Neutral Citation Number: [2026] UKUT 245 (LC)

Case No: LC-2025-627

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
AN APPEAL AGAINST A DECISION OF THE FIRST-TIER PROPERTY CHAMBER
Ref: BIR/OOCN/ECR/2024/0602 AND OTHERS

Royal Courts of Justice, Strand, London, WC2A 2LL
7 July 2026

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE – JURISDICTION – whether Code rights were granted "for the statutory purposes" – Ofcom direction under section 106 of the Communications Act 2003 – provision of infrastructure

BETWEEN:

ON TOWER UK LIMITED

Appellant

-and-

AP WIRELESS II (UK) LIMITED

Respondent

A telecommunications site at Vulcan Arms,
Doldowlod,
Llandrindod Wells,
Wales, LD1 6NN

Upper Tribunal Judge Elizabeth Cooke
11 June 2026

Mr Kester Lees KC and Ms Taylor Briggs for the appellant, instructed by Pinsent Masons LLP
Mr Wayne Clark KC and Mr Tom Morris for the respondent, instructed by Freeths LLP

The following cases were referred to in this decision:

Cornerstone Telecommunications Infrastructure Limited v Keast [2019] UKUT 116 (LC*)*
Cornerstone Telecommunications Infrastructure Limited v Compton Beauchamp Estates Limited [2022] UKSC 18
R (Quintavalle) v Secretary of State for Health [2003] UKHL 13
Royal College of Nursing v DHSS [1981] AC 800
Wathen-Fayed v Secretary of State for Housing Communities and Local Government [2025] UKSC 32
R(N) v Lewisham Borough Council [2015] AC1259

Introduction

1. This appeal is from a decision of the First-tier Tribunal in a reference under Schedule 3A to the Communications Act 2003, known as the Electronic Communications Code and referred to here as "the Code". The decision related to nine sites on which the appellant On Tower UK Limited ("On Tower") currently has the benefit of an agreement which it says is a Code agreement, conferring rights under the Code; each agreement has expired and On Tower wishes to have a new agreement pursuant to Part 5 of the Code. The respondent AP Wireless II (UK) Limited ("APW") is the other party to each agreement, and says that they are not Code agreements. As to eight of the sites the FTT decided that each agreement was a Code agreement; those eight sites are the subject of an appeal by APW which has not yet been decided by the Tribunal. This appeal relates to the other site, at the Vulcan Arms, Llandrindod Wells; On Tower appeals the FTT's decision that, for reasons that do not arise in relation to the other eight sites, the agreement is not a Code agreement.

2. On Tower was represented in the appeal by Mr Kester Lees KC and Ms Taylor Briggs, and APW by Mr Wayne Clark KC and Mr Tom Morris; I am grateful to them all for their interesting and skilful arguments.

The legal and factual background

The Code and its predecessor

3. The Code regulates the relationship between those who provide and operate the electronic and physical systems that make electronic communications possible, and those who own the land on which the apparatus involved has to stand.

4. The Code came into force on 28 December 2017, when the amendment of the 2003 Act by the Digital Economy Act 2017 took effect. It is not the first legislation of its kind. Its predecessor was Schedule 2 to the Telecommunications Act 1984, which was amended by the Communications Act 2003. That schedule is often referred to as the "Old Code", but the amendments effected in 2003 are important in this appeal and so I refer to the "1984 Code" to mean Schedule 2 to the 1984 Act in its original form, and the "2003 Code" to refer to its later form as amended in 2003. I refer to the successive versions as "iterations of the Code", and to "Code rights" and "Code agreements" regardless of the version under discussion.

5. The Code, like its predecessors, defines Code rights, and makes provision for them to be imposed on landowners in certain circumstances where they cannot be conferred by agreement. It also provides for Code agreements (that is, agreements that confer Code rights) to continue when they would otherwise have expired, and thus gives security of tenure. A new provision in the Code, which did not feature in either of its predecessors, is a special rate of consideration which is advantageous to those who hold Code rights; as the Tribunal put it in paragraph 10 of *Cornerstone Telecommunications Infrastructure Limited v Keast* [2019] UKUT 116 (LC*)*, "the consideration payable under the Code is likely to be substantially lower than that payable under the old Code". The Code can be described as an expropriatory provision; it can require a landowner to confer rights over

their land, and at a consideration less than it could have obtained from the operator in the open market.

6. Code rights can only be held by a person to whom the Code has been "applied" by a direction given by Ofcom pursuant to section 106 of the 2003 Act.

The parties

7. The following remarks are by way of background, but will be well-known to anyone familiar with the long-running litigation between these two parties, who are frequent flyers in the FTT and this Tribunal. On Tower is what is known as a "WIP", a wholesale infrastructure provider. Its business is the provision of physical infrastructure, usually in the form of masts to which mobile phone operators (known in this abbreviation-ridden environment as "MNOs", mobile network operators) can attach their antennae; there are obvious advantages to the MNOs and to the public in the MNOs not having to each build and maintain their own masts.

8. On Tower has had the Code applied to it by a direction from OFCOM under section 106 of the 2003 Act; so On Tower can hold Code rights, and the consideration it pays for the land it holds under Code agreements is the favourable rate prescribed by the Code.

9. However, the consideration received by On Tower from the customers who use its infrastructure is not restricted by the provisions of the Code. That is because paragraph 108 of the Code provides that electronic communications equipment is not "land" for the purpose of the Code and, since Code rights are defined in paragraph 3 of the Code as rights over land, the right to put antennae on a mast is therefore not a Code right. As the Tribunal explained in *Keast*, the Code does not regulate the legal relations between operators; as counsel in that case put it, there are no "blue on blue" Code rights.

10. APW is not a Code operator – it has not had the Code applied to it by a direction of Ofcom. It is what is known as a site aggregator; its business model is the purchase of sites on which masts stand, typically paying a capital sum to the landowner and then taking the consideration payable under the Code agreement. Obviously the value of that arrangement has been affected by the change, on the coming into force of the Code in 2017, in the rate of consideration payable under the Code. Where On Tower holds a site under an agreement with APW, it pays a Code rent to APW but receives a market rent from its operator customers.

The renewal of a Code agreement under Part 5 of the Code, and the issue in the appeal

11. Part 5 of the Code provides security of tenure. Paragraph 30 provides that when a Code right ceases to be exercisable, for example when the agreement expires by effluxion of time, nevertheless the agreement continues so that the operator can continue to exercise the Code rights and the site provider continues to be bound by them. Paragraph 33 provides that "an operator or site provider who is a party to a code agreement" can by notice require the other party to agree that the existing agreement be terminated and that a new Code agreement should have effect. Transitional provisions in the Digital Economy Act 2017 provide that a party to a "subsisting agreement", namely an agreement which was a Code agreement under the 2003 Code prior to the coming into force of the Code, may also use the Part 5 procedure.

12. That was the procedure followed by On Tower in relation to the nine sites that were the subject of the reference to the FTT, including the site at Vulcan Arms. That site was the subject of a Code agreement with an MNO in 2012, but that agreement was surrendered and a new one made with On Tower, then known as Arqiva Services Limited, on 27 September 2016. In respect of each on the nine sites the contractual term of the agreement had expired by effluxion of time, the Vulcan Arms agreement on 20 November 2023, and On Tower wanted a new one. APW's case before the FTT was that in each case On Tower was not "a party to a Code agreement".

13. It is not in dispute that a Code agreement is one that confers one or more Code rights, and Code rights are defined in paragraph 3 of the Code:

> "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,
> … etc…[there follows a list of rights (b) to (i)]"

14. In its statement of case in the FTT APW raised issues relating to the ownership of infrastructure on the sites, which the Tribunal will have to consider in the appeal relating to the eight sites where On Tower was successful. But in its skeleton argument, filed on 3 July 2025 before the hearing on 9 July, APW raised for the first time a different point about the Vulcan Arms agreement which, unlike the others, was entered into in 2016 before the Code came into force. The skeleton said:

> "64. There is a discrete issue here, which is that at the date of grant OT had a limited direction under s.106. It did not extend to a "conduit system" (which would have been treated by the statutory provisions post the coming into force of the Code as a reference to "an infrastructure system"). This extension only occurred much later during the contractual term. It is submitted that the extension of the limitation cannot lead to Code protection."

15. As we shall see when we go through the relevant provisions, AWP's argument is about the "statutory purposes". It says that at the time the Vulcan Arms agreement was made, the provision of infrastructure in the form of masts was not a statutory purpose. Therefore the rights granted under the agreement could not be Code rights, and the direction from Ofcom that applied the Code to On Tower at the time of the Vulcan Arms agreement did not authorise it to provide infrastructure in the forms of masts, again because such provision was not then (although it is now) one of the statutory purposes.

16. As we shall see, the FTT agreed. Before we look at the FTT's decision we have to take a journey through the relevant provisions of the 1984 Code, the 2003 Code and the current Code.

The statutory purposes and the nature of a Code agreement

17. Under all the iterations of the Code, in order to be a Code agreement the rights conferred have to match one or more of the types of rights described (as to which there is no issue in the present case), the rights have to be conferred for one or more of the statutory purposes, and the operator has to have had the Code applied to it for the statutory purpose(s) for which those rights are conferred. It is agreed between the parties, and would

appear to be correct, that to be a Code agreement these conditions must be met at the time the agreement is made and the rights are conferred.

18. It is convenient to start from the familiar provisions of the Code, before looking back to see how they have evolved.

19. Paragraph 3 is set out at paragraph 13 above. Paragraph 4 defines the statutory purposes:

> "4. (1) In this code *"the statutory purposes"* , in relation to an operator, means—
> (a) in relation to sharing rights, the purposes of enabling the provision by other operators of their networks, and
> (b) in relation to rights other than sharing rights—
> (i) the purposes of providing the operator's network, or
> (ii) the purposes of providing an infrastructure system."

20. That paragraph is somewhat muddied by the reference to sharing rights; the important point is that (leaving aside sharing rights, which are not relevant to this appeal) the statutory purposes are defined in the Code as the purpose of providing the operator's network and the purpose of providing an infrastructure system.

21. Paragraph 5 of the Code states that the operator's network is "so much of any electronic communications network or infrastructure system provided by the operator as is not excluded from the application of the code under section 106(5)." Section 32 of the Communications Act 2003 defines an "electronic communications network":

> "(1) In this Act *"electronic communications network"* means—
> (a) a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description; and
> (b) such of the following as are used, by the person providing the system and in association with it, for the conveyance of the signals—
> (i) apparatus comprised in the system;
> (ii) apparatus used for the switching or routing of the signals; [...][1]
> (iii) software and stored data ; and
> (iv) (except for the purposes of sections 125 and 127) other resources, including network elements which are not active"

22. Section 106 of the Communications Act 2003 is about the application of the Code to a person and provides:

> "(1) In this Chapter "the electronic communications code" means the code set out in Schedule 3A. …
>
> (3) The electronic communications code shall have effect—
>
> (a)…in the case of a person to whom it is applied by a direction given by OFCOM …
>
> (4) The only purposes for which the electronic communications code may be applied in a person's case by a direction under this section are—

(a) the purposes of the provision by him of an electronic communications network; or

(b) the purposes of the provision by him of a system of infrastructure which he is making available, or proposing to make available, for use by providers of electronic communications networks for the purposes of the provision by them of their networks.

(5) A direction applying the electronic communications code in any person's case may provide for that code to have effect in his case—

(a) in relation only to such places or localities as may be specified or described in the direction;

(b) for the purposes only of the provision of such electronic communications network, or part of an electronic communications network, as may be so specified or described; or

(c) for the purposes only of the provision of such system of infrastructure, or part of a system of infrastructure, as may be so specified or described."

23. When we put section 106 alongside paragraph 4 of the Code it is obvious that an operator needs to have the Code applied to it for the statutory purpose that is relevant to its own undertaking. In order to hold Code rights to transmit signals as part of its network, an MNO needs to have the Code applied to it for the purpose of the provision by it of an electronic communications network as defined in section 32 and in order to provide masts a WIP needs a direction under section 106(4)(b) (whether or not either also benefits from a direction for the other of the two relevant purposes). Since 2018 On Tower has had a direction for both of the purposes set out in section 106(4), corresponding to the two statutory purposes set out in paragraph 4 of the Code.

24. However, the Code in its previous incarnations has been in different terms.

25. Inevitably in 1984 things looked very different because of the state of technology at that date. Paragraph 2 of the 1984 Code was in much simpler terms than the corresponding paragraph 3 of the Code:

"1) The agreement in writing of the occupier for the time being of any land shall be required for conferring on the operator a right for the statutory purposes—

(a) to execute any works on that land for or in connection with the installation, maintenance, adjustment, repair or alteration of telecommunication apparatus; or

(b) to keep telecommunication apparatus installed on, under or over that land; or

(c) to enter that land to inspect any apparatus kept installed (whether on, under or over that land or elsewhere) for the purposes of the operator's system."

26. The statutory purposes were defined in paragraph 1 of the 1984 Code as "the purposes of establishing and running the operator's system" and "the operator's system" as "the telecommunication system the running of which is for the time being authorised by the

licence mentioned in paragraph (a) of section 10(1) of this Act…". A licence under section 10 was "for the running of any such telecommunication system as is specified in the licence." As Mr Lees KC and Ms Briggs pointed out in their skeleton argument, in 1984 the "systems" referred to would have involved fixed-line communications; the development of mobile telephony was still in its infancy.

27. Technology marched on. The Communications Act 2003 amended Schedule 2 to the 1984 Act, and it became the 2003 Code. Paragraph 2 of the Code was unchanged, but the statutory purposes were now defined in paragraph 1 as "the purposes of the provision of the operator's network". So the purpose is now "providing" (rather than running) a "network" (rather than a system).

28. An "operator" was defined in paragraph 1 of the 2003 Code as "where the code is applied in any person's case by a direction under section 106 of the Communications Act 2003, that person".

29. "The operator's network" was defined (so far as relevant) as:

> " (a) … so much of any electronic communications network or conduit system provided by that operator as is not excluded from the application of the code under section 106(5) of the Communications Act 2003."

30. So in place of the undefined "system" of the 1984 Code, a network could be an "electronic communications network" or a "conduit system", and the statutory purposes are the provision of either. Both those expressions were defined in paragraph 1:

> ""conduit" includes a tunnel, subway, tube or pipe;
>
> "conduit system" means a system of conduits provided so as to be available for use by providers of electronic communications networks for the purposes of the provision by them of their networks…
>
> "electronic communications network" has the same meaning as in the Communications Act 2003"

31. The definition of an "electronic communications network" in section 32(1) of the 2003 Act was in the same terms as it is now (see paragraph 21 above), save that section 32(1)(b)(iv) was not yet enacted (which is not relevant to this appeal).

32. Section 106 of the 2003 Act, in the form in force in 2016, read as follows (so far as relevant):

> "(3) The electronic communications code shall have effect— (a) in the case of a person to whom it is applied by a direction given by OFCOM; …
>
> (4) The only purposes for which the electronic communications code may be applied in a person's case by a direction under this section are—
>
> > (a) the purposes of the provision by him of an electronic communications network; or

(b) the purposes of the provision by him of a system of conduits which he is making available, or proposing to make available, for use by providers of electronic communications networks for the purposes of the provision by them of their networks.

(5) A direction applying the electronic communications code in any person's case may provide for that code to have effect in his case—

(a) in relation only to such places or localities as may be specified or described in the direction;

(b) for the purposes only of the provision of such electronic communications network, or part of an electronic communications network, as may be so specified or described; or

(c) for the purposes only of the provision of such conduit system, or part of a conduit system, as may be so specified or described."

33. Section 106(4) of course has to be read alongside the definition of "electronic communications network" in section 32.

34. Thus in the 1984 Code the statutory purposes were the establishment and running of telecommunications systems and a licence could be granted for that purpose; in the 2003 Code the statutory purposes were the provision of an electronic communications system or a conduit system, and the 2003 Code could be applied to an operator for the purposes of providing either or both; since 2017 in the Code the statutory purposes are the provision of an electronic communications system or an infrastructure system, and the Code can be applied to an operator for the purposes of providing either or both. That evolution (and the reasons for it) is crucial to this appeal.

35. The Code was applied to On Tower (then named Crown Castle UK Limited) by a direction of Ofcom dated 21 July 2005 ("the 2005 Direction") in the following terms:

"The electronic communications code shall apply to Crown Castle UK Ltd for the purposes of the provision by Crown Castle UK Ltd of an electronic communications network to have effect in the United Kingdom".

36. When it made the 2005 Direction Ofcom published an Explanatory Statement, which set out reasons why Crown Castle had not had such a direction before and why, in Ofcom's view, the terms of the 2003 Act meant that it could have one now:

"1.4 Prior to the implementation of the Act, Crown Castle could not benefit from the powers conferred upon Code operators as it does not run a telecommunications network. It is for this reason that Crown Castle has not had or benefited from Code powers. However, as a result of convergence, the distinction between networks has becoming increasingly blurred. This was recognised in drawing up the Act and there is therefore a broader interpretation of those that can and should be permitted to benefit from Code powers".

1.5 The proposed direction would help to promote competition, as Crown Castle

provides apparatus used to support the five mobile network operators' networks and is therefore important in terms of ensuring that the operators can all offer widespread coverage. The transmission network, meanwhile, helps to promote competition in television markets.

1.6 Although Crown Castle has been able to maintain its network without Code powers, Ofcom considers that a large network that helps to underpin competition in communications markets needs to benefit from Code powers much as any other network needs to benefit from Code powers. Crown has explained that it does not own the freehold interest of all of its networks [sic] sites and could therefore be asked to vacate a site without recourse to the powers that would be conferred upon it under the Code. This is not a satisfactory position to maintain.

37. Turning to the public benefit in making a direction, Ofcom went on to say:

> "1.9 … in terms of the apparatus used to support the mobile networks, its [i.e. Crown Castle's] network helps to ensure widespread coverage and, importantly, helps to prevent a proliferation of masts as its network is not used solely for one operator."

38. That was Ofcom's explanation of the reason why Crown Castle had not had such a direction before and why, in Ofcom's view, the terms of the 2003 Act meant that it could have one now.

39. In 2018 the 2005 Direction was extended to include also the provision by On Tower of an infrastructure system. An Explanatory Statement was again published, which made it clear that in Ofcom's view On Tower was a WIP, provided a "network of sites", and already benefited from the protections of the Code (see paragraphs 3.11 and 3.13 of the 2018 Explanatory Statement).

The FTT's decision

40. Against that background we can turn to the FTT's decision. At paragraph 89 and following Judge Jackson set out paragraph 2 of the Code, with its definition of an operator as a person to whom the Code is applied by a direction under section 106. He then explained:

> "92. On 21st July 2005 OFCOM gave a Direction under Section 106(3) of the Communications Act 2003 applying the electronic communications code in the case of the Claimant (at that time known as Crown Castle UK Ltd). The terms of the Direction were:
>
> > "The electronic communications code shall apply to Crown Castle UK Ltd for the purposes of the provision by Crown Castle UK Ltd of an electronic communications network to have effect in the United Kingdom."
>
> 93. The 2003 Act was amended with effect from 28th December 2017 by the Digital Economy Act 2017. Prior to 2017 a Direction could be given for a network or a system of conduits or both. In 2017 the wording "system of conduits" was amended to "system of infrastructure". It is important to note that the 2005 Direction only applied for the purposes of a network and not to the provision of a

> system of conduits. The agreement at Vulcan Arms was entered into on 27th September 2016 between Raymond John Denis Lawrence and others (1) and Arqiva Services Limited (2) [AF 3c]. At the time that agreement was entered into the Claimant (known at that time as Arqiva Services Limited) had a Direction as a network provider but not for the purposes of the provision of a system of conduits. The Claimant was the subject of a limitation under section 106(5)(b).
>
> The Limitation was not removed until 25th September 2018 when following modification, the Claimant received a "Modification to Direction" from OFCOM adding a further direction in respect of an infrastructure system.
> …
>
> 96. I reject Mr Kitson's submission that an OFCOM Direction is a gateway. In the case of Vulcan Arms, the 2005 Direction was limited to the provision of a network. Taking the Claimant's case at its highest it is a provider of a system of infrastructure. The Claimant did not have a Direction for a system of conduits in 2016 when the agreement at Vulcan Arms was entered into. Its Direction was limited under section 106(5) to the provision of an electronic communications network. The provision of a system of conduits provided by the operator was, to use the language of Paragraph 6(a), excluded from the application of the Code under section 106(5). Accordingly, I find that the code rights granted by the 2016 Agreement were not for statutory purposes."

The appeal

41. On Tower appeals, with permission from the FTT, on three grounds:

> "Ground 1: The FTT erred in concluding that, at the time the Agreement was entered into, the Direction was subject to an express and/or implied limitation under section 106(5)(b) of the Communications Act 2003.
>
> Ground 2: The FTT erred in having regard to – and applying – the provisions of the Code, rather than the Old Code.
>
> Ground 3: The FTT further erred in failing to construe, at all or properly, the terms "electronic communications network" and "conduit system" in paragraph 1(1) of the Old Code. Had the FTT done so, then it would have concluded that, on its true construction, the term "conduit system" was not synonymous with "infrastructure system" and, further, the term "electronic communications network" was not limited to the provision of an active broadcast network, but, rather, was sufficiently wide to encompass the provision by a WIP of a "network of sites" for use by providers of electronic communications networks."

42. Grounds 1 and 2 are uncontroversial. APW agrees that in order to assess whether the Vulcan Arms agreement was a Code agreement, the FTT should have been looking at the date on which the agreement was made, in 2016, and at the provisions of the 2003 Code which was then in force; moreover, the 2005 Ofcom direction was not one that was limited under section 106(5) of the 2003 Act. The real issue is ground 3, which requires the Tribunal to address APW's argument before the FTT that the provision of infrastructure alone, by a person that was not also providing a transmission service, was not one of the statutory purposes under the 2003 Code, so that On Tower's provision of infrastructure

was not included in the 2005 direction and in exercising the rights granted by the Vulcan Arms agreement it was not doing so "for the statutory purposes", so that the agreement was not a Code Agreement.

The arguments in the appeal

The arguments for On Tower

43. On Tower's primary case is that the FTT misconstrued section 32 and 106 of the 2003 Act. It ought to have held that the phrase "electronic communications network" was not limited to the provision of an active broadcast network but was wide enough to encompass the provision of a "network of sites" with passive infrastructure for MNOs. That was the view Ofcom took in making directions in favour of WIPs, such as the 2005 Direction for On Tower, and that was the view of the industry. That was the view Ofcom still held when it extended On Tower's direction in 2018, as can be seen in its Explanatory Statement.

44. Mr Lees KC argued that the Law Commission's reading of the 2003 Code is irrelevant and inadmissible, because it cannot be authority for the construction of the legislation then in force (although it can be of assistance in understanding the policy behind legislation that it recommended).

45. As an aside, and in light of APW's argument that On Tower would have had Code rights if it had had a conduits direction, Mr Lees KC explained that the phrase "conduit system" was always about fixed-line communications; he argued that it is a red herring in the context of WIPs. A conduit is a line or pipe and does not describe installations of passive infrastructure such as masts that are not physically linked. In 2017 Parliament chose to modernise and clarify the 2003 Act by shifting to technologically neutral language, jettisoning the notion of "conduits" and using the term "infrastructure" which is wide enough to include fixed-line apparatus while acknowledging the role of WIPs. But that did not mean that only a WIP with a conduit direction could have been granted Code rights pre-2017. The FTT was wrong about that; in fact "electronic communications network" was wide enough to encompass a network of masts.

46. If its primary case fails and it is found that the FTT did not misconstrue the statutory provisions On Tower has two further arguments.

47. The first relies on the "always speaking" principle; it is argued that by the time the Vulcan Arms agreement was entered into in 2016 the term "electronic communications network" had changed so that it now included the provision of passive infrastructure by WIPs.

48. Mr Lees KC reminded the Tribunal of the need to interpret legislation purposively and of the words of Lady Rose in *Cornerstone Telecommunications Infrastructure Limited v Compton Beauchamp Estates Limited* [2022] UKSC 18, at paragraph 106:

> "…the starting point here is not to try and define the word 'occupier' and then allow that definition to mandate how the regime established by the code works. The correct approach is to work out how the regime is intended to work and then consider what meaning should be given to the word 'occupier' so as best to achieve that goal".

49. Mr Lees KC also referred to dicta in *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13 where Lord Steyn said at paragraph 21:

> "But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

50. Lord Bingham said at paragraph 8 that an overly literal approach:

> "… not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute…*".*

51. Mr Lees KC argued that it is well-established that a provision in a statute is, in general, "always speaking." Words change their meaning as time passes, as a result of social change or technological developments, and where a new state of affairs falls within "the same genus of facts" as to those to which the expressed policy was formulated or "there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made" (Lord Wilberforce in *Royal College of Nursing v DHSS* [1981] AC 800 at 882, in a passage taken as authoritative in *Quintavalle*). At paragraph 9 of *Quintavalle* Lord Bingham gave an example:

> "If Parliament, however long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now."

52. Thus in *Quintavalle* itself the issue was whether an embryo created without fertilisation by cell nuclear replacement ("CNR") could fall within the definition of "embryo" in the Human Fertilisation and Embryology Act 1990 as "a live human embryo where fertilisation is complete." The House of Lords decided that the purpose of the 1990 Act was to protect live human embryos created outside the human body; had Parliament known about live human embryos created by CNR it could not possibly have intended to exclude them from protection.

53. In the present case, it is argued, the telecommunications industry was still in its infancy in 2003, and it moved on rapidly thereafter. The drafters of the 2003 Act could not have foreseen the central role that WIPs would come to play in the industry by facilitating mast-sharing, which has both promoted competition and avoided the proliferation of masts. If Parliament had foreseen their role and their importance it would of course have wanted them to have Code rights and could not rationally have intended to leave them outside the Code.

54. On Tower's final argument is that the construction for which APW argues gives rise to absurd results. It is submitted that the need for a purposive approach is illustrated by the consequences of finding that On Tower was not a party to a Code agreement at the Vulcan Arms site, which it is said would be "stark, practically absurd, and divorced from the

commercial realities of the entire industry for decades. It would bring significant uncertainty to the sector; it would mean that where a WIP has been in occupation of a site for a very long time, it is now seen to have had no Code rights, and there is nothing it could do about that. Mr Lees KC put forward the following examples, all of which have different consequences if the FTT's decision is correct:

> "Situation 1: imagine that, in 2010, a site provider enters into an agreement with a MNO, pursuant to which the MNO is entitled to install ECA on the land for a term of 10 years. In 2012, the MNO lawfully assigns the Code agreement to a WIP. At the time of the assignment, the WIP has a "network" direction pursuant to s.106 of the Communications Act 2003. However, in 2018, the direction is modified, so that the WIP has a "network" and a "infrastructure" direction from Ofcom. The WIP is still in situ today.
>
> Situation 2: imagine that, in 2010, a site provider enters into an agreement with an MNO, pursuant to which the MNO is entitled to install ECA on the land for a term of 10 years. A WIP is desirous of taking an assignment of the agreement. However, it becomes apparent that the extent of the demise needs to be increased to incorporate a slither of land adjacent to the compound. So, rather than the MNO assigning the agreement to the WIP, the site provider grants a new agreement to the WIP, thereby effecting a surrender by operation of law of the original agreement. The new agreement is on precisely the same terms as the original agreement (save in respect of the demise). At the time of grant, the WIP has a "network" direction pursuant to s.106 of the Communications Act 2003. However, in 2018, the direction is modified, so that the WIP has a "network" and a "infrastructure" direction from Ofcom. The WIP is still in situ today.
>
> Situation 3: imagine that, in 2010, a site provider enters into an agreement with a WIP, pursuant to which the WIP is entitled to install ECA on the land for a term of 10 years. At the time of grant, the WIP has a "network" direction pursuant to s.106 of the Communications Act 2003. ... In 2012, the WIP assigns the agreement to an MNO, who remains in situ today."

55. In situation 3, I have omitted the words "The WIP is still in situ today" which I think were included in error. I can summarise Mr Lees KC's discussion of the three outcomes by saying that in situation 1, if the FTT was right, the WIP had Code rights because the agreement was a Code agreement when made, and the agreement is a subsisting agreement for the purposes of the use of Part 5 of the Code; in situation 2 the WIP does not have Code rights because the agreement was surrendered and re-granted – it thereby falls into the same category as the agreement at Vulcan Arms and, if the FTT was correct, is not a subsisting agreement; in situation 3 the MNO does not have Code rights because the agreement was not a Code right when made, despite the long occupation of the MNO. On Tower's argument is that there is no good reason why these three scenarios should have different outcomes.

56. While the present appeal concerns the Vulcan Arms, On Tower points out that it will have implications for uncounted other sites. If the FTT's decision is upheld, the number of "subsisting agreements" will be reduced, and there may be a proliferation of costly and time-consuming references to the tribunals.

57. At the hearing Mr Lees KC developed his argument by reference to a principle of construction which he very fairly said that the extent is in doubt, namely that established practice may be an aid to construction of a statute. He referred to *Wathen-Fayed v Secretary of State for Housing Communities and Local Government* [2025] UKSC 32 where Lord Hamblen at paragraph 62 referred to *Benion, Bailey and Norbury* in section 24.20:

> "Where the meaning of a statute has been considered by the lower courts and business or other activities have been ordered on that basis for a significant period of time. The courts may be slow to overturn settled practice and understanding. However, the extent (if any) to which settled practice is relevant to interpretation is presently unclear."

58. Lord Hamblen JSC went on to refer to dicta of Lord Carnwath JSC in *R(N) v Lewisham Borough Council* [2015] AC 1259, who said that where the statute is ambiguous but has been the subject of authoritative determination in the lower courts and business has followed that interpretation, the higher courts will be slow to overturn settled practice. Mr Lees KC acknowledged the uncertainty of the principle, but submitted that settled practice at least shows that an "electronic communications network" can mean "a network of masts".

APW's arguments in the appeal

59. APW's case is that the statutory purposes in the 2003 Code were (a) the provision of an electronic communications network and (b) the provision of a system of conduits (see paragraphs 27 and 29 above). Conduits are lines or pipes; they are the physical carriers of information from place to place; it is not in dispute that masts are not conduits. An electronic communications network was defined in section 32 of the 2003 Act, repeated here for convenience:

> "(1) …(a) a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description; **and**
> (b) such of the following as are used, by the person providing the system and in association with it, for the conveyance of the signals—
> (i) apparatus comprised in the system;
> (ii) apparatus used for the switching or routing of the signals; [...][1]
> (iii) software and stored data …"

60. The emphasis of the "and" is mine; Mr Clark KC explained that an electronic communications network can be simply a transmission system (section 32(1)(a)), which is a system that transmits (not a "network of sites"), and equally it can be such a transmission system together with such of the items of infrastructure listed in section 32(1)(b) as are used by the person providing that system, but it cannot be that infrastructure alone. Items (a) and (b) are linked with an "and", not an "or". The provision of a transmission system and a mast for use with that system is within the statutory purposes, because a transmission system and a mast is an electronic communications network; the provision of a mast, or any number of masts, alone is not. However, a conduit system alone is an electronic communications network and the provision of a conduit system is within the statutory purposes.

61. Mr Clark KC referred to the situation in *Keast* where the claimant was an infrastructure provider (Cornerstone Telecommunications Infrastructure Limited) with a direction under section 106(4)(b), made prior to the coming into force of the Code, which enabled it to provide a system of conduits. As the Tribunal explained at paragraph 84:

> "The Claimant is in the business of providing not only pipes and wires but also masts, cabinets and other items that cannot plausibly be described as conduits, and that is the sort of apparatus that it wishes to keep on the Respondent's land. The Respondent says that OFCOM's direction is limited to the provision of conduits and that it therefore cannot have the Code rights that it seeks."

62. The claimant relied on paragraph 3 of Schedule 3 to the Digital Economy Act 2017 which says:

> "In any enactment passed or made before the commencement date, unless the context requires otherwise –
> (a) a reference to a conduit system, where it is defined by reference to the existing code, is to be read as a reference to an infrastructure system as defined by paragraph 7(1) of the new code".

63. The Tribunal in *Keast* accepted that the "conduits" direction under the earlier section 106(4)(b) was to be read, after the Code came into force, as an "infrastructure" direction under the amended section 106(4)(b). Hence the way APW's argument was put in its skeleton argument (paragraph 14 above): if On Tower had had a "conduits" direction that would have been treated post-2017 as an infrastructure direction. But it had an electronic communications network direction under section 106(4)(b) which, according to APW, could not authorise it to exercise rights for the statutory purposes unless it was also providing a transmission system.

64. Mr Clark KC also referred to the Law Commission report, *The Electronic Communications Code* (2013). In chapter 2 of that Report the Commission looked at the need for a Code and at the relationships it ought to regulate. At paragraph 2.23 it asked who should have Code rights, and said this:

> "*Rights for whom?*
>
> 2.23 This is obvious but worth stating: the Code Rights, as defined in the 2003 Code, are rights for Code Operators only. Any or all of the same rights may of course be conferred by agreement on other operators who have not had the Code applied to them, but such rights will not be Code Rights. …
>
> 2.25 Electronic communications apparatus may, of course, be installed by an operator that is not a Code Operator. … What happens if that operator later becomes a Code Operator? We take the view that the rights do not at that point become Code Rights. Code Rights are those that are Code Rights at the outset because they were granted to a Code Operator. Agreements negotiated on the basis that Code Rights were not being granted should not have that basis changed because of a change in status of one of the parties.
>
> 2.26 A different scenario arises where a wholesale infrastructure provider holds a lease of land, installs infrastructure upon it, and then confers contractual rights upon mobile operators to install antennae on the mast. The terms of the provider's

lease enable (explicitly or otherwise) the installation of electronic communications apparatus; but that is not a Code Right if the infrastructure provider is not a Code Operator, and in that case that lease will not be a regulated relationship. The infrastructure provider generally has the option of seeking to become a Code Operator – that is, to have the Code applied to it under section 106 of the Telecommunications Act 2003.

2.27 But it can only do so if it falls within the provisions of section 106(4) of the Communications Act 2003 …

2.28 The infrastructure provider will not fall within these provisions if it does not itself operate an electronic communications network, unless its mast sites also involve the presence of cable or fibre within a system of conduits. It is perhaps strange that a provider of conduits for the use by others for electronic communications apparatus can be a Code Operator, but a provider of other infrastructure cannot. We consider that infrastructure providers should be eligible to have the Code applied to them, and therefore … to acquire Code Rights. This would enable the Code to be applied consistently across all infrastructure providers. We have discussed this suggestion with the Mobile Operators Association, who have indicated that they would support such a development, assuming that telecoms operators would remain able to enforce Code Rights against the infrastructure provider and other Site Providers where relevant. The Association commented:

> Clearly ensuring that the rights are available to infrastructure providers would ensure that an infrastructure provider managing a site has the necessary Code powers to protect the site. This should simplify the practical application of the Code in such cases and greater encourage the use of site and infrastructure sharing through wholesale providers or joint ventures, in support of the government's public policy objectives on site sharing and re-use.

2.29 We recommend that section 106 of the Communications Act 2003 be amended so that the revised Code may be applied to a person who provides infrastructure on the same basis as it may be applied to providers of systems of conduits.

65. Mr Clark KC did not suggest that the Law Commission Report was an authoritative statement of what the 2003 Code meant. But he said that the Tribunal is entitled to look at it to identify the mischief that the reform was intended to fix. He referred to paragraph 1.26 of the Report:

> "1.26 …the 2003 Code presupposes a relatively simple structure of relationships between occupiers and Code Operators, although it allows for the possibility of various interests in land. It makes no provision for situations where the landowner deals only with a wholesale infrastructure provider, who in turn deals with Code Operators; nor does it provide for tripartite arrangements between a landowner, a number of Code Operators and a wholesale infrastructure provider. Arqiva explained that:

> There has … been a blurring of the way networks are deployed, operated, shared and maintained, with many sites now being owned and managed by wireless infrastructure companies, who are effectively neutral hosts providing a range of infrastructure and operational management services to operators. This has also led to a blurring between the relationships held with the landowner, with often no direct link with third party sharers who may be code operators. Thus the underlying assumption in the Code that a single operator may need to use code powers in relation to a network site against a single landlord is therefore no longer valid.

66. There the consultation response by On Tower (then named Arqiva) is reproduced in the context of the Commission's statement that the Code "makes no provision for situations where the landowner deals only with a wholesale infrastructure provider." APW's reading of the relevant provisions of the 2003 Code mirrors what Arqiva and the Law Commission were saying: the 2003 Code assumed a bipartite relationship between landowner and MNO and did not provide for the tripartite arrangement between a landowner, a WIP and its MNO customers.

67. Furthermore, Mr Clark KC argued, if On Tower's argument is correct then the move in the Code from "conduits" to "infrastructure" was pointless; there was no need for a change because, contrary to the Law Commission's view, WIPs were already catered for. Furthermore, the Commission's report is evidence of the industry view of the meaning of the Code, which means that On Tower's argument from settled practice cannot succeed.

68. Turning to the "always speaking" principle, Mr Clark KC pointed out that the technology and the business practice of the provision of passive infrastructure in the form of masts was already established; there is no societal change or technological development that could support the use of the principle.

69. Mr Clark KC did not shrink from the position that Ofcom got it wrong and said that the law should not bend to validate a commercial arrangement that was from the outset based on a flawed legal premise. As to the scenarios said to illustrate the absurd outcomes of the FTT's conclusion, they were not absurd, he said, but were the logical consequences of the FTT's construction and of the policy of the 2003 Code. In Mr Clark KC's view, the exclusion of WIPs from Code protection was deliberate. To extend an "electronic communications network" to "a network of sites" would not, in Mr Clark's KC's view, be interpretation; it would be judicial legislation and impermissible.

Discussion

70. I am keenly aware of the need to read the Code in a way that is consistent with its intended working. I bear in mind Lady Rose's words in *Compton Beauchamp*, and I do not doubt that they are equally applicable to the 2003 Code as the Code's statutory predecessor. I have to work out how that regime was intended to work and then consider what meaning should be given to its provisions so as best to achieve that goal.

71. It is not particularly difficult to work out how the Code was intended to work. We have the Law Commission's report and the 2016 DCMS report in May 2016. But it is much more difficult to discern the thinking behind the 2003 Code. It was enacted over 20 years ago; technology has changed, business models have changed, and – perhaps most important – the market within which electronic communications were developing and the

associated businesses were developing was very different from that created by the Code, because consideration was not restricted by the assumptions required by the Code. For that reason the 2003 Code was not an expropriatory statute to the same extent as the Code, and the implications of being or not being a Code operator were different – that status mattered, but only really in terms of security of tenure. Actually getting rights from landowners was not usually a problem in a willing market underpinned by freely negotiated consideration.

72. The first thing to say in considering On Tower's arguments is that it is impossible to read section 32(1)(a) of the 2003 Act as including a "network of sites". I appreciate that Ofcom thought it did, as we can see from the Explanatory Statement (paragraphs 36 to 39 above), but the words "a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description" do not describe passive infrastructure. They do not describe, as Ofcom put it, "Crown Castle's estate … of over 3,600 sites". No quantity of masts is a network unless the masts are connected. One might argue that they are because the MNOs' antennae send signals from one to another; and of course *that* network is an electronic communications network, but it is not On Tower's network and the masts that On Tower provides are not themselves a network.

73. Furthermore, the word "and" between section 32(1)(a) and section 32(1)(b) cannot be read as "and/or". It is conjunctive, not disjunctive. When the draftsman wanted to say "or" they did so: see section 32(3) where the definition of an "associated facility" refers to:

> "the purpose of—
>
> (a) making the provision of that network or service possible;
>
> (b) making possible the provision of other services provided by means of that network or service; or
>
> (c) supporting the provision of such other services.

74. Equally, where the draftsman wanted to say "either or both" they did so: see section 32(7) where "a content service" is defined as "so much of any service as consists in one or both of the following…".

75. The plain and unambiguous meaning of section 32 is, as is argued for APW, that an "electronic communications network" can be simply a transmission system, and it can be such a transmission system <u>together with</u> the infrastructure listed in section 32(1)(b) used in conjunction with that system, but it cannot be that infrastructure alone.

76. I repeat that I read that as the plain and unambiguous meaning of the section. As it happens, that is what the Law Commission thought it meant. I agree with On Tower that the Law Commission's view cannot be authority for the construction of the legislation in force at the time it reported; it is however very useful in explaining the mischief that the new Code was intended to address. What is particularly interesting is that APW's construction of section 32 appears consistent with the position as understood by the Law Commission's consultees, who included On Tower (then known as Arqiva), namely that passive infrastructure is not an electronic communications network and that therefore a WIP cannot benefit from a direction under the Code.

77. The Law Commission cannot have been aware of the 2005 Direction. The first sentence of its paragraph 2.28, which Mr Lees KC says is wrong, could not have been written with knowledge of that direction. Nor can paragraph 1.26. I have not been pointed to any evidence that the Law Commission was aware of the 2005 Direction; either On Tower did not tell the Law Commission about the 2005 Direction, or the Law Commission overlooked or misunderstood that information. Had the Law Commission known about that direction, it might or might not have regarded the direction as apt to describe a "network of sites"; but the implication of what On Tower appears to have said to the Law Commission is that it was not. And that is my reading of the statute, consistent with the Law Commission's and with APW's.

78. If that is right, then Ofcom was wrong when it took the view that Crown Castle had a "network of sites" which could bring it within section 32(1)(a), and wrong in the 2018 Explanatory Statement when it expressed the same view about the position before the 2018 amendment of the 2005 Direction. That is an unfortunate consequence, but in my judgment Ofcom's reading of section 32 was incorrect.

79. On Tower argued that if its primary argument about the meaning of section 32 fails, the "always speaking" principle would enable the Tribunal to reach a different conclusion.

80. The principle requires first that one be able to formulate the policy of the statute, and then assess whether "a fact of the same genus" as those contemplated by the policy is within it. For On Tower, Mr Lees KC asks "Could Parliament rationally have intended to leave WIPs outside the Code?"; and I do not know the answer to that question. As I said above (paragraph 71) it is difficult to discern the thinking of 2003, particularly in view of the fact that the importance of having Code rights was then far less than it is now because consideration was unregulated.

81. On Tower has made two suggestions as to how the principle might be used here. One is in reading section 106(4), to bring "a network of sites" within the expression "the provision by him of an electronic communications network". The difficulty with that argument is that section 106(4) cannot be the target for the operation of the "always speaking" principle because the expression "electronic communications network" is a defined term. One has to go to section 32 where the expression is defined. I asked Mr Lees KC what he said the "always speaking" principle would do to section 32, and his answer was that it would enable "and" to be read as "or", so that either a transmission system or passive infrastructure could satisfy the definition.

82. That is a difficult suggestion. It is not a suggestion that the meaning of a noun has changed with social change or technological development. It is an argument that the structure of a statutory provision should change, so that where the statute said two things were necessary now only one of them is sufficient. It is said that technological change justifies that reading.

83. That cannot work. It is clear from Ofcom's Explanatory Statement that On Tower's business model pre-dated the 2003 Act. The skeleton argument for On Tower says the same: "By 2003 … MNOs, who had previously been "running" their own systems, had begun partnering with third parties (including On Tower) to construct and "provide" mobile masts for them. Mast sharing developed as a way to reduce the costs of network roll-out." On Tower cannot point to any technological change between 2003 and the date

of the 2005 Direction, nor any change in commercial practice, that could justify a shift in the meaning of section 32(1).

84. In my judgment the argument from the "always speaking" principle fails.

85. Finally On Tower argues that the results that follow from the construction for which APW argues would be absurd. APW says that they would be perfectly logical, and I agree that the outcomes of the scenarios On Tower sets up follow from the premise that On Tower could not get Code rights by virtue of a "network" directive under the 2003 Code. They are not absurd. Any difficulty that those outcomes might cause arise only now, with the Code in force, and only as a result of the transitional provisions; an agreement originally made with On Tower before the Code came into force was not a Code agreement and so is not a subsisting agreement, and therefore cannot be modified or renewed under Part 5 of the Code. Whether that is a problem is at this stage unknown; if it is, that is indeed a practical problem for On Tower but it is not an absurdity.

86. Finally, Mr Lees KC readily acknowledged that the principle of reluctance to overturn settled practice cannot be leaned on too hard. I agree. In the present case the statutory wording is not ambiguous. Moreover, it is not a case where the wording in question has already been the subject of judicial determination. So I do not think that that principle can assist On Tower. It is not even clear that there was a settled practice. The Law Commission report indicates that it was the understanding of the industry that WIPs could not get Code rights; certainly the Mobile Operators Association (paragraph 64 above) thought so. And we know from *Keast* that some WIPs, or at least CTIL, had a "conduits" direction, which has in effect been rectified by the transitional provisions (paragraph 62 above); the existence of such directions, and the care taken in the transitional provisions to regularise the position of those who had them, indicates that there was no general understanding that WIPs had "network" directions and thereby had Code rights.

Conclusion

87. In conclusion, the appeal succeeds on grounds 1 and 2, but fails on ground 3. The FTT reached the right answer for the wrong reason. Its conclusion stands; the agreement at Vulcan Arms was not a Code agreement.

Judge Elizabeth Cooke
7 July 2026

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.