Neutral Citation Number: [2025] UKUT 280 (LC)

Case No: LC-2024-739

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
Ref: LC-2023-321 and 11 others

Royal Courts of Justice, Strand, London, WC2A 2LL

27 August 2025

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE – CODE RIGHTS – the right to share electronic communications equipment, the site, and rights – the effect of the amendments to paragraph 3 of the Code effected by the Product Security and Telecommunications Infrastructure Act 2022 – wayleaves and conduits – whether an operator should be prevented from objecting to planning applications made by the site provider

BETWEEN:

ON TOWER UK LIMITED

Appellant

-and-

AP WIRELESS II (UK) LIMITED

Respondent

Telecommunications sites at Ewefields Farm, and elsewhere

Upper Tribunal Judge Elizabeth Cooke
29-30 July 2025

Mr Kester Lees KC and Ms Imogen Dodds for the appellant, instructed by Gowling WLG (UK) LLP
Mr Wayne Clark KC and Ms Fern Schofield for the respondent, instructed by Eversheds Sutherland (International) LLP and Freeths LLP

The following cases were referred to in this decision:

Cornerstone Telecommunications Infrastructure Limited v London and Quadrant Housing Trust [2020] UKUT 282 (LC)
EE v Stephenson [2022] UKUT 180 (LC) ("*Pendown"*)
On Tower UK Limited v JH and FW Green Limited [2020] UKUT 348 (LC) ("*Dale Park*")
On Tower UK Limited v AP Wireless II (UK) Limited [2022] UKUT 152 (LC) *("Audley House")*

Introduction

1. This is an appeal from the decision of the First-tier Tribunal in a reference under Schedule 3A to the Communications Act 2003, known as the Electronic Communications Code ("the Code"). The FTT's decision was about the terms of leases to be granted to the appellant, On Tower UK Limited, of sites owned by the respondent AP Wireless II (UK) Limited, pursuant to paragraph 34 of the Code.

2. The appellant was represented in the appeal by Mr Kester Lees KC and Ms Imogen Dodds, the respondent by Mr Wayne Clark KC and Ms Fern Schofield; I am grateful to them all.

The background

The Code

3. The Code regulates the legal relationships between landowners and those who have electronic communications apparatus (or "ECA") on land – or as the Code puts it, between site providers and operators. The latter are business organisations that either operate an electronic communications network (known as "MNOs" or mobile network operators) or provide the physical infrastructure (such as masts) that enables other operators to do so. The provisions of the Code apply only to those operators to whom "the code is applied" by a direction under section 106 of the Communications Act 2003. Thus there are Code operators, and there are other operators. The appellant is a Code operator, the respondent is not.

4. The Code sets out at paragraph 3 a list of "Code rights" which operators may need for their business of providing a network or providing infrastructure. Not all Code agreements confer all the Code rights on the operator; but the conferral of one or more Code rights is what makes an agreement subject to the provisions of the Code, including its provisions about consideration and about security of tenure. Code agreements may be made consensually, or may be imposed upon the appellant and the site provider by an order made by the FTT following a reference under the Code. Their terms include not only the conferral of Code rights but also other terms.

5. A significant innovation of the Code, which came into force in December 2017, was the change it made in the basis of consideration paid by operators to site providers. Paragraph 24 of the Code provides that consideration is now paid at a rate which assumes "that the right that the transaction relates to does not relate to the provision or use of an electronic communications system"; that provision, known as the "no network assumption", means that consideration is calculated without regard to the commercial market value of the right to the operator. That has made the position of site providers considerably less attractive and is the reason why the Code has provoked so much litigation since its coming into force in December 2017; site providers receive consideration for what they provide and compensation for any loss or damage that they suffer because of the exercise of Code rights, but the Code does not provide for them to make a profit out of the arrangement.

6. The Code gives operators security of tenure; so where the Code agreement is a lease, for example, at the expiry of its term it nevertheless continues so that the operator can continue to exercise its Code rights (paragraph 30). However, Part 5 of the Code makes provision for a Code agreement nevertheless to be brought to an end following the giving of a notice, and for the site to be vacated, or alternatively for a new Code agreement to be made by the parties, either by agreement or by an order made under paragraph 34.

7. References under the Code were originally made to the Upper Tribunal, but now that most issues of principle have been resolved provision has been made for references to be commenced in the FTT and to reach the Upper Tribunal only on appeal as this one has done.

The parties

8. The appellant is a wholesale infrastructure provider, or "WIP", providing ECA for MNOs (both Code operators and others) to use. For example it provides mobile phone masts, and allows network operators to place antennae on its masts. Its customers typically also bring some of their own ECA to the site, including cabinets and cables. The appellant's infrastructure is placed on land pursuant to agreements regulated by the Code and which include both the grant of Code rights and other terms. However, the Code does not regulate the placing of ECA on ECA; so the appellant's customers pay a commercial rate for the right to place antennae on its masts, for example, without the benefit of the no network assumption.

9. The respondent's business is the purchase and management of telecommunications sites such as mast sites; in some cases it takes intermediate leases of land already subject to Code agreements, making a capital payment to the original site provider and thenceforth being the immediate landlord to the operator, while in others it buys the freehold of the site, with or without some surrounding land. Unlike many site providers it is not using the site for a business unrelated to telecommunications – farming, for example, or offices where the site is a building. Its business is simply the acquisition and management of telecommunications sites for which it receives the consideration and compensation payable pursuant to the Code.

These proceedings

10. This appeal relates to 12 greenfield sites, one at Ewefields Farm, Chesterton and others elsewhere, where the appellant has had ECA pursuant to Code agreements for some years. In the case of each site a notice has been served under paragraph 33 of the Code requiring that the existing agreement be terminated and a new agreement entered. The validity of that notice has not been in dispute, but references were made to the FTT under paragraph 33(5) of the Code seeking orders under paragraph 34 in relation to each of the sites. The 12 references were heard together by the FTT and a single decision issued, requiring the parties to enter new leases in a standard form (with some site-specific variations) and determining the terms of the leases save insofar as they were agreed. There are no site-specific issues in the appeal and I refer throughout to "the new lease" in standard form although there will be 12 new leases.

11. The appeal is about whether the new lease should give the appellant the right to share with its customers not only its physical infrastructure but also the sites and its rights under the agreements – an issue that has already been the subject of more than one Upper Tribunal decision in relation to other sites. The appellant says that the sharing rights granted to it by the FTT were too restrictive, and it appeals with permission granted by the Tribunal. The respondent has asked for permission to cross-appeal on a number of issues and the Tribunal has directed that that application be heard on a rolled-up basis along with the appeal.

The provisions of Part 5 of the Code about new agreements

12. The relevant provisions of paragraph 34 are as follows (references to "the court" should be read as references to the FTT):

> "(6) The court may order the termination of the code agreement relating to the existing code right and order the operator and the site provider to enter into a new agreement which—
>
> (a) confers a code right on the operator, or
>
> (b) provides for a code right to bind the site provider.
>
> (7) The existing code agreement continues until the new agreement takes effect.
>
> (8) This code applies to the new agreement as if it were an agreement under Part 2 of this code.
>
> (9) The terms … of a new agreement under sub-paragraph (6), are to be such as are agreed between the operator and the site provider.
>
> (10) If the operator and the site provider are unable to agree on the terms, the court must on an application by either party make an order specifying those terms.
>
> (11) Paragraphs 23(2) to (8), 24, 25 and 84 apply—
>
> …
>
> (b) to an order under sub-paragraph (10)
>
> as they apply to an order under paragraph 20.
>
> (12) In the case of an order under sub-paragraph (10) the court must also have regard to the terms of the existing code agreement.
>
> (13) In determining which order to make under this paragraph, the court must have regard to all the circumstances of the case, and in particular to—
>
> (a) the operator's business and technical needs,
>
> (b) the use that the site provider is making of the land to which the existing code agreement relates,
>
> (c) any duties imposed on the site provider by an enactment, and
>
> (d) the amount of consideration payable by the operator to the site provider under the existing code agreement."

13. This appeal is about the terms of the new lease to be entered into in respect of all the sites, and therefore paragraph 34(10) and its incorporation of paragraphs 23 to 25 of the Code is important. Paragraph 24 is about the consideration payable by the operator to the site provider, and paragraph 25 is about compensation payable for any loss or damage sustained as a result of the exercise of a Code right. Paragraph 23 is about the terms of an agreement imposed under paragraph 20, and therefore by virtue of paragraph 34 the terms

of an agreement that is the subject of an order under paragraph 34. Paragraph 23(5) reads as follows:

> "(5) The terms of the agreement must include the terms the court thinks appropriate for ensuring that the least possible loss and damage is caused by the exercise of the code right to persons who—
>
> (a) occupy the land in question,
> (b) own interests in that land, or
> (c) are from time to time on that land."

14. Paragraph 34(12) says that the terms of the existing agreement must be taken into account when considering those of the new agreement; but the Tribunal has not been addressed about the existing agreements for the 12 sites. I understand that that is because they all make different provisions about sharing, and the approach taken by the parties is that the sharing term should be same in all the new agreements. Accordingly paragraphs 34(13) and 23(5) are crucial.

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

> "62. First, the Tribunal should consider the term the operator seeks and the reason why it needs the term in question in order to pursue the business for whose purposes it received its Ofcom direction and in light of the public interest in a choice of high quality telecommunications services.
>
> 63. Second, the Tribunal will consider the concerns or objections raised by the respondent and whether in order to minimise loss or damage in accordance with paragraph 23(5) the term should not be imposed, or should be imposed to a limited or qualified extent.
>
> 64. If those concerns do not prevent the imposition of the term and do not require its qualification, then the Tribunal will consider whether, in imposing that term, it should also impose further terms to minimise loss or damage."

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

Sharing terms in Code agreements

17. Paragraph 17 of the Code provides that every Code agreement automatically confers upon the operator the right to share its ECA and to upgrade it:

> "(1) An operator … who has entered into an agreement under Part 2 of this code may, if the conditions in sub-paragraphs (2) and (3) are met—

(a) upgrade the electronic communications apparatus to which the agreement relates, or
(b) share the use of such electronic communications apparatus with another operator.

(2) The first condition is that any changes as a result of the upgrading or sharing to the electronic communications apparatus to which the agreement relates have no adverse impact, or no more than a minimal adverse impact, on its appearance.
(3) The second condition is that the upgrading or sharing imposes no additional burden on the other party to the agreement."

18. In the Code as originally enacted the right to upgrade was a Code right and the right to share was not.

19. On a number of occasions in the course of the early Code litigation site providers argued that operators should have no more extensive rights to share and to upgrade than were set out in paragraph 17. That of course was not what the Code provided; paragraph 17 set a minimum, but not a limit. The operator might well require for its business operations more extensive rights to upgrade and to share, and such rights could be conferred by agreement, or by the Tribunal subject to the test in paragraph 23(5). In a number of decisions the Tribunal has imposed agreements that provide for more extensive sharing and/or upgrading than those provided for in paragraph 17, for example by permitting sharing with non-Code operators and by permitting the sharing of the site and of other rights. In *Cornerstone Telecommunications Infrastructure Limited v London and Quadrant Housing Trust* [2020] UKUT 282 (LC), the Tribunal (the Deputy Chamber President, Martin Rodger QC, and Mrs Diane Martin TD MRICS FAAV) pointed out the importance of sharing to an infrastructure provider:

> "82. We do not regard the minimal rights conferred by para. 17 as appropriate for an agreement between an infrastructure provider and a site provider for a term of ten years."

20. In *Dale Park*, again, sharing rights beyond those prescribed by paragraph 17 were imposed. The Tribunal said at paragraph 66:

> "… without the ability to share the claimant is out of business … Moreover as a neutral host it needs an unrestricted right to share…"

21. The Court of Appeal confirmed, at [2021] EWCA Civ 1858, that that was the correct approach. At paragraph 62 Newey LJ with whom Dingemans and Whipple LJJ agreed, said:

> "In short, I have not been persuaded that the Tribunal's assessment of the significance of paragraph 17 was other than correct. While paragraph 17 provides a starting point and it is incumbent on an operator seeking more extensive rights to explain why, it need not establish "pretty striking circumstances" or "pretty compelling circumstances". Nor is it the case that an application for wider rights is to be approached on the basis that it is inherently improbable that such rights are appropriate."

22. Yet again the point was argued in *On Tower UK Limited v AP Wireless II (UK) Limited* [2022] UKUT 152 (LC) *("Audley House")*, and again the Tribunal held that rights to sharing and upgrading were not to be restricted to those set out in paragraph 17. The parties have helpfully provided a note of the text of the agreement as ordered in *Dale Park,* in *Audley House*, and in *EE v Stephenson* [2022] UKUT 180 (LC) ("*Pendown"*); in each case the rights conferred on the infrastructure provider were to share the ECA, the site and the rights granted to it.

23. I have rather laboured the point, but I have to do so because in the present appeal the respondent has argued, first that those cases should be viewed with caution in light of the Supreme Court's decision in *Compton Beauchamp*, and second that those cases no longer represent the correct approach to sharing in light of amendments to the Code made by the Product Security and Telecommunications Infrastructure Act 2022 ("the PSTI 2022"). I can address the *Compton Beauchamp* point now, because it requires only brief comment, and I then give some background to the PSTI 2022 amendments and return to that point later.

The Compton Beauchamp *point*

24. As to *Compton Beauchamp*, the short point made for the respondent is that it is now known that it is possible for an operator to apply under Part 4 of the Code for new Code rights during the currency of a Code agreement. The suggestion, if I have understood correctly, is that in the pre-*Compton Beauchamp* cases the Tribunal would order the conferral of Code rights out of caution, on the basis that they might be needed later because the operator gets just one bite of the cherry so the agreement has to give it everything that it currently needs or might need later; now, on the other hand, the operator can always come back for more and therefore a less cautious approach can be taken and there is no need to order the conferral of Code rights that might not be needed.

25. In my judgment the decision in *Compton Beauchamp* makes no difference to the approach to be taken to the terms of Code agreements. Paragraph 23(5) of the Code remains as it was. There is no reason why the *Dale Park* approach should not remain appropriate – and in fairness it was not argued that it does not. In every case the operator will need to show a business need for the terms it wants, and there will need to be consideration of the possible loss and damage to the site provider. A business need may be current or it may be future. The operator needs to provide evidence of need but does not have to establish a compelling case. *Compton Beauchamp* is not authority for the idea that consideration of the operator's future business needs can be deferred because the operator can come back and ask for more; that would just store up costly negotiation and litigation for the future. That is particularly important in view of the fact that where a Code operator does ask for more rights in the course of an agreement there may be an issue about whether what it seeks is a new Code right (for which it can make an application under part 4) or the modification of a right it already has (for which it cannot: *Compton Beauchamp* paragraph 130). One can imagine the vehemence with which that point may be disputed.

26. Accordingly I take the view that the decision in *Compton Beauchamp* has not changed the way in which the FTT and the Tribunal will approach the terms of Code agreements.

The 2022 amendments to the Code

27. In January 2021 the government consulted about possible changes to the Code, and asked the following questions:

> "Question 18 Do you think that a court should be able to impose rights that allow more extensive upgrading and sharing than is permitted under the automatic rights in paragraph 17 in any, or all, of the following situations:
>
> (a) If the court is imposing a new agreement and such rights are requested?
>
> (b) If the court is imposing a renewal agreement and such rights are requested?
>
> …
>
> Question 19 Do you think the court's jurisdiction to impose these rights needs to be expressly stated in the legislation, given that the Upper Tribunal has already held that this is possible?"

28. In its response following the consultation (*Access to Land: consultation on changes to the Electronic Communications Code – government response,* November 2021) the government said:

> "4.17. After careful consideration, during which we took into account the fact that this is an issue which has been considered in some detail by the courts, we have concluded that changes to this effect are not needed in relation to upgrading. Upgrading is included as a specific Code right in paragraph 3 of the Code, separately to the automatic right to upgrade provided for in paragraph 17. We think this makes it clear that rights to upgrade apparatus which are outside the scope of paragraph 17 can be agreed or imposed.
>
> 4.18. We think the position in relation to sharing, which is not currently included as a Code right in paragraph 3, is less clear. Since we think it is important that, as with rights to upgrade, it should be possible for rights to share apparatus outside the scope of paragraph 17 to be agreed or imposed, we have decided to make changes to paragraph 3 to make it clear that sharing is a distinct Code right.
>
> 4.19. As the right to share relates specifically to the right to share apparatus, we think this right should only be available to the operator who owns the apparatus in question. It should not be possible for subsequent operators to use this right to require an operator to share their apparatus with them. That is a separate matter for commercial discussion. Similarly, we do not think that an operator who is granted a right to share their apparatus, should automatically be able to effectively share their Code rights with other operators, although we acknowledge that a site provider may agree for them to do so.
>
> 4.20. The sharing right we are introducing in paragraph 3 of the Code is therefore a 'bare' right to share, which - if agreed or imposed - solely gives an operator

who has installed or is maintaining apparatus on land permission to share that apparatus with others. Any additional terms that may be needed to give effect to this right - for example, the circumstances in which another operator will be permitted to access the land - will be a matter for the parties to negotiate through additional terms or to ask the courts to impose."

29. Following that consultation paragraph 3 of the Code was amended by the PSTI 2022 and it now reads as follows (with the additional sharing rights emboldened):

> "(1) For the purposes of this code a *"code right"*, in relation to an operator and any land, is a right for the statutory purposes—
> (a) to install electronic communications apparatus on, under or over the land,
> (b) to keep installed electronic communications apparatus which is on, under or over the land,
> (c) to inspect, maintain, adjust, alter, repair, upgrade or operate electronic communications apparatus which is on, under or over the land,
> **(ca) to share with another operator the use of electronic communications apparatus which the first operator keeps installed on, under or over the land,**
> (d) to carry out any works on the land for or in connection with the installation of electronic communications apparatus on, under or over the land or elsewhere,
> (e) to carry out any works on the land for or in connection with the maintenance, adjustment, alteration, repair, upgrading or operation of electronic communications apparatus which is on, under or over the land or elsewhere,
> **(ea) to carry out any works on the land for the purposes of, or in connection with, sharing with another operator the use of electronic communications apparatus which the first operator keeps installed on, under or over the land or elsewhere,**
> (f) to enter the land to inspect, maintain, adjust, alter, repair, upgrade or operate any electronic communications apparatus which is on, under or over the land or elsewhere,
> **(fa) to enter the land for the purposes of, or in connection with, sharing with another operator the use of electronic communications apparatus which the first operator keeps installed on, under or over the land or elsewhere,**
> (g) to connect to a power supply,
> (h) to interfere with or obstruct a means of access to or from the land (whether or not any electronic communications apparatus is on, under or over the land), or
> (i) to lop or cut back, or require another person to lop or cut back, any tree or other vegetation that interferes or will or may interfere with electronic communications apparatus.
> (2) In sub-paragraph (1), references to *"the first operator"* are to the operator mentioned in the opening words of that sub-paragraph."

The disputed term about sharing and the FTT's decision

30. The FTT was presented with an extensive schedule of disputed terms for the new lease of the 12 sites; at paragraph 56 of its decision it said "The Tribunal is being asked to determine 140 points of dispute. Many concern drafting and boilerplate clauses. Most could and should have been agreed. As a result very considerable costs have been incurred

by both sides that could easily have been avoided." The FTT heard evidence of fact and expert evidence; relevant to the appeal is the evidence of fact from Mr Timothy Holloway, a Senior Regional Surveyor for the appellant, and of Mr Nicholas Ward, a Regional Director of Asset Management for the respondent.

31. One of the terms in dispute related to the appellant's right to share. Obviously sharing is crucial to the appellant's business; it needs to share its ECA but, as was noted in the consultation relating to the 2022 amendments, in many cases it needs more than that and the Tribunal has in a number of cases ordered more extensive sharing rights. What it wanted in the present case was the right to share (1) its ECA (which of course is what paragraph 17 confers in any event), (2) the site and (3) the rights conferred by Schedule 1 of the draft lease ("the Rights"). The Rights differed from site to site, but in most instances included a right of access together with rights to park, load and unload, the right on 48 hours' notice (save in emergency) to enter and remain on adjoining land to carry out works, the right to erect install and operate the ECA and to maintain and upgrade it etc, to place a generator on the site, to lay conduits and to grant wayleaves, and to lop trees.

32. The respondent conceded that the appellant could have the extended sharing rights that it sought so far as concerned customers already in occupation of the 12 sites (referred to by the parties as "Category A sharers"); but vis-à-vis customers not in occupation at the date of the lease ("Category B sharers") the respondent wanted the appellant only to have the right to share its ECA and not to be able to share the site or the Rights.

33. The FTT's decision was impressive, as is consistently the case with its telecommunications decisions. It dealt carefully and succinctly with the huge heap of issues between the parties. As to the dispute about the sharing term it said this:

> "59. In *Audley House (On Tower UK Limited v AP Wireless II (UK) Limited* [2022] UKUT 152 (LC) at [135-139] the Upper Tribunal permitted sharing of the site as well as the equipment. Sharing was made subject to a proviso in respect of
> paragraph 10(4) of the Code which both parties have included as part of their drafting.
>
> 60. Mr Holloway in his evidence (Day 2 pp 111-114) explained the process that would be followed where customers (typically MNO's) wished to carry out work (for example upgrades) at the site. Initially there would be involvement of the Project Management Team and discussions with the site provider. The customer's
> contractors would arrive with vehicles and a crane. Work undertaken by contractors would include: "prepare the site, take down anything that needed to come down to replace it with", "they may need to put concrete down to put new cabinets on -- sorry, they may need to lay concrete in order to put new cabinets into the site" and "they could put in cables in".
>
> 61. Audley House was decided before amendments to the Code introduced by the
> Product Security and Telecommunications Infrastructure Act 2022. Sharing is now a Code Right under paragraph 3(1):

(ca) to share with another operator the use of electronic communications apparatus which the first operator keeps installed on, under or over the land,

(ea) to carry out any works on the land for the purposes of, or in connection with,
sharing with another operator the use of electronic communications apparatus which the first operator keeps installed on, under or over the land or elsewhere,

(fa) to enter the land for the purposes of, or in connection with, sharing with another operator the use of electronic communications apparatus which the first operator keeps installed on, under or over the land or elsewhere,

62. In *Audley House* [136] the Upper Tribunal expressed some concern about exactly the kind of work, to be undertaken by contractors, described by Mr Holloway:

> "On Tower can permit those who share the equipment to access and enter the site as necessary. Mr Seitler QC responds that this right does not enable it to allow an operator to place a cabinet on the land within the site. There is clearly some room for argument about that, and accordingly we take the view that the additional right sought by On Tower should be granted, in view of the nature of its business needs, unless the respondent's concerns are justified."

We take the view that paragraphs 3(1)(ea) and (fa) now puts the matter beyond doubt and that the effect of the amendments introduced by the 2022 Act is that a provision requiring the sharing of the site as well as the equipment is no longer required.

63. *Audley House* at [163] also decided that sharing should not be limited to Code
operators. The position is unchanged by the 2022 Act. However the agreed wording, in these references, limits sharing to "providers of electronic communications networks for the purposes of the provision by them of their networks".

34. The clause directed by the FTT is set it out below; I have emboldened the words that the appellant says should not be included:

> "3.6.3 The Tenant is permitted to share occupation and use of the Property and the
> Rights with providers of electronic communications networks **who are in occupation of the Property at the date of this Lease. The Tenant is permitted to share use of the Installation with providers of electronic communications networks** for the purposes of the provision by them of their networks PROVIDED THAT nothing in any written agreement between the Tenant and an Operator pursuant to this paragraph shall be treated as an agreement by the Landlord for the purposes of paragraph 10(4) of the Electronic Communications Code."

35. In that clause "the Property" means the site, including the ECA; the Installation is the appellant's ECA; and an "Operator" is a Code operator. The effect of the clause is to prevent the appellant from sharing the site and the Rights with Category B sharers, as desired by the respondent. The appellant appeals that decision with permission from this tribunal, and seeks the deletion of the emboldened words. With those words deleted, the clause would be in identical terms to the one ordered in *Audley House.*

36. The respondent has applied for permission to cross-appeal in relation to three other provisions ordered by the FTT, relating to wayleaves, conduits, and objections to planning permission. The Tribunal directed that that application be heard on a "rolled up" basis (i.e. so as to decide the permission application, and the appeal itself if permission is granted, together) along with the appeal.

37. Accordingly, in the paragraphs that follow I decide the appeal, and then turn to the rolled up application for permission to cross-appeal.

The appeal

38. The appellant explains that the effect of the sharing clause as ordered by the FTT is that its Category B sharers will not be able to install apparatus such as cabinets and cables themselves, even if that is essential for the services they provide. Instead, any additional ECA will have to be installed by the appellant itself. In addition, the appellant cannot share with its Category B sharers its right to access the site or adjoining land, nor to maintain, repair or upgrade their ECA, nor to install a generator, nor to place conduits and suchlike. The respondent agrees that the impact of the clause is that Category B sharers will be unable to place their own ECA on the site but does not accept that that is a problem; and it argues that Category B sharers can be allowed to exercise the appellant's rights as agents for the appellant. Alternatively they can apply for Code rights against the appellant to place ECA on the site, or seek rights from the respondent in respect of neighbouring land.

39. There are five grounds of appeal:

    1. The sharing term directed by the FTT was contrary to the policy of the Code;

    2. The FTT failed to adopt (or correctly adopt) the *Dale Park* test;

    3. The FTT was wrong to say that the additional sharing rights sought by the appellant were not needed following the enactment of the PSTI 2022;

    4. There was no justification for the differential treatment of customers who are not already in occupation of the sites;

    5. The FTT failed to apply the evidence.

40. Grounds 2, 3 and 5 can be summarised together as follows: The appellant argues that it had produced ample evidence of its business need to share the site and the Rights

41. with the Category B sharers, that the respondent could not show that it would suffer any relevant loss or damage as a result of its being granted the wider sharing rights that it sought, and that therefore had the FTT correctly applied the *Dale Park* test it would have ordered the wider sharing rights sought by the appellant. Instead the FTT having accepted the appellant's evidence nevertheless declined to order that wording because of a misunderstanding of the effect of the amendments made by the PSTI 2022. I shall address these arguments, and the respondent's response to them, before dealing briefly with grounds 1 and 4.

The evidence of the appellant's business need to share the site and Rights

42. The appeal is not against a finding of fact that the appellant did or did not have a business need for the wider sharing rights that it sought. But the appellant argues that on the basis of the *Dale Park* test the FTT should have ordered that the clause should be as the appellant wanted. The first step in the *Dale Park* approach is for the Tribunal to "consider the term the operator seeks and the reason why it needs the term in question in order to pursue the business for whose purposes it received its Ofcom direction and in light of the public interest in a choice of high quality telecommunications services." So in order to assess the appellant's argument I have to look at whether on the basis of the *Dale Park* approach the appellant had produced sufficient evidence of its business need for the sharing rights it wanted.

43. Evidence of the appellant's need to share the site and the Rights was given by Mr Holloway. He said that the point had been argued at length in *Audley House* and that the wording and rights proposed by the appellant reflected the decision in that case. He explained that the appellant's customers needed to use the Rights in order to operate the site. At the hearing he was asked by the FTT what customers needed to be able to do, and he explained that the customer would need to bring vehicles to the site, perhaps with a crane to take down or replace antennae; it might need to install its own cabinets and/or lay concrete, or to put equipment in new or existing cabinets. Mr Lees KC argued that the appellant had done all that was necessary to demonstrate its business need, and referred to dicta in *Dale Park*, approved by the Court of Appeal, to the effect that there is no need for especially compelling evidence (see paragraphs 21 above).

44. The respondent says this evidence was insufficient. It points out that there was no evidence from or about specific Category B sharers to demonstrate their needs. Mr Clark KC said that there was concrete already at all or most of the sites. He argued that there was no reason why the appellant should not itself provide all the ECA its customers needed, such as cabinets – which was an argument made by Mr Toby Watkin KC before the FTT. And the customer could access the site in accordance with clause 1.10 of the lease which says:

> "References to any rights exercisable by the Tenant shall be construed as being exercisable by the Tenant and all persons authorised by them as agent for the Tenant only."

45. Further the respondent argued that the FTT rejected Mr Holloway's evidence: at its paragraph 88, in the context of the landlord's break clause desired by the respondent, the FTT said:

> "OT has no control over upgrades. Mr Holloway was unable to say who paid for upgrades as that was a matter outside his purview. The Tribunal did not find Mr Holloway's evidence on upgrading to be of assistance. It was not helpful to the Tribunal that high level information on forward planning discussions between OT and the MNO's around sharing was not produced at the hearing."

46. Taking that last point first, I disagree with the respondent. The FTT's words in paragraph 88 are firmly grounded in a different context, namely the potential for the respondent or its sister company (which is a Code operator) to take over the site and redevelop it in the future, and the link between that potential and its wish for a break clause. This paragraph has nothing to do with the terms of the appellant's right to share which is discussed in paragraphs 53 to 62 of its decision, quoted in part above at paragraph 33, and in those paragraphs the FTT did not take issue with the appellant's evidence.

47. In my judgment the appellant produced sufficient evidence that it needed the wider sharing rights for its Category B customers. True, it did not produce evidence of who those future sharers were and what they wanted because those future arrangements have not yet come to pass. It is difficult to see what evidence of future need the respondent was looking for; is the appellant really supposed to produce for example a letter from an operator who is not yet sharing a particular site to say that if it were to use that site, it would need to put a cabinet there? It is unnecessary and impracticable for the appellant to produce something new for each of its hundreds of sites to show that there are future sharers who will want to put cabinets, cabling or concrete there. As a WIP the appellant has to be alive to its customers' potential future requirements and ready for technological change. The appellant's evidence was not really challenged, and was consistent with evidence that has been accepted in many other cases; it would not be credible to suggest that the practice and wishes of MNOs is going to change so that future customers will not actually want to enter the sites or to place ECA there. What is suggested is that nevertheless the appellant should change its business model and should be the exclusive provider of physical ECA such as cabinets and cables. Why that is any concern of the respondent is a mystery; there is more to say about that point when we come to look at what the FTT said about the PSTI 2022, below. But the appellant's evidence of its usual practices and its customers' requirements was sufficient.

48. I agree that Mr Holloway's evidence does not sharply distinguish between the ability to share the site and the ability to share the Rights. Such distinct evidence is difficult to devise because the two ideas go hand-in-hand. A customer entering the site and putting a cabinet there as well as connecting its antenna to the appellant's mast is obviously sharing the appellant's ECA but it is not easy to say whether it is sharing the site, or the appellant's right to enter it and put things there, or both. The respondent's attempt to distinguish between the two ideas is pointless. As I said above at paragraph 22, the clauses ordered to be included in the leases in *London and Quadrant*, in *Dale Park* and in *Audley House* conferred the right to share both site and rights with the infrastructure provider's customers.

49. I do not accept the argument that there is no need for the customers to share the Rights because the appellant can authorise it to exercise them under clause 1.10 (paragraph 44 above), because that clause enables the Tenant to authorise others to exercise rights as its agent *only*. It is difficult to see that when a customer enters the site to further its own business it is an agent of the appellant; and it is also pointless. There is simply no need for the arrangement to be shoe-horned into an agency that it does not fit, when the appellant could simply share the site and the Rights with its customers.

50. In summary, the appellant produced evidence that it has a business need to be able to share with its customers, present and future, the site itself and the Rights granted by Schedule 1 of the lease. The FTT appears to have accepted that evidence; at any rate it did not express disagreement, and indeed there was no basis on which it could have rejected it.

Loss or damage to the respondent as a result of the wider sharing rights

51. It will be apparent from the discussion so far that the respondent is adamantly opposed to the wider sharing rights that the appellant seeks in relation to its Category B customers. What is far more difficult to understand is the reason for its objection.

52. It was suggested to the FTT that the respondent is concerned about damage caused by future sharers of the sites, and that it wanted to be in a direct contractual relationship with sharers so that it could pursue them directly for any damages. That sort of argument has been raised in previous cases and always rejected; the respondent has the protection of the compensation provisions of paragraph 25 of the Code, as well as the additional indemnity provided by the agreement. It was not relied upon in the appeal.

53. Before the FTT Mr Ward, giving evidence for the respondent, explained that in the absence of the wider sharing rights the Category B customers would have to approach the respondent for rights to enter neighbouring land to place cabinets there (because the respondent could not grant the customer rights over the site of which the appellant has exclusive possession under its lease). Alternatively "there would be that discussion with On Tower", in other words the appellant would have to ask the respondent for additional sharing rights. The judge asked "And that discussion with On Tower is about asking On Tower for more money?". "Yes" said Mr Ward.

54. Before the Code came into force it was commonplace for an agreement under the "old Code" to require an operator to make an extra payment of consideration whenever it wanted to share its site with another customer. Known as "payaway", these were substantial payments because consideration in the old Code was at market rates, without the "no network assumption" (see paragraph 4 above). As Mr Lees KC argued, the respondent's evidence to the FTT sounded very like an attempt to re-introduce payaway by extracting further payments when the appellant is unable to make the arrangements its customers want in the future because of the limited nature of its sharing rights under the lease.

55. In the appeal Mr Clark KC did not adopt that evidence. He did say that the conferral of additional sharing rights would entitle the respondent to additional consideration; but an entitlement to consideration is not loss or damage. In any event Mr Clark KC conceded

that no evidence had been produced to the FTT to show what additional consideration would be payable in the event that rights to share the site and the Rights were conferred on the Category B customers. I venture to think it is unlikely that any evidence could have been produced to justify additional compensation, but at any rate that is nothing to do with loss or damage.

56. Mr Clark KC conceded that the respondent could not produce any evidence of loss or damage in monetary terms. Instead, he said, its objection was one of principle. The appellant is an infrastructure provider and therefore should provide infrastructure. It obtained its Code designation on that basis. It should not be letting its customers bring their own cabinets on to the site. Moreover, the extensive sharing rights it seeks will enable it to stop providing any infrastructure at all; it will be able to remove all its ECA and simply take payments from its customers without providing them with anything other than a bare site.

57. There is no evidence that the appellant wishes to change its business model in that way, but even if it does that is irrelevant to what the FTT had to decide. The respondent has not shown that it will suffer any loss or damage as a result of the wider sharing rights that the appellant seeks.

Conclusion on the Dale Park *test*

58. In light of what I have said above, it is difficult to see why the FTT, with the *Dale Park* test in mind (as it certainly had, since it set it out at paragraph 51 of its decision), would not have decided that the appellant should have the right to share the ECA, the site and the Rights (or "the Property and the Rights" as the draft clause put it) with its Category B customers as well as its Category A customers. To understand why it did not do so we have to look again at paragraphs 59 to 63 of its decision.

The FTT's decision: did it misunderstand the PSTI 2022?

59. Paragraphs 59 to 62 of the FTT's decision are set out above at paragraph 33. It can be seen that the FTT recorded Mr Holloway's evidence, and said nothing to indicate that it did not accept that the appellant's customers do what Mr Holloway said they did (as indeed the Tribunal has accepted in previous cases). It referred to the discussion of sharing in *Audley House*, where wider sharing rights than those granted by paragraph 17 were conferred because of the appellant's business needs and because its customers needed to place cabinets on the site (just as Mr Holloway described in the present case). The Tribunal in that case expressed some doubt about whether the wider rights were needed, even though in *Audley House* the appellant had a wider right to grant access to its customers than it has in the present case. In this case it can enable customers to exercise rights (e.g. to access the land) only as its agents, whereas in *Audley House* the lease stated that "rights exercisable by the Tenant shall be construed as being exercisable by the Tenant and all persons authorised by them". Despite that the Tribunal granted the wider right sought by the appellant so as to put beyond doubt ability to allow customers to put ECA on the site.

60. Having re-capped that point the FTT then said:

> "62. We take the view that paragraphs 3(1)(ea) and (fa) now puts the matter beyond doubt and that the effect of the amendments introduced by the 2022 Act is that a provision requiring the sharing of the site as well as the equipment is no longer required."

61. Mr Lees KC and Mr Clark KC put different constructions on those words.

62. Mr Lees KC argued that the FTT must have taken the view that the Code rights introduced by the PSTI 2022 clearly enabled the appellant to allow its customers to put ECA on the site, so that no express clause to that effect was required.

63. If that is what the FTT thought, then it was wrong.

64. What the PSTI 2022 did was to designate certain rights as Code rights. It did not provide that all three of the new Code rights ((ca), (ea) and (fa)) were to be terms of all Code agreements. Not all Code agreements contain all Code rights, and the rights at (ea) and (fa) seem to me to go beyond the minimum sharing rights that have to be conferred in every case pursuant to paragraph 17 of the Code. Even where all the Code rights relating to sharing – at (ca), (ea) and (fa) - are expressly granted by an agreement, they do not enable the tenant (in this case the appellant) to share the site or any rights granted by the agreement with its customers. As we saw in paragraph 4.20 of its response to the consultation (paragraph 28 above) that was not the aim of the amendments. The Code rights are for the tenant to share ECA, to carry out work in order to share its ECA, and to enter the site in order to share its ECA.

65. However, that may not have been what the FTT thought; Mr Clark KC argued for a very different construction of its words. He submitted that the FTT had been convinced by an argument addressed to the FTT by Mr Watkin KC during closings, of which a transcript was provided in the appeal bundle. Mr Watkin KC told the FTT that the effect of the 2022 amendments was that *Audley House* and other pre-2022 decisions about sharing no longer bind the FTT because the Code has been amended. Mr Watkin KC said (from page 67 of the transcript):

> "… now sharing has been defined as a Code right, the Code rights of course being the things which Parliament has conferred on an operator for the policy of the Act and it's a confined list.
>
> … all that Parliament has said is a Code right is the right "to share with another operator the use of electronic communications apparatus". Not the property, not the rights conferred by the agreement….
>
> You can share electronic communications equipment in two senses. You can let other people broadcast through your kit, which sometimes happens, or you can let other people come on to your site and attach their equipment to your electronic communications equipment, which … would include the mast. But what you aren't allowed to do is to share the site. So for example you can't allow other operators to build their own infrastructure on the site, for example … the putting of a cabinet by another telecommunications operator on the site…"

66. He added "all we have to do is to make sure the rights which are being granted by this agreement mirror the code rights" (page 71 of the transcript).

67. Therefore, said Mr Clark KC, what the FTT meant in its paragraph 62 was that the policy and provisions of the Code require that the appellant share its ECA but not the Rights nor the site, because that would be to go beyond the Code rights and Code agreements must not do so.

68. If that was what the FTT thought, it did not say so; and I am extremely dubious as to whether it is permissible to construe the judgment by reference to the transcript. As a matter of objective construction of the FTT's words I think the construction for which Mr Lees KC argued is more likely. But it is possible that the FTT was led astray by Mr Watkin KC's argument, and it is important to explain why that argument was wrong.

69. First, it has never been the case that an operator is "confined" to the Code rights listed in paragraph 3. That argument has been made by site providers and consistently rejected by the Tribunal and by the Court of Appeal. That it is incorrect as a matter of principle is clear from the provisions of the Code, in which there is no prohibition on an operator being granted rights that are not Code rights. The purpose of Code rights – i.e. the reason why certain rights have that status - is to confer protection on the operator, not to restrict it. Rights going beyond Code rights have regularly been conferred by Code agreements, whether consensually or by order; hence the cases decided prior to the PSTI 2022 when rights to share ECA were granted despite sharing not being a Code right at all, and to an extent that went beyond what was required by paragraph 17. Hence also the many cases in which other terms, which are not Code rights, have been imposed or agreed.

70. Second, nothing in the PSTI 2022 has changed that position. Such a radical change would require clear wording to the effect that a Code agreement may not grant to an operator rights which are not Code rights. That that was not intended to be the case specifically in respect of sharing is clear from the consultation preceding the PSTI 2022, which did not suggest such a change, and from government's response to that consultation. I repeat part of paragraph 4.20:

> "…Any additional terms that may be needed to give effect to this right - for example, the circumstances in which another operator will be permitted to access the land - will be a matter for the parties to negotiate through additional terms or to ask the courts to impose."

71. It remains the case that the issue is not whether sharing is a Code right but what rights the appellant needs, whether Code rights or other terms. It is simply wrong to say that the tribunals and the parties must "make sure the rights which are being granted by this agreement mirror the code rights", whether in respect of sharing or of any other Code right.

72. Again one wonders why the respondent is so concerned to change the appellant's business model so that it can no longer allow customers to put cabinets on the site. The answer, in terms of motivation, was explained by Mr Watkin KC to the FTT:

> "we say simply that we're entitled to be paid for something commercially which isn't controlled by the Act. On Tower is being paid commercially by the MNOs to attach their equipment to the mast…. And we say, by the same token, we can charge MNOs if they want to put their cabinets on the land, and the way we do that is by confining On Tower to the rights – the Code rights which Parliament has said that On Tower is entitled to have."

73. That reveals the third reason why Mr Watkin KC's argument was incorrect: in its consultation paper published in January 2021 the government stated at paragraph 2.13 "We do not intend to revisit the valuation framework contained in the Electronic Communications Code." The government's response to the consultation confirmed at paragraph 1.14 that the valuation framework would not be amended. And Parliament made no change to the government's drafting so as to effect such an amendment. Yet the respondent's aspiration to confine the appellant to Code rights so that it can charge market rates for anything further that MNOs want would replicate the "payaway" practice that the Code put a stop to. If such a major change to the central policy of the Code had been intended it would have been set out very clearly, with lengthy explanation, in the government's policy document and, again, made explicit in the drafting of the amendments. There is nothing whatsoever in the Code to support the respondent's argument.

74. Whether the FTT understood the effect of the Code to be as Mr Lees KC suggested, or as Mr Watkin KC argued, I do not know, because the FTT did not say. I do not need to decide which error it made; both constructions were equally incorrect. There is nothing in the PSTI 2022 to suggest that an infrastructure provider either does not need or should not have the right to allow customers to place their own cabinets, cables and other ECA on the site. The PSTI 2022 did not make such wider sharing rights either unnecessary or impermissible.

Conclusion on grounds 2, 3 and 5

75. Accordingly I agree with the appellant that had the FTT applied the *Dale Park* test correctly it would have decided that the lease should grant the appellant the rights to share the ECA, the site and the Rights. It did not do so because it misconstrued the effect of the amendments to the Code made by the PSTI 2022. I set aside the FTT's decision and substitute the Tribunal's decision that the sharing term is to be as set out in paragraph 34 above without the emboldened words.

Grounds 1 and 4

76. That being the case I do not need to say very much about grounds 1 and 4. It is certainly the case that the restriction of sharing rights to those now defined as Code rights would be contrary to the policy of the Code; there has been no change of policy which requires sharing rights to be restricted as the respondent argues. And the differential treatment of Category A and Category B sharers is certainly strange, although that arose from the respondent's agreement that the wider rights should be granted in respect of the Category A sharers; I imagine that if the FTT had had to decide about both Categories it might well

have made the same decision about both since whichever of the two available errors the FTT made it would apply to both categories of sharers alike.

77. Neither ground 1 nor ground 4 would have been sufficient alone for success in the appeal, but both are consistent with the success in the appeal on grounds 2, 3 and 5.

The cross-appeal

78. I am asked to decide three things. First, was the application for permission to cross-appeal out of time? Second, should permission be granted and the cross-appeal be allowed in respect of the clauses about wayleaves and conduits? Third, should permission be granted and the cross-appeal allowed in respect of the right to object to planning applications?

79. As to the time point, the appellant says that the respondent's application for permission to cross appeal, made when it filed and served its Respondent's Notice in the appeal, was out of time, and that the application should have been made along with the respondent's comments on the grounds of appeal pursuant to rule 21(8) and 22(1)(b) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010. The appellant is content for an extension of time to be granted, but both parties would like the Tribunal to determine whether the application was out of time, and I heard the parties' arguments on that point.

80. On reflection I have decided not to decide whether the application for permission to cross-appeal was out of time. The appellant's concession that an extension can be given means that my decision on the point would be *obiter*. It would not prevent the parties arguing the point again. That being the case I prefer not to decide it. If and insofar as it is necessary to do so, I grant the respondent both an extension of time for its application for permission to cross-appeal, and (again, if and insofar as it is necessary) a dispensation from the requirement in rule 21(1) of the Tribunal's rules that permission be sought from the FTT first. I turn to the grounds for cross-appeal.

The clauses about wayleaves and conduits

81. I turn to the first and second grounds of cross-appeal, which Mr Clark KC helpfully argued together at the hearing. Three preliminary points need to be made. First, shortly before the FTT hearing the respondent provided plans for the sites in question, showing each site edged red and in addition showing an area around each site edged blue in order to designate an area to which the appellant would have a right of access, for the purposes of maintenance and upgrade and for heavy machinery. I refer to the area edged blue on each plan as the "blue areas". In just one case, if I have understood correctly, the blue area was coextensive with the site itself but in the other cases the blue area was bigger than the site.

82. Second, in general terms the respondent usually has rights over land outside its actual telecommunications sites. Those rights vary; in some cases the respondent owns or has a lease of land outside the site and in some cases it has rights over land outside the site granted by the landowner – referred to in the draft lease as "the Superior Landowner". The Tribunal was not addressed about the exact terms of those rights, but I understand that some are restrictive covenants preventing the landowner from dealing with other operators.

83. Third, the appellant needs to connect each site to power and fibre (as the FTT accepted).

84. Turning then to the clauses in issue in these first two grounds; the FTT determined that the draft lease should contain a clause ("the wayleaves clause") about the grant of wayleaves and another ("the conduits clause") giving the appellant the right to lay conduits.

85. The FTT decided that the wayleaves clause should read as follows (with my emphasis added as explained below):

> "If the Tenant requires, the Landlord will (upon payment of the Landlord's reasonable and proper professional costs by the Tenant) grant such wayleaves [and/or use reasonable endeavours to procure that the Superior Landlord complies with its covenant under the Superior Lease (if applicable) to grant such wayleaves)] to any statutory undertaker and/or public electricity supply authority for the installation of Conduits **[on over or under the Landlord's Adjoining Property and/or the Superior Landlord's Property],** as may be necessary to enable the operation of the Installation for the Permitted Use and/or to enjoy the Rights, subject to and in accordance with clause 4.2.2 below"

86. The respondent seeks the deletion of the words in bold, and the insertion of the words "under such parts of the Property shown edged blue on the Plan" after "such Conduits." In substance, the respondent is content for the appellant to have the right to grant wayleaves for the laying of conduits on the site and the blue land, but not on the rest of the respondent's adjoining land if any nor on the superior landlord's adjoining property.

87. Turning to conduits, the conduits clause ordered by the FTT confers the following rights upon the appellant:

> "The right **to lay in and upon the land shown edged blue on the Plan together with the right** to grant to any public electricity supply authority and/or public electronic communications operator and/or statutory undertaker the right to lay in **or upon [Superior Landlord's Property and/or Landlord's Adjoining Property and/or Third Party Property] in** such locations and by such means and on such terms as shall first be approved by the Landlord in accordance with clause 4.2 (such approval not to be unreasonably withheld or delayed) such Conduits (including a separate power supply) to connect the Installation with any available electricity or electronic communications supply cable as the Tenant shall require for the purposes of the exercise of the Rights and thereafter use any such Conduits and such Conduits as exist at the date of this Lease for the Permitted Use and to inspect maintain adjust repair alter renew reroute and upgrade the same."

88. Again the respondent seeks to appeal the right given in respect of the respondent's adjoining land and the superior landlord's land, and instead wants the appellant to have the right to grant wayleaves only over the land edged blue.

89. At the hearing Mr Clark KC summarised the grounds of appeal by making four arguments. First, he said that the clauses in issue lay an excessive burden on the respondent to procure

the grant of wayleaves even where it has no power to do so, without any clear benefit for the appellant when the appellant had not shown a business need to be able to grant wayleaves or lay conduits over land outside the blue areas. Second, he argued that the FTT did not consider what rights the respondent actually has over land outside the blue areas, nor what terms would cause the least possible damage to the respondent. Third, that the evidence was that in practice there was no need for the respondent's involvement outside the blue areas because in practice the statutory undertaker would negotiate directly with the landowner; and fourth, that the FTT wrongly understood that the respondent's preferred wording would limit the areas in which statutory undertakers would be able to operate, whereas in fact it limited only the areas where the respondent would need to be involved.

90. The respondent made one further argument in its grounds which I shall address separately. So far as the arguments summarised above are concerned, essentially the argument for the respondent is that outside the blue land there is no need for it to get involved. It is particularly burdensome for it to have to do so, especially if it is required to force the superior landlord to grant rights. It is unreasonable for it to have to sue the superior landlord. In practice the statutory undertaker will deal directly with the landowner at the appellant's request.

91. As Ms Dodds pointed out, that is rather a surprising argument in view of the fact that the respondent's business is supposed to be to assume on behalf of the freeholder the burden of dealing with the operator. As Mr Ward, for the respondent, put it in his witness statement:

> "Often site providers sell an interest in the site to APW on the basis that APW will
> effectively estate manage the site moving forward, indeed this is one of the key selling points for site providers when engaging with our acquisition team, often because they have had bad experiences with the telecoms site. Essentially therefore APW steps into the shoes of the previous site provider and consequently should receive the same notice regarding operational matters the site provider received previously (who was not necessarily receiving this), however instead of the previous site provider receiving the notice from the operator and/or having to communicate with the operators (or their agents) moving forward, APW will and does facilitate those discussions. APW maintains good relationships with superior landlords and operators, APW's estate management approach minimises abortive visits and helps minimise and resolve disputes with the superior landlords or adjoining owners."

92. If that is the respondent's key selling point then it is surprising to hear it objecting so vehemently to getting involved in the matter of wayleaves and conduits, which one imagines would be the sort of thing that site providers would find irksome and might want the respondent to manage for them.

93. In my judgment the FTT's decision about the wayleaves and conduits clauses did not arise from a misunderstanding, nor from any disregard for the evidence. The clauses are the natural consequence of the respondent's interposing itself between the original site provider and the operator. Since it has put itself in that position, it must therefore grant the

rights that the operator needs in respect of wayleaves and conduits insofar as it can do so (the introductory words to the schedule of rights granted in the lease states: "The following rights are for the benefit of the Tenant insofar as the Landlord is able to grant the same"). It may well be that on many occasions it will not need to be involved, but the clauses have to be there in case of need. There was no need for the FTT to investigate precisely what rights the respondent had over neighbouring land, nor to specify and analyse exactly what rights the respondent had or what was needed for each site. The respondent's role as intermediate landlord makes this sort of obligation inevitable. Its interest was carefully protected by its rights to approve plans – another consequence of its acquisition of land and rights for the purpose of managing the site for the freeholder- and by its right to recover its costs from the appellant.

94. Furthermore, I take the view that the respondent's attempt to limit its involvement in the granting of wayleaves and conduits to the blue land was irrational. The blue lines were drawn for a very different purpose. I appreciate that the respondent offered to limit its involvement to that area by way of compromise, but why choose that area in particular or indeed any area at all if its involvement was unnecessary?

95. Finally, the grounds for cross-appeal also included the assertion that in requiring these rights for the appellant the FTT had ignored the fact that the respondent's rights over neighbouring land had a value and might be surrendered for value. The clauses determined by the FTT would be an impediment to its doing so, or might render its ability to do so subject to the whim of the appellant or subject to a demand for a ransom payment.

96. No evidence was called to indicate that such rights had a surrender value. In any event, I find the argument very strange. APW's business is the acquisition of land and rights in order to provide sites and facilities to operators. It interposes itself between landowners and operators for that purpose, but it does not operate any other business on the land. To some extent that complicates the situation for the operator, because there are now a landlord and a superior landlord rather than simply a freeholder landlord. Clauses of the kind directed by the FTT are intended to ensure that the operator's need for services is not frustrated by the division of rights between the respondent and the freeholder. The suggestion that the respondent in fact wants to make money by surrendering rights to the freeholder appears to run contrary to its business model as set out by Mr Ward, quoted above.

97. Again, it may be that in some, perhaps many cases there will be no need for the respondent to be involved in the grant of wayleaves and the laying of conduits. But it has acquired land and rights in order to interpose itself between the landowner and the operator and it is surprising that it should complain about a clause that reflects that interposition.

98. I see no realistic prospect of success on a cross-appeal about the wayleaves clause and the conduits clause, and permission to cross-appeal is refused.

The right to object to planning applications

99. Finally, the respondent sought permission to appeal the FTT's rejection of its argument that the appellant should covenant in the lease:

> "3.8.2 not to object to any planning application the Landlord (or any third party acting with the authority of the Landlord) submits in relation to the Property and/or ay neighbouring land."

100. The respondent's concern here is to protect itself in the event that it applies for planning permission to develop the site. It anticipates that the appellant will be keen to object, because if the respondent wishes to redevelop that may mean that the appellant has to give up possession. The respondent led evidence to the effect that the appellant's parent company had on occasions made planning objections containing erroneous statements about planning law and policy, and the FTT accepted that evidence. However, the FTT also accepted that an objection made by the appellant in relation to the site at Hexton (one of the sites in this appeal) "cannot be described as a "spoiler" application". It went on:

> "67…We also have regard to the integrity and robustness of the planning process involving public consultation and the opportunity for an applicant to respond to objections … Planning Officers are qualified to establish if an objection raises material planning considerations that should be taken into account in the decision-making process. In addition objections of the kind made by OT may not be the decisive factor. For example the application for prior approval at Courts Farm was refused, amongst other reasons, because of "visual impact".
>
> 69… we have to consider whether such an obligation should be included to ensure least possible loss and damage is caused by the exercise of code rights. In our judgement the clause sought by APW does not touch or concern the exercise of code rights. It is sought by APW to regulate competition. We are not satisfied that the prohibition sought by APW relates in any way to the sites which are the subject of these references, or the code rights sought by OT. The exercise of code rights does not in any way concern the making of or objections to planning applications. Accordingly we find that there is no basis for imposing the term sought by APW."

101. In its grounds for cross-appealing the respondent points out that it is not the policy of the Code to inhibit the ability of site providers to develop their land. And the appellant's objection would arise from its exercise of Code rights, because it would be objecting in order to maintain its ability to exercise them. But for those Code rights the appellant would have no reason for objecting to planning applications. Furthermore, the FTT applied the wrong test; there is no "touch and concern" threshold in the Code; the FTT imported a restrictive test, and should not have done so. And a restriction on a tenant's ability to object to its landlord's planning applications is commonplace in leases.

102. At the hearing of the appeal Ms Schofield took me to the evidence given before the FTT by Mr Morrison, a planning expert called by the appellant. He was asked whether planning officers would be swayed by spurious objects, and his evidence was that faced with an objection they would not but that "it depends a bit on the planning officer", and that "usually" an objection would be referred back to the applicant who would be given the opportunity to comment. Ms Schofield argued that that indicated that while a spurious objection would usually be referred for comment, sometimes it would not, and that sometimes a spurious objection would be accepted without question by a planning officer.

On the other hand she argued that there was no real need for the appellant to object to planning applications; what legitimate point, she asked, could the appellant make that would not in any event have been made by others? I did not find either argument persuasive, nor even particularly relevant. The respondent's complaint is that objections made by the appellant are "anti-competitive"; but these two organisations are legitimately in competition with each other and it is not the role of the Code agreement to inhibit that.

103. Ms Schofield also pointed out that the appellant had not shown that it had a business need to object to planning applications. There is no need for it to do so. It has the right to object to planning applications and does not need that right to be conferred by the agreement. Whether or not it is common for that right to be excluded in commercial leases does not seem to me to be relevant in the context of a Code agreement.

104. Going back to the grounds of appeal, it is said both that the FTT applied the wrong test ("touch and concern") and that the term was necessary to prevent loss and damage to the respondent by the exercise of Code rights. I can deal shortly with both. I agree that the words "touch and concern" were unfortunate because they are redolent of other areas of law. But I have no doubt that the FTT was not imagining a new test. Instead it was trying to express the point that the Code requires that loss and damage to the respondent *by the exercise of Code rights* be minimised. That paraphrase was unnecessary, I think, but that is all it was. It was not the introduction of a new and restrictive test.

105. And any loss or damage caused to the respondent by objections to planning applications are not caused by the exercise of Code rights. They might, and probably would, be motivated by the wish to continue to exercise Code rights; but the making of a planning objection is not an exercise of Code rights. There is no prospect of a successful cross-appeal on this ground and permission to cross-appeal is refused.

Conclusion

106. The appeal succeeds and the deletion sought by the appellant from the sharing clause is made. But permission to cross-appeal on the grounds argued by the respondent is refused.

Upper Tribunal Judge Elizabeth Cooke
27 August 2025

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which

the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.