. In any event Mr Kay was clear that based on a rent of £1750 p.a. and allowing for inflation at 3% Icon would never recover its capital outlay.

68. Mr Kay explained that Icon approaches redevelopment in three initial phases: (1) acquisition, (2) design and (3) planning.
69. In his First Witness Statement at Paragraph 23 [C20] Mr Kay explains Icon's criteria at stage (1) acquisition:

"Icon looks to identify opportunities/new portfolio sites by:

- 1. reviewing sites in the APW portfolio which have additional vacant land next to the mast site which can be used for the provision of improved infrastructure. This provides us with a speed to market as Icon can avoid the acquisition stage and go straight to the planning permission stage;*
- 2. reviewing sites in the APW portfolio without additional land but where the existing operator's passive infrastructure on the site is deemed to be limited. We would look to offer the MNOs improved infrastructure (by way of a more sustainable site that can accommodate additional sharers and upgrades over a long period of time for improved coverage and capacity); and*
- 3. considering sites which are not currently in the APW portfolio where the existing operator's passive infrastructure on the site is deemed to be limited and looking to offer the MNOs improved infrastructure and therefore a more sustainable site that can accommodate additional sharers and upgrades"*

Criteria 1 applied to Queens Oak Farm as there was additional vacant land. The Site had already been acquired by APW in 2014 for £175,000 [B87-95]. Phase (1) was completed when the site was transferred to Icon on 9th May 2024 for £96,780.09 [B96-102].

70. Phase (2) began with a Site Initiation Document dated 17th May 2024 [B496]. That document records:

“We need measurements for the two existing demises (Cellnex - to the east of the land and Airwave in the middle). We then need a new demise to be marked out to the west of the land that needs to be at least 30m away from any of the other structures as not to interfere with signal.”

Accordingly, all three sites, the Icon Site, the Airwave Site and the On Tower Site, were in play. As Mr Kay told us *“we hedged our bets at that stage”*.

71. JEM Projects Limited was instructed on 22nd May 2024 [B415] and prepared a report dated 11th June 2024 [B386-414] producing *“panoramic photographs [are] to provide the authority’s radio team with the assurance that the proposed site antenna locations are clear from any immediate clutter and to assist in the final selection of the antenna parameters such as heights and orientations.”*
72. Icon carried out an MSV Survey on 11th June 2024 [B538-545] which covered the Icon Site and Airwave Site [B543] and also the On Tower site [B544].
73. Phase (3) was initiated by a decision to instruct planners on 5th July 2024 [B556]. At that stage Icon were still pursuing the Icon Site – *“there are two existing masts in the same field but we are going to be 30m away from both”*. Mr Kay told the Tribunal that Icon’s preferred option was to redevelop the On Tower site but *“didn’t think legally we could do that”*. Accordingly in 2024 the only proposal that was being progressed was the Icon Site.
74. Planning application for the Icon Site was made by Icon’s planning agents Entrust on 12th July 2024 [B109-110]. The application was received by the LPA on 17th July 2024 and granted on 2nd September 2024 [B111-112]. Entrust informed Mr Kay and others of the LPA decision on the same day [B585]. The following day, 3rd September 2024, Entrust confirmed that the Prior Approval related to *“additional mast alongside the other two”* [B608].
75. Following grant of Prior Approval costs for the redevelopment were estimated at £192,586.23 [B612]. Based on those costs Mr Kay prepared a business plan [B678].

Icon refers to its business plan as a Tower Return Model (“TRM”) as explained by Mr Kay at paragraph 19 of his Second Witness Statement [C34]:

“The Tower Return Model is a standard document with pre-populated formulas which we input figures into. This includes budget build costs and expected rental income to see if we want to progress with the investment. If the investment provides a worthwhile return, we complete a SCIP (Site Candidate Information Pack) and submit it to the Board for approval.”

Crucial to the TRM is the Internal Rate of Return (“IRR”):

“However, if the SCIP involves an existing APW asset (including one which was previously acquired by APW albeit now vested in Icon), we have to first ask the Underwriting Team to provide a blended figure for IRR before we complete a SCIP, as we must include the original transaction in our calculation, to provide an accurate return.”

In his evidence Mr Kay explained that the IRR is based on costs of the redevelopment, period of return and rental income blended for acquisition costs. Taking a cautious approach Mr Kay included a degree of “fat” in the budgeted costs. The Tribunal notes that whilst IRR is an entirely standard analysis tool it is usual to use other metrics as well which consider external factors which may impact on ultimate return.

76. Mr Kay was very clear in his evidence that the proposed redevelopment was investment led and based on rates of return. At paragraphs 15 and 16 of his First Witness Statement dated 28th April 2025 [C18-19] Mr Kay explains that the APW Group continues to look to maximise its current investments and that Icon’s objective is to provide a long term investment for its overall parent company Radius.
77. When asked about parameters for acceptable rates of IRR, Mr Kay conceded that there was in fact no minimum level of IRR for the purposes of Board approval. Icon has built towers speculatively to show that it can do so, for marketing purposes. As a start-up Icon are trying to break into the market and “do not have parameters” in contrast to other parts of APW. Despite the figures provided in TRM, SCIP and IRR the Board, in

effect, makes “a judgment call”. Mr Lees asked Mr Kay if Queens Oak Farm was a speculative build. Mr Kay confirmed that Queens Oak Farm was not a speculative build.

78. On 20th February 2025 the Upper Tribunal handed down its judgement in **Steppes Hill Farm**. The Board of APW Wireless acted with alacrity and on 3rd March 2025 [B470-472]:

“Icon will review all Sites within litigation that are subject to renewal pursuant to the Code to determine whether there is a further ability for redevelopment as a result of the Steppes Judgment. In particular Icon should:

- i. Look at any redevelopment opportunities that go over the top of the current operators compound as this has now been confirmed to be a viable legal position for a WIP to take*
- ii. Where there is a viable option on a site, Icon should submit a planning application to go over the top of a site;*
- iii. If planning permission has already been obtained on a neighbouring piece of land, Icon should submit a second planning application and provide the necessary documentation to local planners to ensure that one of the planning applications (as opposed to both) are implemented.”*

79. Accordingly, Icon changed its plans. On 3rd April 2025 Icon instructed JEM that they intended to proceed to build over the On Tower Site [B706]. When asked about Icon’s change of plan, Mr Kay agreed that Icon’s motivation was to get On Tower off the Site. Mr Kay very candidly accepted that Icon’s motivation was *“to remove competition off our land.”* However, in his Second Witness Statement dated 27th August 2025, at paragraphs 34 and 35, Mr Kay explains that there is very little difference in the budgeted costs for the TRM at the Icon Site under the 2024 Prior Approval and the TRM for the On Tower Site under the 2025 Prior Approval. The advantage of ensuring the best chance of MNOs migrating to the new Icon tower outweighed the negligible costs differences [C37-38].

80. On 1st May 2025 Entrust made a further planning application [E208 -209] and [B133 - 137]. Objections were received from Arqiva [B781] and Cellnex [B774-780 and H85-

86]. On 24th July 2025 the LPA determined that Prior Approval was not required [B178-179].

81. Mr Kay explained that Icon accepted that its revised proposal of “going over” the On Tower would cause significant disruption to NMOs. Accordingly, Icon decided that inducements should be offered to MNOs. Mr Kay told the Tribunal that incentive was initially £35,000 in total. On 4th August 2025 the Board of APW met to discuss Queens Oak Farm following the granting of 2025 Prior Approval [B473-474]:

The Board was prepared to offer certain inducements at the Queens Oak site to attract operators. A revised set of figures, showing the proposed inducements and their impact on the investment return, would need to be prepared and submitted to the Radius Investment Committee as part of a tower submission call. Once approved, the Company would provide the necessary funding to Icon to build the Queens Oak site once vacant possession is obtained.

The Board resolved:

The board were happy to commit to the investment for Icon to redevelop the site at Queens Oak Farm. The Company will provide the funding subject to the submission and approval of a SCIP to show the impact of any proposed inducements on the investment return.

82. The TRM is a living document which is constantly updated. The last iteration of the TRM is dated 21st August 2025 [B441] and shows revised costs of £201,697. Return Analysis is based on:

EE - £12,500 p.a.

CTIL - £12,500 p.a.

Anglian Water - £5,000 p.a.

Mr Kay’s analysis works on three “carriers” – EE (EE and H3G combined), CTIL (VF and VMO2) and Anglian Water. This reflects the fact that at the site EE and H3G share transmission equipment and VF and VMO2 share antennas.

We are satisfied that Mr Kay's estimated returns are correct. Although Icon has not spoken to MNO's it has a good idea of the present rents paid by the carriers. This is because the existing On Tower agreement provides for "payaway" of the amounts received from sharers. 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.

However, Mr Kay has not taken into account the possible effects of the VF and H3G merger.

Mr Kay confirmed that the TRM was based on the assumption that all MNOs would come across. Each transfer is staggered by 1 month to allow rigging for each carrier to take place in isolation for safety reasons.

83. The IRR shown on the TRM was supplemented by New Site Development Analysis prepared by underwriters at Icon [B442]. The blended IRR i.e. taking into account original transaction costs are:

1 carrier – 6.64%

2 carriers – 9.43%

3 carriers – 10.26%

84. The SCIP dated August 2025 (which takes the form of a PowerPoint presentation [B445-448]) shows IRR as follows:

Assumptions

CTIL Rent = £12,500 / EE Rent = £12,500 / Anglian Water Rent = £5,000, starting October 2025.

- IRR = 8.00% with £35k contribution to MNO rigging costs until Oct 2045*
- IRR = 8.79% with no additional rig cost, until Oct 2045*
- IRR = 9.37% with additional £35k rig costs, term completion Oct 2055*

- *IRR = 10.00% with no additional rig cost, term completion Oct 2055*

Radius Investment Committee approval was given on 21st August 2025 [B449-450].

85. It is clear that Radius gave its approved to an investment led development based on IRR. The SCIP is a fully costed plan based on detailed figures for expenditure and return. The investment return shows the impact of the proposed inducement of £35,000 on the return. The SCIP was based on 3 carriers migrating across at 1, 2 and 3 month intervals starting in October 2025.

86. Based on Radius approval, the Board of Icon resolved on 22nd August 2025 that:

“following approval of the build costs, investment returns (including the proposed inducements) by the Radius Investment Committee on tonight’s tower submission call, the tower works at Queen’s Oak site will commence as soon as vacant possession is obtained.” [B475-476]

87. In his second Witness Statement dated 15th September 2025, Simon Robinson on behalf of On Tower suggested that temporary site and rigging costs for MNOs as stated by Mr Kay were inadequate and could be as much as £122,000 [H12-15]. Accordingly on 22nd September 2025 APW held a further Board Meeting [H374-375]:

OTUK has suggested that the costs to be incurred by the MNOs could be in the range of £96,000 to £122,000. Icon does not agree the figures. It has previously factored into its calculations an incentive towards rigging costs of £35,000. Icon now wishes, in a worst case scenario, to provide an incentive of up to £122,000, and seeks additional funding for that purpose.

It was resolved:

That the Company will provide any additional funding that is required to allow Icon to offer an incentive of up to £122,000.

88. When asked by the Tribunal, Mr Kay confirmed that, although incentives up to £122,000 was potentially available, he did not consider that anything like that sum would be needed. Mr Kay was very careful to explain that the question any incentive, if at all, would be the subject of a business discussion once Icon's new tower had been built.
89. Mr Kay said that he had had a call with Nithya (surname unknown) at Icon underwriters about the effect on IRR of the increased incentive but had not yet communicated that information to the Radius Investment Committee. Mr Kay told us that on the basis of the telephone call IRR (20 years) was 6.15% and IRR (30 years) was 7.77%.
90. After Mr Kay had completed his evidence and been released Icon obtained Radius Investment Committee approval, as evidenced by an email dated 2nd October 2025 from Esteban J. Castrejon containing "*formal confirmation of the Radius Investment Committee's approval for this site, including the £122,000 incentive and corresponding reduction in IRR*" [H475].
91. On 2nd October 2025 there was a further APW Board meeting [H471-474]

Business of the Meeting:

e) It is understood that evidence was given in the proceedings that taking into account the Increased Incentive Sum, the IRR of the development would be 6.15% for 20 years and 7.77% for 30 years

f) The Adjusted IRRs were approved by the Radius Investment Committee on 2 October 2025 as recorded in an email from Este on 2 October 2025 at 21:03. Peter Thacker was in attendance on the submission call and confirmed that it had been explained to the Committee that although the Adjusted IRRs vary by number of carriers and the term over which they are calculated, the Increased Incentive Sum would be deployed by Icon in its discretion. It is not commercially likely that the entirety of the Increased Incentive Sum would be dispensed only to one carrier over a 20-year term.

Resolved:

3. That the Board is content with how the Increased Incentive Sum and the Adjusted IRRs have been dealt with to date;

4. That the Board remains of the firm view that there is no reason not to proceed with the Queens Oak build out;

92. Mr Lees put it to Mr Kay that the driver behind Icon's proposed redevelopment was to resist renewal proceedings. Mr Kay's response was that Icon was seeking a return on its investment and the best way for that to be achieved was to remove potential competition.
93. Mr Kay has been clear in his evidence, both written and oral that Icon wants to ensure the best chance that MNOs will come across to the new Icon tower. Mr Kay was extremely frank in his evidence. He accepted that he did not know if the MNOs would come across and that Icon could not force them to do so. He has not spoken to them. He thought that the MNOs were keeping their options open but there was a risk that they would not come across. Mr Kay accepted that there was a possibility that the MNOs would find an alternative location. In such circumstances Mr Kay said that Icon would proceed with its redevelopment even if none of the 3 carriers come across. It would do so as part of its plans to break into the market. There is also benefit in building a "naked" tower because the site is more valuable "*if you own the steel sitting on it*".
94. In addition to the "naked tower" build Mr Kay put forward a further business strategy during cross examination by Mr Lees. Mr Kay suggested that even if no tenant came onto the site for the first two years and then one of the carriers came across at a rent of £12,500 that would give an IRR of 5.72%. If a second carrier came on site in October 2029, also paying £12,500 p.a. IRR would increase to 8.25%. Mr Kay confirmed that he had entirely discounted Arqiva/Anglian Water in that scenario. Mr Kay's business case suggesting carriers only coming across after 2 and 4 years was raised for the first time in cross examination. It is not raised in the SCIP [B448] which is based on three carriers starting October 2025, staggered at 1, 2 and 3 monthly intervals for logistical reasons.

95. Mr Kay was cross examined at length by Mr Lees in respect of the MNOs currently at the site. When asked about MNOs Mr Kay said that “we do speak generally”. However, Icon does not have MNO’s coming to them to ask for sites. Icon has yet to break into the market. Accordingly, Mr Kay agreed with Mr Lees in cross examination that Icon is unaware of MNO’s specific requirements for the new site. Mr Kay said that although neither EE or H3G intended to upgrade or replace at the present time, he was satisfied that they would have to do so over the lifetime of the tower. Mr Kay estimates that the new tower will last significantly longer than 30 years with good maintenance. He accepted that Icon’s proposals would cause significant disruption for the MNO’s but felt that once Icon had spoken to them and heard what Icon had to offer the position would change. In particular Icon can offer security of tenure up to 30 years if required. This is advantageous for MNOs who are looking at “total costs of ownership”. Mr Kay also took the view that disruption was something that occurs at all sites where upgrades were necessary. Mr Lees suggested that Icon’s decision was not customer lead. Mr Kay replied that “*we are removing the only mast – that is competition.*” Mr Kay believed that all MNOs would come across based on lower rents and also lack of an alternative site. There is in Mr Kay’s opinion a clear driver. MBNL need to maintain coverage and are known to be seeking an alternative site close by. Similarly, CTIL have asked On Tower to find an alternative site. There is clearly demand from Anglian Water as they have, very recently, entered into a 20 year agreement at the existing site.
96. When asked why he had not spoken to MNOs Mr Kay gave two reasons. The first relates to ongoing 1954 Act proceedings in the County Court concerning a site known as Dredgemans Hill in which the parties are in dispute about, inter alia, the ownership of a mast. Icon accordingly notified all operators at that site that they should make payments directly to Icon. On Tower’s legal team responded on 19th August 2024: “*It is, of course, completely inappropriate for Icon to contact On Tower’s customers and we have informed them of the situation.*” The Tribunal finds that whilst there may be issues at one particular site that would not prevent Mr Kay from, perfectly properly, speaking to MNOs about proposals in respect of Queens Oak Farm. Indeed, he accepted later in his evidence that Icon does speak to MNOs but not about Dredgemans Hill or Queens Oak Farm. The second reason why Mr Kay has not spoken to MNO’s is that

commercially Icon will be in a much stronger position to do so should they win this case.

97. Mr Kay is not aware of a potential alternative site for the MNOs to migrate to other than White Rose Farm which he said: *“makes sense, keeps their options open”*. Mr Kay said that although he had not had any discussions with the MNOs, Icon checked planning applications daily and *“without planning they do not have a site”*. Mr Kay explained that there are 6 dishes at the site for transmission links to other sites. If On Tower move too far away those transmission links may be broken.
98. Mr Kay was asked what would happen if On Tower vacated the Site voluntarily. Mr Kay said that Icon would still build their tower. Mr Kay said that the tower market is a difficult one to break into. It might take years. He accepted that the MNOs may not come across, but Icon had the only site in the vicinity with planning, a tower and ownership of land. Mr Kay said that at present operators were hedging their bets. Understandably they want to avoid disruption but once built they will come over. Mr Kay was very clear that if the MNOs shun Icon’s new tower that would be *“hugely anti-competitive”*. A new tower at Queens Oak farm is well worth building. Icon knows the site is needed and they can provide operators with everything they need. Mr Kay added: *“easier to be the sole provider – competition in practice.”* Later he said: *“if we do not kick OT off, we cannot get tenants. It makes perfect sense. Competition in action.”*
99. In Mr Kay’s view Icon’s original plan to build on the Icon Site is less attractive than going over the On Tower Site. The On Tower Site involves marginally higher costs and greater disruption. However, the prospects are far better as a new mast on the On Tower Site will be the only tower in the area. Ultimately a new mast on the On Tower site is the best solution and long term investment.
100. Icon has built towers speculatively. It has built only 6 towers, 5 of which still stand unoccupied. Breaking into the market has proved difficult. Even where there are coverage gaps MNOs will not come over. Only one of Icon’s towers is occupied. That occupier is Airwave. Vodafone were going to come over to Tryst Sports Centre in Cumbernauld and Century Mill in Bolton. However, Vodafone have not done so. Mr Kay believes that is as a result of the **Steppes Hill Farm** which *“didn’t help our*

relationship with Vodafone". MBNL have not expressed interest in Trysts Sports Centre as their site is not at risk. MBNL have looked at other sites around Century Mill but have not indicated a wish to come onto that site. There has been no interest whatsoever in the other speculative builds.

Evidence of Ralph Freemantle

101. Mr Freemantle is not a decision maker at icon. He does not decide when to proceed with a site or undertake commercial analysis. His role relates to customer design needs. In simple terms how best to get kit onto a tower.
102. Mr Freemantle confirmed that Icon has not yet had an MNO make contact and ask for a new site. The legacy portfolio transferred from APW to Icon contains about 50 sites. Icon has not built a lot of sites. Only 6 have been built.
103. As Icon do not own the mast at Queens Oak Farm Mr Freemantle has not carried out any investigations. He confirmed that Icon had built speculatively where there was a need for coverage but no mast. The Swann tower is Icon's default structure for most site builds. The site at Queens Oak Farm is within the generic load case in terms of height and wind speeds. The Swann tower has headroom for upgrades. Mr Freemantle has not had any contact with the MNOs at the site and accordingly is not aware of any need for upgrades.
104. Mr Freemantle said that he felt it inappropriate to talk to On Towers customers during pending litigation. He would not like to guess what they might think. Mr Freemantle accepted that the MNOs might well go somewhere else. The choice is one for the MNOs – they may not come over at all.
105. Mr Freemantle has for that reason not undertaken any design work. Icon cannot specify antennas as discussions in terms of radio have not begun.

106. The works required to give effect to Icon's proposed redevelopment, assuming power and fibre already installed, are set out at paragraph 32 of Mr Freemantle's Witness Statement [C29]:

- (a) Removing active equipment from the existing tower
- (b) Installing temporary trackway
- (c) Removing the existing tower
- (d) Breaking out and removing the existing concrete base
- (e) Installing new foundations
- (f) Erecting new steel tower onto stub
- (g) Rigging for new antenna, feeder and fibre cabling.

Mr Freemantle explained that On Tower would carry out items (a) – (d). Icon will carry out items (e) and (f). Icon could also carry out rigging under item (g). However, it may be that MNOs will use their own design teams in which case it would be more sensible for MNOs to carry out rigging themselves.

107. Potentially agreement could be reached between the parties for the existing concrete base to remain. However, it may be difficult to accommodate the loading of the Swann tower using resin anchors attached to the existing concrete base. Icon has not carried out any analysis of the existing concrete base and there is "*a lot of homework to do*", but the most likely scenario is replacement. Icon's preference is for On Tower to remove its concrete base so that Icon can install a new base with a stub on which to mount the Swann tower.

Evidence of Simon Robinson

108. Mr Robinson very helpfully talked the Tribunal through the active equipment presently on site by reference to the photograph at [B669]. There are 9 panel antennas. At the top of the headframe are 6 antennas, 3 each for EE and H3G. EE and H3G have their own antennas but share transmission equipment on the ground. At the bottom of the headframe are 3 more panel antennas. These are shared by VMO2 and VF who share antennas and transmit through the same equipment. Arqiva has an omni antenna.

Rigging bundles are both coaxial and fibre. The bundle on the right-hand side of the photograph runs to the top of the tower and serves EE and H3G. The rigging on the left serves VMO2 and VF.

109. Mr Robinson confirmed that On Tower would remove the concrete base at the site unless any agreement to the contrary was reached with Icon. It would be unusual to remove fibre on decommissioning a site. The usual arrangement would be for it to be terminated and capped. Similarly, power would be terminated with the DNO. Fencing at the site would usually be a matter for discussion with the landlord as to removal or otherwise.
110. The On Tower Mast is made of galvanised steel and usually, on decommissioning, it would be cleaned, painted and put up at another site. If not capable of reuse it would be recycled. The concrete base could be crushed and used as subbase for roadbuilding or filling up quarries. Ultimately On Tower is responsible for any landfill. On Tower would return the site to greenfield, if requested by the landowner, by covering with topsoil and planting with seed. Otherwise on removal of the concrete bases On Tower, with landowners' agreement, would fill in the hole and make safe. Mr Robinson thought a trackway would probably not be necessary at this site given the proximity of the concrete farm road and the fact that the site is not in a boggy area.
111. Simon Robinson made a Second Witness Statement on 15th September 2025 [H12-15] which sets out the costs of the temporary site and the costs to be paid by the MNOs. Icon proposes a temporary tower as close as possible to the existing On Tower mast. Mr Robinson agrees that this is sensible as it allows ground based equipment to be reused and design costs will be lower. The disadvantage is that the temporary site will need to be rigged identically to the existing mast (4 sets of rigging – one per MNO). Mr Robinson indicates that for VF, VMO2, EE and H3G 2,400m of coaxial feeder will be required costing in the region of £60,000-£75,000 to supply and fit. Mr Robinson also indicates that MNOs will only use “Tier 1” subcontractors rather than “Tier 2” as proposed by Icon. Mr Robinson suggests further costs not taken into account by Mr Kay:
 - Installation of new equipment - £10-15,000

- Fibre and DC rigging - £15-18,000
- Line of sight check - £5-6,000
- Site commissioning and integration - £6-8,000.

112. MNOs at Queens Oak Farm still use coaxial cable. EE, however, has moved to fibre but still also has some coaxial cabling on site. Rigging with fibre is lower cost. Rigging costs are incurred in four stages – derig tower, rig temporary tower, rig new tower and derig temporary tower. Those rigging costs will be borne by MNOs.

(1) Subjective test – intention

113. The test of intention was formulated by Asquith LJ in **Cunliffe v Goodman** [253 and 254]:

An "intention" to my mind connotes a state of affairs which the party "intending"—I will call him X— does more than merely contemplate : it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition.” “X cannot, with any due regard to the English language, be said to "intend" a result which is wholly beyond the control of his will.”

“This leads me to the second point bearing on the existence in this case of "intention" as opposed to mere contemplation. Not merely is the term "intention" unsatisfied if the person professing it has too many hurdles to overcome, or too little control of events: it is equally inappropriate if at the material date that person is in effect not deciding to proceed but feeling his way and reserving his decision until he shall be in possession of financial data sufficient to enable him to determine whether the project will be commercially worthwhile.

A purpose so qualified and suspended does not in my view amount to an "intention" or "decision" within the principle. It is mere contemplation until the materials necessary to a decision on the commercial merits are available and have resulted in such a decision.”

“Neither project moved out of the zone of contemplation—out of the sphere of the tentative, the provisional and the exploratory—into the valley of decision.”

Icon and APW undertakings

114. Icon and its parent company APW have both offered undertakings:

- *Icon undertakes to the Tribunal and also to On Tower that it will commence the intended redevelopment of the On Tower UK site at Queens Oak Farm and complete the same as soon as reasonably practicable upon vacant possession being obtained. [H476]*
- *APW undertakes to the Tribunal and On Tower that it will make available all such funds as may be necessary to support the Icon Undertaking even should the costs of so doing exceed the Estimated Costs (“Estimated Costs” means the total anticipated cost of undertaking the Queen’s Oak redevelopment, estimated to be not more than £332,697) [H477]*

Those undertakings were approved by Icon’s Board on 22nd September 2025 [H376-377] and by the Board of APW on 2nd October 2025 [H471-474]

115. Icon’s accounts for the year ending 31st December 2024 show a loss of £3,076,173 [H390-408]. Icon has fixed assets of £8,371,654. However, Icon’s current liabilities exceed its total assets by £3,129,771. The balance in Icon’s current account on 30th September 2025 was £257,805 [H409 – 422]. APW’s accounts and bank statements [H423-470] show that it has more than sufficient funds to make available all such funds as may be necessary to support Icon’s undertaking.
116. The learned commentators in Reynolds and Clark: Renewal of Business Tenancies 6th Ed, helpfully summarise the position in respect of the use of undertakings in 1954 Act proceedings at 7-208 and 7-275:

“In the Betty’s Cafes case, the court accepted an undertaking from the landlord to carry out the proposed works. In Espresso v Guardian the court accepted an undertaking to carry out certain works and to occupy for business purposes under ground (g). It was stated that where a responsible landlord offers such an undertaking to the court it will be powerful evidence of fixity of intention, although not conclusive. There is some doubt as to the appropriateness of the court accepting an undertaking in a case falling under ground (g), although the same objections would not appear to extend to an undertaking given under ground (f)”

“It is common for a landlord to give an undertaking to the court under ground (f), but there may be some doubt as to the propriety of the court accepting an equivalent undertaking under ground (g). In Espresso v Guardian such an undertaking was accepted under both grounds (f) and (g). In London Hilton Jewellers v Hilton International Hotels, the Court of Appeal held that the giving of an undertaking to implement ground (g) “compelled fixity of intention” and “was decisive”. In Lennox v Bell an undertaking was offered under ground (g) but the court declined to regard the offering of that undertaking as being conclusive either of the bona fides of the landlord’s intention or of its firmness. In Lightcliffe v Walton, the Court of Appeal held that the giving of an undertaking under ground (g) did not create a legal presumption that the landlord’s stated intention was genuine and, if the judge had ground for doubting the landlord’s veracity, he was entitled to disregard the undertaking altogether.”

117. More recently Lord Briggs considered the position in **Franses** at [29]:

“The courts have until now restricted the forensic examination of the Landlord’s purpose or motive to a test of the genuineness of that intention. By genuineness I have no doubt that the court meant honesty. In practice, that examination has, for very many years, largely been overtaken by the common use of the undertaking to the court to carry out the works if a new tenancy is refused, as a reliable litmus test for genuine intention. But neither the undertaking to the court, nor the examination of the genuineness of the landlords intention, will reveal whether the landlord’s intention is of the disqualifying conditional kind, as this case demonstrates.”

118. Mr Lees objects to the undertakings primarily on the basis that Icon itself does not have sufficient funds to support its undertaking but also because both undertakings lack specificity, are reactive in that they were provided during the course to the hearing and are given under the authority of Peter Thacker at APW who has not been tendered for cross examination.
119. We have been referred to **Nogueira v Westminster LBC** [2014] UKUT 327 (LC). In that case it was held that the FTT could not accept undertakings. However, the Upper Tribunal was not referred, in that case, to the power of the FTT to accept an undertaking and subsequently to transfer to the Upper Tribunal for enforcement under FTT Rule 6(3)(n)(ii), the Upper Tribunal having all the powers of the High Court under s25 of the Tribunals, Courts and Enforcement act 2007. We are satisfied that we can accept the undertakings proffered on the basis of our powers to transfer to the Upper Tribunal for enforcement.
120. Icon is an operator pursuant to an OFCOM direction. We are satisfied that the proposed undertaking is backed financially by the APW undertaking. We therefore accept both the Icon and APW undertakings as evidence, although not conclusive evidence, of the genuineness of Icon's intention to commence and complete its proposed redevelopment.

Conclusions – subjective intention

121. In determining Icon's subjective intention, we must first determine what that intention actually is. Our finding is that Icon's settled intention is investment led. It is based on the business plan contained in the TRM dated 21st August 2025 [B441], blended IRR [B442] and the SCIP of August 2025 [B445-448] which was approved by the Radius Investment Committee on 21st August 2025 [B449-50] and by the Icon Board on 22nd August 2025 [B475-476].
122. There is no suggestion from any of the Icon, APW or Radius decision makers that Icon's redevelopment intention involves the building of "a naked" tower i.e. a tower with no carriers. There is no support from any of the Icon, APW or Radius decision makers that

Icon's plans for the Site are as a "start up" or "seed" capital. There is no support for Mr Kay's suggestion that there is benefit in building a "naked" tower because the site is more valuable *"if you own the steel sitting on it."* We find no support in the Board minutes of Icon nor from the Radius Investment Committee that business plan was to build a naked tower for marketing purposes. There is no support for Mr Kay's suggestion that Icon will proceed with its redevelopment if the 3 carriers do not come across. Nor is there any support for the contention that the business case was based on a naked tower for 2 years with the first carrier coming on in 2027 and a second carrier in 2029. We find that there is no realistic prospect of MNOs, having decamped to a new site, would seek to return to Queens Oak Farn after 2 or even 4 years. Those alternative business cases are mere contemplation on Icon's part, containing too many hurdles and events outside of Icon's control. Above all they lack any commercial merit. We find that Icon's redevelopment is wedded to MNO's migrating from On Tower.

123. At paragraph 308 of **Steppes Hill Farm** the Upper Tribunal made the following findings:

"The commercial objectives behind the construction of the New Tower emerged quite clearly from the evidence referred to in our previous paragraph and from the evidence generally. The New Tower is designed to accommodate the four MNOs which currently use the Vodafone Site and the MBNL Site, at rents which we assume to be more advantageous to Icon. It is quite clear from the evidence that what Icon is seeking to achieve, in relation to the Sites, is a situation where the Vodafone Site and the MBNL Site are decommissioned, thereby compelling Vodafone, Telefonica, H3G and EE to migrate to the Orange Site. Indeed, if this was not the intention of Icon, the Respondents' investment in the construction of the New Tower on the Orange Site would make little commercial sense. If this investment is to be repaid, operators must be brought to the New Tower, which has been constructed with the intention that it should have plenty of spare capacity for additional operators to join the Orange Site. This commercial objective is, at the least, much more likely to be realised if there is no competition from the Masts. In these circumstances it seems quite clear to us from the evidence, and we so find, that Icon has demonstrated a decision to proceed with the removal of the Masts."

124. Having discounted Mr Kays “naked tower”, value of the land with steel on it and carriers not coming across until 2027 and 2029 we are left with the investment led business case set out in the SCIP. The SCIP is based on financial modelling based on 3 carriers coming across in 1 month, 2 months and 3 months. It is an investment led strategy to provide a return for Icon, APW and Radius on their investment. The commercial objectives behind the SCIP are clear and 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.

(2) Objective test – reasonable prospects

125. The planning experts are agreed that there is no planning impediment to Icon’s redevelopment. Icon’s plans are backed by APW and Radius and it is not disputed that it has funding in place.

126. Icon bears the burden of satisfying the Tribunal that it has reasonable prospects of being able to bring about the redevelopment. In a 1954 Act case, **Gatwick Parking Services Ltd v Sargent** [2002] EGLR 45, CA Laws LJ observed:

“the hurdle to be surmounted by the appellant under section 30(1)(g), in the light of the authorities on the subject, is by no means a high one. It does not have to demonstrate a balance of probability that [planning] permission will be granted. He has to show that there is a real, not merely a fanciful, chance.”

127. The Tribunal is required to assess the objective element on the assumption that Icon is entitled to possession of the site and that On Tower’s tenancy at will has determined. In **Westminster City Council v British Waterways Board** [1985] AC 676 at [680-682] Lord Bridge said that the 1954 Act requires that the landlord’s “*prospect of success should be assessed on the footing that he is entitled to possession...*”. The task before the Tribunal was set out in **Humber Oil Terminals Trustee Limited v Associated British Ports** [2012] EWCA Civ. 596 at [25]:

“The judge had to assess the objective element of ABP’s [Landlord] stated intention by making the required statutory assumption that it is ABP and not HOTT [Tenant] that is in possession of the premises; and therefore necessarily on the assumption that HOTT’s tenancies had determined. That is what he did and he made his findings of fact referred to above as to the probabilities of what would then happen.”

At first instance Vos J held: *“I do not need to decide what will happen, only on a balance of probabilities what is the most likely outcome”* [see paragraph 19 of the Judgement of Rimer LJ].

The position of the MNOs

128. Frederick Ansell (Asset Protection Manager for On Tower) has prepared two Witness Statements dated 28th April 2025 [C2-5] and 27th August 2025 [C41-45]. His evidence was agreed and Mr Ansell did not give oral evidence to the Tribunal. In his second Witness Statement Mr Ansell confirmed that:

Paragraph 6 [C42]: *“there are no customer demands for future upgrades at this Site or any requirement to increase the height of the tower”*.

129. At paragraphs 7-9 [C42-43] Mr Ansell explains the procedure On Tower follows where it receives a notice to quit (“NTQ”) from a site provider:

Stage 1: Receipt of NTQ and initial strategy review

Stage 2: Inform customers and serve notice to terminate

Stage 3: Site search and nomination process

Stage 4: Acquisition and design

Stage 5: Build and decommissioning

130. On Tower has served termination notices on its customers at the site:

NTQ – EE 19th November 2024 [H143-149]

NTQ – H3G 19th November 2024 [H150-156]

NTQ – Telefonica 1st May 2025 [H157-163]

NTQ – Arqiva 21st August 2025 [H164-168]

131. A potential alternative site at White Rose Farm has been nominated:

VMO2 Site Share Project Requests 1st July 2025 [H113] and VMO2 demand for the QOF replacement site [H120-125]

EE and H3G email from Ericsson (MBNL copied in) to On Tower dated 18th February 2025 and Nomination file (redacted) [H280-283]

Arqiva: Emails between Catherine Rogers of Arqiva Limited and Spencer Cunningham of OTUK 18th September 2025 – 30th September 2025 [H384-386]

132. At paragraphs 10 and 11 of his Second Witness Statement [C43-44] Mr Ansell explains that On Tower has identified an alternative site at White Rose Farm. He also explains that MBNL (not On Tower) have made a planning application for White Rose Farm:

“10. I can confirm that the same process has been followed in this case. On Tower’s Licensing team served termination notices on our customers and we have identified a potential alternative site at White Rose Farm which has been nominated by EE and H3G (via MBNL, their managing agent). We are therefore progressing this as a back up to the Site if Icon is successful in these proceedings.

11. Our customers don’t necessarily want to put all their eggs in one basket and sometimes they will also run their own processes as a back up in case the alternative site fails in the acquisition and design process or we fail in remaining in occupation of the current site. Each customer has its own processes and they often pursue a parallel process to ours so they can minimise the risk of having a dead cell and have a back up option in case On Tower cannot provide a replacement, such as White Rose Farm. As mentioned in paragraph 7 above, I am aware MBNL has made a planning application in relation to White Rose Farm, but I don’t have any information about the planning application or its withdrawal.”

133. The only other information that the Tribunal has in respect of the White Rose Farm nomination is contained at paragraph 49 of Mr Kay's second Witness Statement [C40]:

"I am told by APW's legal team that on 21 May 2025 they became aware from a check of the planning portal that EE and H3G submitted a prior approval application on 17 April 2025 in relation to the installation of a telecoms mast at White Rose Farm, which is located near the On Tower Site. This was subsequently withdrawn on 1 May but the reasons for this are not known."

Our finding of fact is that MBNL, independently of its nomination to On Tower, made a planning application in respect of White Rose Farm on 17th April 2025 which it withdrew on 1st May.

134. At paragraphs 314-317 of **Steppes Hill Farm** the Upper Tribunal considered the position of the MNOs:

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

315. So far as the MNOs other than Vodafone who are using the Masts are concerned, we are not able to say what they would do. In closing submissions Mr Watkin argued that we were entitled to infer, from the available evidence, that other MNOs would wish to stay in the location. Mr Watkin also submitted that Vodafone could have called

evidence from the other MNOs but had not done so. It was submitted that we could infer from this that Vodafone was seeking to insinuate that there were difficulties with the other MNOs migrating to the New Tower, without being able to demonstrate this by evidence.

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

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

135. We have the advantage over the Upper Tribunal in **Steppes Hill Farm** in that because of the way the case has been run before us we have some material about the likely

actions of the MNOs. We approach that material with caution because we do not have any direct evidence from the MNOs. However, we do have sufficient secondary evidence from which we can safely infer the likely actions of the MNOs.

136. In support of the Icon Position that once all the posturing is over the MNOs will migrate:

- Commercial pragmatism will prevail.
- The MNOs will want to avoid detriment to their customers and will not “set their faces” against migration
- Icon is providing a brand-new tower which is future proofed and can support all future upgrades and sharers
- The site at Queens Oak Farm works in terms of network coverage and transmission links
- There is clear demand. The MNOs are known to be looking at alternative sites close by. Arqiva/Anglian Water have very recently come onto the Site.
- MNOs will need to maintain coverage. The MNOs will want at all costs to avoid a “dead cell” or “not spot”.
- The rent offered is competitive and based on existing payaway figures
- Icon is prepared to offer incentives of up to £122,000 to cover additional rigging costs
- Icon is the freeholder of the site and can offer long term agreements of 20 or 30 years allowing MNOs certainty as to total costs of ownership
- On Tower do not have planning permission for alternative sites. MBNL have withdrawn their application at White Rose Farm.
- On Tower will require Prior Approval for any new mast up to 25m and full planning permission for a mast above 30m
- Without planning On Tower do not have an alternative site

137. In support of the On Tower position in respect of the MNOs:

- Icon have not spoken to the MNOs at all about this case
- Icon has not had any discussions with MNOs about their technical requirements.

- All 3 carriers are working with On Tower to find an alternative site and have made nominations.
- MBNL and Arqiva have both objected to Icon's 2025 planning application.
- Icon has built 6 "naked towers". None of the MNOs has come onto those towers.
- Icon does not have an established relationship with MNOs seeking new sites
- Mr Kay, in his candid evidence, accepts there is a real risk that MNO's may not come across until 2027, 2029 or at all. Similarly, Mr Freemantle accepted that MNOs may well go somewhere else. This is clear evidence that Icon themselves have very real doubts as to viability of its business plan.
- The offer of incentives to attract MNOs suggests that Icon is well aware of MNO reluctance
- The manner in which the Respondents have conducted this litigation will have damaged their relationship with the MNO's as Mr Kay accepted had happened with Vodafone following Steppes Hill
- As explained by Mr Ansell, On Tower has a well established existing procedures to move to a new site when served with an NTQ by a site provider
- On Tower is able to use the Prior Approval procedure to obtain planning permission for a new tower up to 30m at an alternative site
- On Tower as an operator has expropriatory powers under the Code, where the public benefit likely to result outweighs prejudice, to obtain new sites under Part 4 of the Code.

138. The proposed Icon tower is future proof, the rent competitive and Icon can offer a long term deal. The Site at Queens Oak Farm works and there is clearly demand. Icon is prepared to compensate MNOs for the costs of migration by way of substantial incentives. However, Icon has not spoken to the MNOs. MNOs are actively seeking alternative sites. Icon has no existing relationship with MNOs. MNOs have not migrated to any of Icon's new towers. This litigation will have damaged any future relationship Icon may have had with MNOs.

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.

(3) Conditional Intention

139. In **Franses** at [19] Lord Sumption JSC set out the test to be applied:

“...the landlord’s intention to demolish or reconstruct the premises must exist independently of the tenant’s statutory claim to a new tenancy, so that the tenant’s right of occupation under a new lease would serve to obstruct it. The landlord’s intention to carry out the works cannot therefore be conditional on whether the tenant chooses to assert his claim to a new tenancy and to persist in that claim. The acid test is whether the landlord would intend to do the same works if the tenant left voluntarily.”

140. Conditionality in the context of Code rights was considered in **Meyrick** at [37]:

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

141. Mr Lees relies on the way in which Icon’s case has pivoted in response to the ongoing litigation. In 2022 the Site was discounted in a review of 4,040 sites in the APW portfolio. At that time 948 sites were better and 170 went forward for planning. No coverage drivers were identified in 2022 and that position has not changed. The decision to look again in 2024 was entirely lawyer led in response to the renewal proceedings and the claim for Code rights. Queens Oak Farm was simply “fast tracked” in response to the restarting of litigation. In 2025, in the aftermath of **Steppes Hill Farm**, Icon pivoted from building on the Icon Site to going over the On Tower site. The evidence of Mr Kay is that IRR for the Icon Site was similar to IRR for going over the On Tower Site. The explanation given by Icon is that the change of strategy in was made in the face of an offer (never actually made) of a renewal at a rent of £1750 p.a. Mr Lees

submits that the pivot in 2025 was solely to defeat Code rights. At the hearing Icon pivoted yet again to a naked tower strategy which Mr Lees characterises as opportunism to shore up a failing investment led case. Icon's strategy, Mr Lees submits, is entirely lawyer-led. Icon would do whatever is necessary to get On Tower off the site and defeat its claim for Code rights.

142. The finding in **Steppes Hill Farm** is at [328-330]:

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

329. ...

330. ... Applying Lord Sumption's "acid test" in the present case, we find that Icon would proceed with the removal of the Masts, even in circumstances where Vodafone was not seeking Code rights and, together with Telefonica, was willing voluntarily to vacate the Vodafone Site.

143. We accept Mr Clark’s arguments that Icon makes no secret of its desire to better its position by removing a competitor from the Site. Mr Kay said as much in his evidence. That is a perfectly legitimate business aim and recognised as such in **Steppes Hill Farm**. The consequence of Icon’s redevelopment is that On Tower is prevented from acquiring Code rights – but that is a merely collateral effect. The pivot by Icon in 2025 to going over the On Tower Site was entirely consistent with its investment led strategy as set out in the SCIP. Applying the acid test as adopted in **Meyrick** we find that Icon would intend to do the same works even if Icon did not seek Code rights.
144. At this point we would wish to say something about the Icon legal team. We are quite satisfied that any implied criticism made by On Tower is entirely unintentional. For our part, solicitors and counsel who have represented Icon before us have done so entirely professionally.

(4) Reasonable time

145. In **Steppes Hill** at [277] it was held that redevelopment must be commenced within a reasonable time of termination of the code agreement:

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

146. The joint consensus of the technical experts is that the redevelopment will take 12 weeks at best if re-using the existing base and approximately 26 weeks if new foundations/base are required and a temporary site is not acceptable to the MNOS [Q6 at D45].

147. Icon have not contacted the MNOs to discuss their requirements for the site. No commercial or technical conversations have taken place. As Mr Freemantle told us there are many “*ifs, when’s and maybes*”. It is clear that final technical and design discussions will only start once vacant possession has been obtained. No final decision has been made in respect of who will rig, the fate of the existing concrete base, whether operator cabinets will remain and details of the temporary site. However, we find that it is likely that technical issues will be resolved during the 12/26 week period proposed by the technical experts.
148. We find that construction of the new tower can be completed within a reasonable time.

(5) The meaning of Redevelop

149. Mr Clark refers to “the irreducible minimum works” that Icon will carry out. Those works include excavation, concrete foundations and the installation of the new tower. Mr Freemantle told us that the most likely scenario is that Icon will replace the concrete base. However, it remains an open question as no analysis of the existing concrete base has been carried out. In particular design work needs to be carried out as to whether resin anchors attached to the existing base would be sufficient or whether a new base with a stub will be required. Our finding is that although Icon have expressed a preference for a new base no final decision as to the “minimum works” of excavation and new concrete foundations has yet been made. Similarly, Icon has not yet had any discussions with On Tower as to fencing and the capping off of fibre and power. We adopt Mr Robinson’s evidence that it would be unusual for fibre to be removed and that power would be terminated with the DNO (Distribution Network Operator). We find that trenching work is unlikely to be required.
150. Mr Lees’s submits that that the natural meaning of the word “redevelopment” connotes a change to what was on the land before. Icon is merely replacing existing ECA. The net result is the same. Replacement is not redevelopment.
151. Mr Lees also relies on paragraphs 5, 101 and 108 of the Code:

5 Electronic communications apparatus, lines and structures

(1) In this code “electronic communications apparatus” means –

- (a) apparatus designed or adapted for use in connection with the provision of an electronic communications network,*
- (b) apparatus designed or adapted for a use which consists of or includes the sending or receiving of communications or other signals that are transmitted by means of an electronic communications network,*
- (c) lines, and*
- (d) other structures or things designed or adapted for use in connection with the provision of an electronic communications network.*

(2) References to the installation of electronic communications apparatus are to be construed accordingly.

101 Ownership of property

The ownership of property does not change merely because the property is installed on or under, or affixed to, any land by any person in exercise of a right conferred by or in accordance with this code.

108 General Interpretation

“land” does not include electronic communications apparatus;

152. In Mr Lees’ submission, to hold that replacement of ECA constitutes redevelopment of land is inconsistent with paragraphs 5, 101 and 108 which clearly distinguish between land and ECA and also between the redevelopment of land and the installation of ECA. For that reason, Icon’s redevelopment relating to a mast, cabinets and concrete bases (which as structures for use in connection with a network fall within Paragraph 5(1)(d)) cannot be redevelopment of land.

153. Mr Lees also relies on the policy drivers behind the Code. As Judge Cook observed in **Meyrick** at [5]:

“It is unlikely that the Law Commission contemplated redevelopment of this nature when it recommended a provision to the effect of para.21(5).”

The balance to be struck between operator’s business needs, the public interest and the interests of site owners was set out by Fancourt J in the oft quoted passage in **EE v Stephenson** [2021] UKUT 167 (LC) at [53]:

“The purpose underlying the Code is to ensure that operators can use and exploit sites more flexibly, quickly and cheaply than had previously been the case, at lower than open market rents, in furtherance of the public interest of providing access to a choice of high quality electronic communications networks, while providing a degree of protection to site owners' legitimate interests”

In Mr Lees submission the tearing down and replacement of ECA does not support rollout and does not encourage investment. Competition would be better fostered by Icon continuing with its 2024 plan of building on the Icon Site. In addition, Icon’s proposed redevelopment would come at a significant environment cost.

154. A different view was taken by the Deputy Chamber President, when considering inclusion of a redevelopment break clause, in **EE Ltd v. AP Wireless II (UK) Ltd** [2024] UKUT 216 (“Vache Farm”) at [21]:

“.... as Stephenson shows, it is not the policy of the Code to stand in the way of 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 the future enjoy less favourable terms at that site than if its previous lease of the land had continued.... If, at the end of the ...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.”

155. As Mr Clark rightly submits Icon is also a WIP and there is no justification for treating one WIP differently from another. The fact that On Tower is the WIP operating from the Site does not entitle it to greater consideration in policy terms than Icon as freeholder WIP. Competition sits front and centre in Paragraph 21 of the Code which requires the Tribunal to have regard to: “*the public interest in access to a choice of high quality electronic communications services*”. Icon’s ambition to break into the market undoubtedly promotes competition and encourages investment.
156. Although Mr Lees has sought to distinguish **Steppes Hill Farm**, we follow what was said in that case, albeit that **Steppes Hill Farm** was concerned with paragraphs 31(4)(c) and (d) rather than paragraph 21(5), at [260]:

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

157. We find that taking down of one mast and the construction of another mast is redevelopment under Paragraph 21(5) of the Code.

Decision

158. Preliminary Issues (a) and (b) have been withdrawn.

159. In respect of Preliminary Issue (c) 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).

160. The test under Paragraph 21 of the Code for the imposition of a code agreement is met.

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.