Neutral Citation Number: [2026] EWCA Civ 43

Case No: CA-2025-000538

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(LANDS CHAMBER)
Mr Justice Fancourt
[2024] UKUT 00429 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/02/2026

Before:

LORD JUSTICE NEWEY
LORD JUSTICE HOLGATE
and
LORD JUSTICE FOXTON

- -

Between:

ON TOWER UK LIMITED	**Claimant/ Respondent to the appeal**
- and -	
AP WIRELESS II (UK) LIMITED	**Respondent in the original references/ Appellant**

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- -

Toby Watkin KC and Wayne Clark KC (instructed by **Eversheds Sutherland (International) LLP**) for the **Appellant**
Kester Lees KC and Taylor Briggs (instructed by **Gunner Cooke LLP**) for the **Respondent**

Hearing dates: 13 and 14 January 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 3 February 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. This appeal concerns the electronic communications code ("the Code") contained in schedule 3A to the Communications Act 2003 ("the 2003 Act"). The central question relates to the meaning of "party to a code agreement" as those words are used in Part 5 of the Code. The answer affects, among other things, which "operators" can make applications pursuant to Part 5.

2. In a decision dated 18 December 2024 ("the Decision"), Fancourt J ("the Judge"), sitting in the Upper Tribunal (Lands Chamber), concluded that an operator to whom the benefit of a licence granting "code rights" has been assigned will be a "party to a code agreement" if it has "assumed the primary responsibility for performing the obligations in the licence agreement" by, among other things, "a covenant or agreement made by the assignee with the assignor to perform the obligations in the licence agreement": see paragraph 92 of the Decision. In a further decision dated 6 February 2025, the Judge found that the respondent, On Tower UK Limited ("On Tower"), had given such a covenant in relation to the two licence agreements with which we are concerned. On that basis, the Judge dismissed the appeal of the appellant, AP Wireless II (UK) Limited ("APW"), against a decision dated 9 January 2024 ("the FTT Decision") of the First-tier Tribunal (Property Chamber) (Judge D Jackson) ("the FTT") on a preliminary issue arising in respect of applications made by On Tower pursuant to paragraph 33 of the Code.

3. With the permission of the Judge, APW now appeals against his decisions. For its part, On Tower contends that the decisions should be upheld for the reasons that the Judge gave and also for other reasons.

Basic facts

4. The proceedings relate to sites at Fields Farm in Sandbach, Cheshire and Blackwell Grange Golf Club in Darlington, County Durham.

5. Orange Personal Communications Services Limited was granted a licence in respect of the Sandbach site by an agreement dated 11 March 1997. The benefit of that agreement was subsequently assigned, first, to Everything Everywhere Limited and Hutchison 3G UK Limited ("Hutchison"), and then on to Arqiva Limited and subsequently On Tower (which was at the time called "Arqiva Services Limited"). In 2021, On Tower served notices under paragraph 33 of the Code seeking a new lease at a much reduced rent. In the following year, APW became the registered proprietor of the site. In 2023, On Tower made a reference to the FTT for an order for a new lease under paragraph 34 of the Code. APW, however, contended that the reference should be struck out because On Tower was not a "party to a code agreement".

6. T-Mobile (UK) Limited ("T-Mobile") was granted a licence in respect of the Blackwell Grange Golf Club site on 5 July 2007. The benefit of that agreement was assigned in turn to T-Mobile and Hutchison jointly, to Arqiva and to On Tower. In 2022, On Tower served a notice under paragraph 33 of the Code seeking a new agreement at a much reduced rent. In 2023, On Tower made a reference to the FTT for a new lease under paragraph 34 of the Code. Once again, APW denied that On Tower was a "party to a code agreement" and contended that the reference should be struck out.

The Code

7. The Code was inserted into the 2003 Act by the Digital Economy Act 2017. It replaced the code ("the Old Code") which had been set out in schedule 2 to the Telecommunications Act 1984 (as latterly amended by the 2003 Act).

8. The Code deals with the relationship between, on the one hand, "operators" and, on the other, "occupiers" of land which operators wish to use. A person can be designated as an "operator" either for "the purposes of the provision by him of an electronic communications network" or for "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": see section 106 of the 2003 Act and paragraph 2 of the Code.

9. Among other things, the Code makes provision for "code rights" to be conferred on operators. By paragraph 3 of the Code a "code right" 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."

The "statutory purposes" are "the purposes of providing the operator's network" or "the purposes of providing an infrastructure system": see paragraph 4 of the Code.

10. Paragraph 9 of the Code (which is included in Part 2) stipulates that a code right "may only be conferred on an operator by an agreement between the occupier of the land and the operator". While, however, such an agreement can be made consensually, the Court is empowered to impose or modify an agreement in certain circumstances. The jurisdiction is in practice exercised by the Upper Tribunal or the FTT (to which, together, I shall refer as "the Tribunal").

11. As its heading ("Power of Court to impose agreement") indicates, such a power is given by Part 4 of the Code, comprising paragraphs 19-27. Paragraph 20 allows an operator requiring a code right to apply for an order conferring it in the absence of agreement. By paragraph 21, the Tribunal may make such an order if the two conditions specified in sub-paragraphs (2) and (3) are met. Those are that "the prejudice caused to the relevant person by the order is capable of being adequately compensated by money" and that "the public benefit likely to result from the making of the order outweighs the prejudice to the relevant person". Sub-paragraph (4) explains that, in deciding whether the second condition is met, the Tribunal "must have regard to the public interest in access to a choice of high quality electronic communications services".

12. Part 5 of the Code, which is of particular importance in the present case, comprises paragraphs 28-35 and has the heading "Termination and modification of agreements". As paragraph 28 explains, Part 5 makes provision as regards:

> "(a) the continuation of code rights after the time at which they cease to be exercisable under an agreement,
>
> (b) the procedure for bringing an agreement to an end,
>
> (c) the procedure for changing an agreement relating to code rights, and

> (d) the arrangements for the making of payments under an agreement whilst disputes under this Part are resolved."

13. Paragraph 29 of the Code defines "code agreement" for the purposes of Part 5 to refer, subject to an exception, to an agreement between an occupier and an operator which confers a code right.

14. Paragraph 30 of the Code provides for a code right to continue beyond the point when, according to the terms of the relevant agreement, it would have come to an end. So far as material, it states:

> "(1) Sub-paragraph (2) applies if—
>
> (a) a code right is conferred by, or is otherwise binding on, a person (the 'site provider') as the result of a code agreement, and
>
> (b) under the terms of the agreement—
>
> (i) the right ceases to be exercisable or the site provider ceases to be bound by it, or
>
> (ii) the site provider may bring the code agreement to an end so far as it relates to that right.
>
> (2) Where this sub-paragraph applies the code agreement continues so that—
>
> (a) the operator may continue to exercise that right, and
>
> (b) the site provider continues to be bound by the right."

15. A code right can, however, be brought to an end by a "site provider" (as defined in paragraph 30 of the Code) in the circumstances specified in paragraph 31. That provides:

> "(1) A site provider who is a party to a code agreement may bring the agreement to an end by giving a notice in accordance with this paragraph to the operator who is a party to the agreement.
>
> (2) The notice must—
>
> (a) comply with paragraph 89 (notices given by persons other than operators),
>
> (b) specify the date on which the site provider proposes the code agreement should come to an end, and

> (c) state the ground on which the site provider proposes to bring the code agreement to an end.
>
> (3) The date specified under sub-paragraph (2)(b) must fall—
>
> (a) after the end of the period of 18 months beginning with the day on which the notice is given, and
>
> (b) after the time at which, apart from paragraph 30, the code right to which the agreement relates would have ceased to be exercisable or to bind the site provider or at a time when, apart from that paragraph, the code agreement could have been brought to an end by the site provider.
>
> (4) The ground stated under sub-paragraph (2)(c) must be one of the following—
>
> (a) that the code agreement ought to come to an end as a result of substantial breaches by the operator of its obligations under the agreement;
>
> (b) that the code agreement ought to come to an end because of persistent delays by the operator in making payments to the site provider under the agreement;
>
> (c) that the site provider intends to redevelop all or part of the land to which the code agreement relates, or any neighbouring land, and could not reasonably do so unless the code agreement comes to an end;
>
> (d) that the operator is not entitled to the code agreement because the test under paragraph 21 for the imposition of the agreement on the site provider is not met."

16. Where a site provider gives a notice under paragraph 31 of the Code, then, pursuant to paragraph 32(1), the code agreement in question will come to an end in accordance with the notice unless either "the operator and the site provider agree to the continuation of the code agreement" or:

> "(a) within the period of three months beginning with the day on which the notice is given, the operator gives the site provider a counter-notice in accordance with sub-paragraph (3), and
>
> (b) within the period of three months beginning with the day on which the counter-notice is given, the operator applies to the court for an order under paragraph 34".

By paragraph 32(3), a counter-notice must state:

> "(a) that the operator does not want the existing code agreement to come to an end,
>
> (b) that the operator wants the site provider to agree to confer or be otherwise bound by the existing code right on new terms, or
>
> (c) that the operator wants the site provider to agree to confer or be otherwise bound by a new code right in place of the existing code right".

Where the operator makes an application for an order under paragraph 34, the Tribunal must make one of the orders specified in that paragraph unless it decides that the site provider has established one of the grounds stated in its notice under paragraph 31, in which case the Tribunal must order the code agreement to be brought to an end: see paragraph 32(4) and (5).

17. Paragraph 33 of the Code, pursuant to which On Tower made the applications giving rise to this appeal, allows either an operator or a site provider who is a "party to the code agreement" to seek a change to terms of a code agreement which has been continued under paragraph 30(2). Sub-paragraph (1) of paragraph 33 states:

> "An operator or site provider who is a party to a code agreement by which a code right is conferred by or otherwise binds the site provider may, by notice in accordance with this paragraph, require the other party to the agreement to agree that—
>
> (a) the code agreement should have effect with modified terms,
>
> (b) where under the code agreement more than one code right is conferred by or otherwise binds the site provider, that the agreement should no longer provide for an existing code right to be conferred by or otherwise bind the site provider,
>
> (c) the code agreement should—
>
> (i) confer an additional code right on the operator, or
>
> (ii) provide that the site provider is otherwise bound by an additional code right, or
>
> (d) the existing code agreement should be terminated and a new agreement should have effect between the parties which—
>
> (i) confers a code right on the operator, or
>
> (ii) provides for a code right to bind the site provider."

By sub-paragraph (2), the notice must specify the day from which it is proposed that the change should have effect and, by sub-paragraph (3), that day must fall:

> "(a) after the end of the period of 6 months beginning with the day on which the notice is given, and
>
> (b) after the time at which, apart from paragraph 30, the code right to which the existing code agreement relates would have ceased to be exercisable or to bind the site provider or at a time when, apart from that paragraph, the code agreement could have been brought to an end by the site provider".

Where the operator and site provider have not reached agreement on the proposals in the notice within six months after its service, "the operator or the site provider may apply to the court for the court to make an order under paragraph 34": see sub-paragraph (5).

18. Paragraph 34 of the Code sets out the orders that the Tribunal can make on an application under either paragraph 32 or paragraph 33. These are specified as follows in sub-paragraphs (2)-(6):

> "(2) The court may order that the operator may continue to exercise the existing code right in accordance with the existing code agreement for such period as may be specified in the order (so that the code agreement has effect accordingly).
>
> (3) The court may order the modification of the terms of the code agreement relating to the existing code right.
>
> (4) Where under the code agreement more than one code right is conferred by or otherwise binds the site provider, the court may order the modification of the terms of the code agreement so that it no longer provides for an existing code right to be conferred by or otherwise bind the site provider.
>
> (5) The court may order the terms of the code agreement relating to the existing code right to be modified so that—
>
> (a) it confers an additional code right on the operator, or
>
> (b) it provides that the site provider is otherwise bound by an additional code right.
>
> (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."

Guidance as to how the Tribunal should go about deciding what order to make is to be found in sub-paragraph (13). That states:

> "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."

19. Paragraph 35 of the Code makes provision for interim orders while applications under paragraph 32(1)(b) and 33(5) are pending. In such a situation, by sub-paragraph (2A), an operator or site provider may apply to the Tribunal for:

> "(a) an order specifying the payments of consideration to be made by the operator to the site provider under the agreement relating to the existing code right until the application for an order under paragraph 32(1)(b) or 33(5) has been finally determined;
>
> (b) an order otherwise modifying the terms of that agreement until that time".

Sub-paragraph (3) requires the Tribunal to determine such payments "on the basis set out in paragraph 24 (calculation of consideration)".

20. By paragraph 24 of the Code, which also applies in relation to an application for an agreement to be imposed under Part 4, the consideration payable by an operator is to be "an amount or amounts representing the market value of the relevant person's agreement to confer or be bound by the code right (as the case may be)" with, however, the proviso that the market value is to be assessed on, among others, the assumptions that "the right that the transaction relates to does not relate to the provision or use of an electronic communications network" and that "paragraphs 16 and 17 (assignment, and upgrading and sharing) do not apply to the right or any apparatus to which it could apply". In this connection, the explanatory notes to the Digital Economy Act 2017 explained that the Act involved "moving to a 'no scheme' valuation regime that ensures property owners will be fairly compensated for use of their land, but restricts their ability to profit from the public need for communications infrastructure" (paragraph 14) and that "[the] value of the rights contained in paragraphs 16 and 17, which relate to the assignment of an agreement or to upgrading and sharing apparatus, is specifically

excluded from the assessment of market value, to ensure that no 'premium' is added for rights conferred by statute, not by agreement" (paragraph 420). The Department for Culture Media and Sport's May 2016 publication, *A New Electronic Communications Code*, had said that site providers "should get fair value for the use of their land" but that this "should not, as a matter of principle, include a share of the economic value created by the very high public demand for services that the operator provides" and that a "no scheme" rate "is more relevant to the nature of modern digital communications infrastructure rollout, and will work to encourage greater investment and improved network coverage". In practice, this will commonly mean that consideration fixed in accordance with paragraph 24 will be less than was payable under a pre-2017 agreement.

21. Returning to Part 2 of the Code, which comprises paragraphs 8-14, paragraphs 10, 11 and 12 are noteworthy. So far as paragraph 10 is concerned, it is sufficient to quote sub-paragraphs (1)-(3) as follows:

> "(1) This paragraph applies if, in accordance with this Part pursuant to an agreement under this Part or Part 4A, a code right is conferred on an operator in respect of land by a person ('O') who is the occupier of the land when the code right is conferred.
>
> (2) If O has an interest in the land when the code right is conferred, the code right also binds—
>
> (a) the successors in title to that interest,
>
> (b) a person with an interest in the land that is created after the right is conferred and is derived (directly or indirectly) out of—
>
> (i) O's interest, or
>
> (ii) the interest of a successor in title to O's interest, and
>
> (c) any other person at any time in occupation of the land whose right to occupation was granted by—
>
> (i) O, at a time when O was bound by the code right, or
>
> (ii) a person within paragraph (a) or (b).
>
> (3) A successor in title who is bound by a code right by virtue of sub-paragraph (2)(a) is to be treated as a party to the agreement by which O conferred the right."

22. Paragraph 11 of the Code states that an agreement under Part 4 must "be in writing", "be signed by or on behalf of the parties to it" and "state for how long the code right is exercisable". So far as material, paragraph 12, headed "Exercise of code rights", provides:

> "(1) A code right is exercisable only in accordance with the terms subject to which it is conferred.
>
> (2) Anything done by an operator in the exercise of a code right conferred under this Part or Part 4A in relation to any land is to be treated as done in the exercise of a statutory power."

23. Paragraph 16 of the Code, which is contained in Part 3 (headed "Assignment of code rights, and upgrading and sharing of apparatus"), also featured in argument. This includes the following:

> "(1) Any agreement under Part 2 of this code is void to the extent that—
>
> (a) it prevents or limits assignment of the agreement to another operator, or
>
> (b) it makes assignment of the agreement to another operator subject to conditions (including a condition requiring the payment of money).
>
> …
>
> (4) From the time when the assignment of an agreement under Part 2 of this code takes effect, the assignee is bound by the terms of the agreement.
>
> (5) The assignor is not liable for any breach of a term of the agreement that occurs after the assignment if (and only if), before the breach took place, the assignor or the assignee gave a notice in writing to the other party to the agreement which—
>
> (a) identified the assignee, and
>
> (b) provided an address for service (for the purposes of paragraph 91(2)(a)) for the assignee."

However, paragraph 5 of schedule 2 to the Digital Economy Act 2017, which contains transitional provisions, provides that paragraph 16 of the Code does not apply in relation to a "subsisting agreement", i.e. one made for the purposes of or under the Old Code which was in force when the Code superseded the Old Code.

24. There was also reference before us to Part 6 of the Code, comprising paragraphs 36-44 and headed "Rights to require removal of electronic communications apparatus". Broadly, this restricts the rights of landowners to effect the removal of electronic communications apparatus from their land. Paragraph 40 provides for a landowner to serve a notice and then to apply to the Tribunal. By paragraph 40(8), the Tribunal may not make an order on such an application in relation to apparatus if "an application under paragraph 20(3) has been made in relation to the apparatus and has not been determined".

25. When the Code was published in draft in 2016, the Minister of State for Culture and the Digital Economy explained in the foreword to *A New Electronic Communications Code* that digital communications infrastructure was "vitally important to citizens right across the UK, as digital communications become an ever more essential part of the economic and social fabric of this country", and that the Code would "provide a robust platform to enable long-term investment and development of digital communications infrastructure in the 21st Century". It was said that the reforms which the Government was putting forward would "make it easier for communications providers to deploy and maintain their infrastructure" and that "[n]ew rights to upgrade and share will allow future generations of technology to be quickly rolled out as they become commercially viable".

26. The Code largely, though by no means entirely, implemented recommendations made by the Law Commission in its 2013 report, *The Electronic Communications Code* (Law Com No 336). The Law Commission did not, however, supply a draft bill.

The Tribunal decisions

The FTT

27. The FTT held that On Tower was a "party to a code agreement" as regards both the Sandbach and Blackwell Grange Golf Club sites, and so able to apply under paragraph 33 of the Code, on the basis that it sufficed that it was entitled to the benefit of the code agreements. Judge D Jackson observed in paragraph 23 of the FTT Decision that "there is [in paragraph 33] absolutely no reference to benefit and burden as far as the operator is concerned" and said that in his judgment there was "no requirement to read into Paragraph 33, to make it work, words to the effect that its provisions only apply where an assignee has taken all the benefits and all of the burdens of the original contracting party". He went on in the next paragraph:

> "To the extent that it is necessary to do so I follow mutatis mutandis the approach of Nugee LJ at paragraph 75 of [*Vodafone Ltd v Potting Shed Bar and Gardens Ltd* [2023] EWCA Civ 825, [2024] 1 WLR 141] and construe paragraph 33(1) as not intended to limit the category of operator to be treated as 'a party to a code agreement'. On that basis the Claimant being currently entitled to the benefit, as assignee, of the agreements listed at paragraph 6 above, is to be regarded as a 'party to a code agreement' with the result that it can invoke paragraph 33. Construing Paragraph 33 in that way provides for, as the Law Commission (339 para 3.17) put it, 'one operator comes to stand in the shoes of another code operator' without the necessity of becoming the subject of all the burdens of the original agreement as required under the General Rule [i.e. the principle that, while the benefit of a contractual licence can be assigned, the burden cannot]. Such a construction does no violence to the wording of Paragraph 33."

28. Judge D Jackson considered that paragraph 12 of the Code provided an alternative route to the same ultimate conclusion. He accepted a submission on behalf of On Tower that

paragraph 12(1) meant that "the statutory right is imprinted with the terms on which it was conferred".

The Upper Tribunal

29. On appeal, the Judge was not persuaded that it sufficed that the benefit of the relevant code agreement had passed to the operator in question. Nor did he agree with the FTT that paragraph 12(1) of the Code helped On Tower or that benefit and burden principles did so. Neither, however, did he accept APW's case that, to become a "party to a code agreement", an assignee must become liable to the site provider (or a predecessor in title of the site provider) for the performance of the obligations imposed by the agreement.

30. The Judge summarised his own view as follows in paragraph 92 of the Decision:

> "A better interpretation of who falls to be treated as a party to a code agreement is in my judgement that a lawful assignee who has assumed the primary responsibility for performing the obligations in the licence agreement will be the operator who is a party to the code agreement. That could be pursuant to a multi-partite deed by which the licensor permitted the assignment, or a unilateral deed of covenant with the site provider made by the assignee, or it could be a covenant or agreement made by the assignee with the assignor to perform the obligations in the licence agreement. Any of these have the effect of placing the burden of the obligations in the licence agreement on the assignee, so that, as between them, the assignee is standing in the shoes of the assignor."

The Judge added in paragraph 93 that he did "not reach this conclusion on the basis that the licensor could then seek to enforce the obligations of the assignee indirectly, by a chain of covenants made by successive assignees", but "on the basis that, by assuming the principal responsibility for the burden of the agreement, the assignee is sufficiently standing in the shoes of the licensee, at least for the purposes of Part 5 of the Code". As he said in paragraph 97, the Judge considered that "a covenant by the assignee with the assignor to perform the obligations in the licence agreement (whether a full covenant or a covenant by way of indemnity only) makes the assignee primarily responsible for discharge of the burden of the agreement, as between it and the assignor, and so makes it a party to the code agreement for the purposes of Part V".

31. The Judge had observed in paragraph 73 of the Decision that the arguments were "finely balanced", that "each has something to be said for it" and that it is "difficult to identify an interpretation of the Code that is wholly consistent with all its provisions, and that also makes commercial sense and provides clarity for its practical application". I agree.

The parties' positions

32. Taking issue with the Judge's analysis, Mr Toby Watkin KC, who appeared for APW with Mr Wayne Clark KC, submitted that the Code should be interpreted as meaning that, in order for a new operator to be treated as a "party to a code agreement" in place of its predecessor, it must be the person currently (or most recently) entitled to the

benefit *and burden* of the agreement as operator. This, Mr Watkin argued, will not be the case unless and until the new operator is under a direct obligation to the landowner to perform the obligations which the code agreement placed on the original operator. If that is not the case, Mr Watkin said, the new operator does not, as far as the landowner is concerned, "stand in the shoes" of the original operator as regards that agreement.

33. In contrast, Mr Kester Lees KC, who appeared for On Tower with Ms Taylor Briggs, supported the Judge's decision. He also advanced the following further reasons for concluding that On Tower is a "party to a code agreement" able to apply under paragraph 33 of the Code:

    i) On a proper interpretation of paragraph 33, in order for an operator to be regarded as a "party to a code agreement", it is enough that the benefit of the agreement has become vested in it by assignment;

    ii) If, contrary to that contention, an operator needs to have assumed the burden of a code agreement to be a "party" to it, any such burden will have passed to On Tower by virtue of paragraph 12(1);

    iii) Alternatively, the burden of a code agreement will to the necessary extent have passed to On Tower on benefit and burden principles.

34. It is logical, I think, to address the proposition that benefit alone will suffice to make an operator a "party to a code agreement" before turning, so far as necessary, to the Judge's approach, that propounded by APW and the alternative justifications for the Judge's decision put forward by On Tower. Before, however, discussing any of these matters, it is convenient to identify some common ground and to refer to the decision of this Court in *Vodafone Ltd v Potting Shed Bar and Gardens Ltd (formerly known as GENCOMP (No 7) Ltd)* [2023] EWCA Civ 825, [2024] 1 WLR 141 ("*Gencomp*"), which featured prominently both in the parties' submissions and in the Tribunal decisions.

Some common ground

35. The following points were common ground between the parties and seem to me to be correct:

    i) Code rights can be granted in a variety of ways. The Law Commission explained in paragraph 2.16 of its 2013 report:

    > "in legal terms a right to keep equipment on land might be conferred by a lease or an easement (both of which are property rights) or a licence (a personal permission, often known in this context as a wayleave, and generally arising as a matter of contract – which may include many other terms)";

    ii) In the case of a lease, an assignee will become liable under the tenant's covenants under the general law of landlord and tenant: see section 3 of the Landlord and Tenant (Covenants) Act 1995;

iii) In contrast, an assignment of a licence will not of itself pass the burden to the assignee. In *Bexhill UK Ltd v Razzaq* [2012] EWCA Civ 1376, Aikens LJ explained in paragraph 44:

> "it is important to recall the effect of an assignment of a right, whether or not it is a statutory legal assignment. The assignee becomes either the legal or beneficial owner of the thing in action and its benefits. He does not become a party to any contract or deed which contains or gives rise to the right. The assignee will only become a party to the contract (or deed) if there is a novation of the instrument containing or giving rise to the right."

In *Gencomp*, Nugee LJ noted in paragraph 60 that "[u]nder the general law the assignment of a contract is effective to confer the benefit of the contract on an assignee but not normally the burden of the contract";

iv) The Code "draws a distinction between those who are parties, or treated as parties, to code agreements and those that are merely bound by code rights" (*Gencomp*, at paragraph 54, per Nugee LJ);

v) Except in the case of site providers or operators who hold jointly, Part 5 of the Code proceeds on the basis that, at the time when a notice is served under paragraph 31 or paragraph 33, there will be a single site provider who is "a party to a code agreement" and a single operator who is such a party. It is not envisaged that, say, a notice under paragraph 31 should have to be served on one person as the original contracting party and also on one or more others as assignees.

The *Gencomp* case

36. In *Gencomp*, a freehold owner had granted an operator (Vodafone) a lease which took effect as a "code agreement". A successor in title of the freeholder subsequently granted APW a concurrent lease of part of the site with the result that APW became entitled to the reversion on Vodafone's lease. APW contended that, in consequence, it was the only party capable of conferring new rights on Vodafone. In contrast, Vodafone argued that such rights had to be granted by Gencomp, which by now owned the freehold.

37. The issue turned on whether APW was a "site provider who is a party to a code agreement" within the meaning of paragraph 33 of the Code. Vodafone's position was that, although APW was a "site provider", it was not "a party to a code agreement". The Court of Appeal disagreed. It accepted that APW was not a "successor in title" within paragraph 10(2)(a) of the Code and to be regarded as a party to the relevant code agreement under paragraph 10(3): see paragraph 50 of the judgment of Nugee LJ, with whom Lewison and Phillips LJ agreed. However, paragraph 10(3) was to be construed as "not intended to define exhaustively who is to be treated as a party to the agreement": paragraph 75. Since, by virtue of the concurrent lease, APW was entitled to both the benefit and the burden of the lease in favour of Vodafone, it was "to be regarded as a 'party to the agreement' with the result that it can invoke paragraph 31 by serving notice on Vodafone, and both it and Vodafone can invoke paragraph 33 by serving notice on each other as 'the other party to the agreement'": paragraph 75.

38. Nugee LJ had observed in paragraph 58 that "[o]ne would expect that the provisions of the Code which depend for their application on a person being a party to the agreement would also be capable of continuing to apply despite a change in the identity of the site provider or operator". Considering the position where there is a change of operator, he noted that where a code agreement is duly assigned (in a case to which paragraph 16 is not disapplied by the transitional provisions) "the assignee takes both the benefit and the burden of the agreement" since "paragraph 16(4) provides that from the time when the assignment of the agreement under Part 2 takes effect, the assignee is bound by the terms of the agreement": paragraph 60. The Code nowhere states that such an assignee is to be treated as a party to the agreement, but (so Nugee LJ explained in paragraph 61) "it cannot seriously be supposed that, after an assignment by B [i.e. the original operator] to C, C is not a 'party to the agreement' for the purposes of the Code". Nugee LJ went on:

> "Take for example, the case where C commits substantial breaches of its obligations under the agreement, or persistently delays in making payments to A [i.e. the grantor], or A wishes to redevelop. If C is to 'stand in the shoes of' B and if the assignment to C is to be something that is generally 'immaterial to' A, one would expect A to be able to serve a notice on C seeking to terminate the agreement just as A could have served such a notice on B had B still been the operator."

The words in inverted commas in this passage were quoted from the Law Commission's 2013 report, which had said that, when it referred to assignment, it meant "simply the case where one Code Operator comes to *stand in the shoes of* another Code Operator" (paragraph 3.17) and that "[a] change of Code Operator in itself should in most cases be *immaterial to* the Site Provider" (paragraph 3.20) (emphasis added in each instance). In the circumstances, Nugee LJ said in paragraph 63, "the Code requires C to be regarded as a 'party to the agreement' despite the fact that there is no provision stating that an assignee of the agreement is to be treated as a party to it".

39. Turning to the position where it is the site provider which changes, Nugee LJ explained in paragraph 66 that, where a site provider confers code rights by way of a grant of property rights, "no express provision is required to make those rights binding on his successors in title" since "[t]he essence of a property right is that it is exercisable against a successor in title". It is therefore to be inferred that paragraph 10(2)(a) of the Code was not intended to cater for that situation but rather for one where "A confers rights on B by way of wayleave" and so the agreement would not under the general law be binding on a person ("D") to whom A had transferred the site: see paragraph 67.

40. With regard to paragraph 10(3) of the Code, Nugee LJ said this in paragraph 68:

> "I think it was largely for the avoidance of doubt. We know that someone such as D who takes the same interest as A will be bound by the agreement conferring code rights even if this is in the form of a wayleave (by virtue of paragraph 10(2)(a)); and I think it must have been assumed that D would also have the benefit of such an agreement as successor to A. In such a case therefore D steps into A's shoes and I think that even without paragraph 10(3) the Code would only make sense if D were

> regarded as becoming a party to the agreement in A's place. After the transfer to D, it is D and not A who is interested in the question whether it can terminate the agreement by notice under paragraph 31, or seek a modification under paragraph 33. And if B wants to initiate the termination of the agreement and its replacement by a new one under paragraph 33, the obvious person for B to serve a notice on, or to bring an application against, would be D, as it is D who is now in a position to grant a new agreement. Equally if B wishes to assign to C, it is D on whom one would expect B to have to serve any notice under paragraph 16(5). And if B wishes to upgrade or share its apparatus, one would expect that the issues under paragraph 17(3) and (4) (namely, whether this would impose an additional burden on the other party to the agreement, or have an adverse effect on their enjoyment of the land) would be assessed by reference to the burden on D, or adverse effect on D's enjoyment. Seen in this light, in my view paragraph 10(3) simply spells out what would have been implicit anyway."

41. Nugee LJ concluded in paragraph 72 that the Code "does not use 'party to the agreement' to refer only to the original parties, at any rate in the case of an operator", and that "if an operator who is an assignee of the agreement can be a party to the agreement without express provision, it would seem odd if the same was not also true of the site provider".

42. In paragraph 83, Nugee LJ addressed a contention that "the argument that APW was a party to an agreement by virtue of having a concurrent lease would not work in the same way if the code rights conferred on Vodafone had been conferred by contractual licence rather than by way of lease, and if APW's solution only worked in the latter case that suggested that it was not an ideal solution". He commented:

> "I do not think it is necessary to consider what the position would have been had Vodafone had a contractual licence rather than a lease. I accept that the answer to this question is not obvious. But what we have to deal with is the case before us where Vodafone does have a lease. In such a case APW's solution works well, and certainly seems to me more of an 'ideal solution' than that favoured by Vodafone."

Does mere benefit suffice?

43. Paragraph 33 of the Code, which On Tower is seeking to invoke, entitles an operator or site provider who is "a party to a code agreement by which a code right is conferred by or otherwise binds the site provider" to require "the other party to the agreement" by notice to agree certain matters. Paragraph 31 similarly speaks of a "site provider who is a party to a code agreement" giving a notice to "the operator who is a party to the agreement". Comparable wording is also to be found outside Part 5, notably in paragraph 10(3). That sub-paragraph provides for a "successor in title who is bound by a code right by virtue of sub-paragraph (2)(a)" to be "treated as a party to the agreement by which O conferred the right".

44. As a matter of conventional contract law, a person who has acquired the benefit but not the burden of a contract would not be considered a "party" to it. Such a person could become a contracting party by novation. Where, though, there has been no more than an assignment of the benefit of a contract, only the original contracting parties would be seen as parties to it.

45. However, it is clear that the words "party to [a code/the] agreement", as used in the Code, do not refer exclusively to those who would be regarded as parties to an agreement as a matter of contract law. As was explained in *Gencomp*, the drafter of the Code "cannot have intended 'party to the agreement' to be confined to (i) an original party and (ii) a person expressly stated by the Code to be a person treated as a party to the agreement": see paragraph 63 of *Gencomp*. It is enough that an operator or site provider is "currently entitled to the benefit and burden of the agreement" as such: see paragraph 75 of *Gencomp*. In fact, an operator or site provider meeting that condition will be a "party to the agreement" to the exclusion of the original operator or site provider regardless of whether the original such party still has the obligations of an operator or site provider (as the case may be). That follows from the fact that, as mentioned above, Part 5 of the Code proceeds on the basis that, at the time when a notice is served under paragraph 31 or paragraph 33, there will be a single site provider who is "a party to a code agreement" and a single operator who is such a party.

46. As was pointed out by Mr Lees, there are various indications in Part 5 of the Code that a "party to [a code/the] agreement" is expected to be entitled to the benefit of the agreement. Thus, paragraph 31 provides for a site provider wishing to bring a code agreement to an end to give notice to "the operator who is a party to the agreement", while paragraph 32 allows "the operator" (who must, in the context, be the recipient of the paragraph 31 notice) to give the site provider a counter-notice (which may state, among other things, that "the operator does not want the existing code agreement to come to an end") and to apply for an order under paragraph 34. An assignee who is at the time exercising the code rights is much more obviously interested in these matters than the original operator who may not have had any involvement with the site for years and could even have ceased to exist. The code agreement in question will have been continued under paragraph 30 "so that … the operator may continue to exercise that right". In the circumstances, Parliament can be expected to have envisaged that paragraph 32 would enable the operator who is continuing to exercise the right to serve a counter-notice and to apply under paragraph 34. It would be strange if Parliament had intended to leave such steps in the hands of an operator who no longer used the site.

47. Similar points can be made in relation to paragraph 33. That allows an operator "who is a party to a code agreement" to require a change to the terms of the agreement and provides for a site provider seeking such a change to give notice to "the other party to the agreement". Once again, it is the operator exercising the code rights at the time who has the most obvious stake in what happens. It is that operator who could be expected to be most likely to wish to invoke paragraph 33 and that operator who would most wish to have notice of an application by a site provider. Yet, if it were enough for a site provider to give notice to the original operator, the notice might not come to the current operator's attention at all.

48. There are also indications in paragraphs 34 and 35 of the Code that Parliament had in mind the operator currently exercising the code rights. Paragraph 34(13) directs the Tribunal to have regard to "the operator's business and technical needs" when deciding

what order to make under the paragraph. The "business and technical needs" which Parliament could be anticipated to have thought important would be those of the present operator, not those of one who had dropped out of the picture. Again, it would be the operator who now had the benefit of the code agreement who could be reckoned to want interim relief under paragraph 35 and whose "business and technical needs" would probably be considered material to such an application.

49. On the other hand, there are aspects of Part 5 which suggest that Parliament assumed that the "party to [a code/the] agreement" on whom a notice under paragraph 31 would be served, who could serve a counter-notice or make an application under paragraph 32 or who could require a change to a code agreement under paragraph 33 would be subject to the obligations imposed on the operator by the relevant agreement. In the first place, the grounds on which a code agreement can be brought to an end, as specified in paragraph 31(4), include "substantial breaches by the operator of its obligations under the agreement" and "persistent delays by the operator in making payments to the site provided under the agreement". The operator in question would seem to be the "party to the agreement" served with the notice and so it can be argued that that operator must be capable of committing "substantial breaches" and repeatedly failing to make prompt payment of rent for which it is liable. An assignee of code rights granted by way of licence who is exercising those rights will not without more, however, owe any obligations under the code agreement as such.

50. Further, the operator bearing the burden of a code agreement can clearly be affected by a continuation, extension or other modification of the agreement. That being so, it might be thought that Parliament would have wished that operator to be involved in any attempt to bring such an agreement to an end under paragraph 31 and any application under paragraph 32(1)(b), 33 or 35(2A). Such an operator might also wish to have a say in what, if any, agreement was reached under paragraph 35(2).

51. However, one of the options given to the Tribunal by paragraph 34 of the Code is to order a new code agreement to be substituted for the existing one. Where an application under paragraph 32(1)(b) or 33 is made by an operator having only the benefit of the current agreement, the Tribunal could be expected to adopt that course if a different order could risk causing prejudice to an operator with the burden of that agreement: that operator's obligations would come to an end with the termination of the old agreement.

52. Further, since there can be no more than one "party to a code agreement", where the benefit and burden of such an agreement are held by two different operators they cannot both be characterised as such a party and it would be consistent with the purposes of the Code if Parliament had preferred the operator in fact exercising the code rights now to that with just the burden of the agreement. After all, as mentioned in paragraph 25 above, the Code was designed to "make it easier for communications providers to deploy and maintain their infrastructure".

53. In any event, neither the Judge's approach nor APW's avoids these problems. The fact that the operator with the benefit of the code agreement had given the site provider a covenant to comply with it (as proposed by APW) or otherwise "assumed the primary responsibility for performing the obligations" (in line with the Judge's solution) would not relieve the original operator of any obligations it might otherwise have been considered to have. That issue was not the subject of debate before us.

54. As for paragraph 31(4) of the Code, this identifies the circumstances in which Parliament considered that a site provider should be able to seek the termination of a code agreement. From a site provider's point of view, what matters is whether the obligations of the operator under the agreement have in fact been performed. Paragraph 31(4)(a) and (b) will therefore work in a sensible way if they can be read as referring to whether there have been "substantial breaches" of the operator obligations or "persistent delays" in payments to the site provider during the period in which the operator now enjoying the code rights has been doing so. Plainly, there are difficulties in reconciling such a construction with the literal meaning of the words, but Mr Lees argued that the Code should be interpreted purposively. He also pointed out that the original operator may not be in a position to perform all the obligations (as to repair, for example) and that, in the context of paragraph 31(4)(d), the focus surely has to be on whether the test under paragraph 21 is met as regards the *current* operator.

55. Mr Lees relied in support of the proposition that the Code should be interpreted purposively on paragraph 106 of the judgment of Lady Rose, with whom Lords Hodge, Sales, Leggatt and Burrows agreed, in *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd* [2022] UKSC 18, [2022] 1 WLR 3360 ("*Compton Beauchamp*"). When considering the meaning of "occupier" as used in paragraph 9 of the Code, Lady Rose said:

> "the starting point here is not to try to 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."

56. Mr Lees argued that, likewise, in the present case the correct approach is "to work out how the regime is intended to work and then consider what meaning should be given to ['party to [a code/the] agreement'] so as best to achieve that goal". Lady Rose made her observation when considering the meaning of "occupier" in the light of previous judicial comments to the effect that that word "has no fixed meaning but must take its content from the context in which it is appears and the purpose of the provisions in which it is used": see Lady Rose's judgment at paragraphs 103-106. That context reduces the extent to which Lady Rose's words can be taken to provide general guidance as to how the Code should be interpreted. Even so, they lend some support to Mr Lees' case. In any event, as Lords Briggs and Leggatt noted in *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2021] UKSC 16, [2022] AC 690, at paragraph 10, there are "numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose".

57. Mr Watkin argued that holding that mere benefit sufficed to make an operator a "party to a code agreement" would be contrary to *Gencomp*. In that connection, he pointed out that Nugee LJ said in paragraph 75 of his judgment in *Gencomp* that "the regime is intended to work in such a way that the person currently entitled to the benefit *and burden* of the agreement as operator, and the person currently entitled to the benefit *and burden* as site provider, are parties to the agreement and can exercise the rights conferred by Part 5 of the Code" (emphases added). He also relied on Nugee LJ's references to an assignee "standing in the shoes" of an original operator and to an assignment being "generally immaterial" to the site provider. Mr Watkin relied, too, on

the passages in the Law Commission's 2013 report which Nugee LJ was quoting and on paragraph 412 of the explanatory notes to the Digital Economy Act 2017, which states that paragraph 16 of the Code (which, of course, is disapplied in relation to subsisting agreements such are at issue here) "provides that an operator may assign an agreement under which code rights are conferred to another operator, enabling the second operator to *'stand in the shoes'* of the first" (emphasis added). Where, Mr Watkin submitted, an assignee has acquired no more than the benefit of a code agreement, it cannot be regarded as "standing in the shoes" of the original operator and the assignment is not "immaterial" to the site provider.

58. In my view, however, *Gencomp* is not inconsistent with Mr Lees' case, and the passages in the Law Commission's report and the explanatory notes are not of real assistance to Mr Watkin either. So far as the Law Commission's report and explanatory notes are concerned, the Law Commission was not addressing itself to a situation in which the benefit and burden of a code agreement had become divorced, it spoke of an assignment being immaterial "in most cases" and "generally", it did not draft the Code and, as a matter of language, an assignee might be said to "stand in the shoes" of the assignor regardless of whether the burden has passed. Similarly, in *Gencomp* the same person had both the benefit and the burden, Nugee LJ spoke as he did in that context and he did not need to consider what the position would have been if the benefit and burden had been split. Moreover, he referred to assignment being "immaterial" only twice and on each occasion by way of quotation from the Law Commission.

59. The Judge said in paragraph 87 of the Decision that On Tower's case (viz. that mere benefit is enough):

> "gives rise to a greater risk of uncertainty on the facts of individual cases, if an informal (but lawful) assignment at any time is sufficient to change the identity of the operator, or if the identity of the relevant operator under Part 5 depends on payment or acceptance of rent in the absence of any obligation to make payment. The application of Part 5 would then depend on facts that could change from time to time, at the will of one or other party."

60. However, it seems to me that a site provider (who might be a private individual rather than a sophisticated commercial organisation such as APW) may well find it easier to identify the current operator on the ground than to determine who now has "primary responsibility for performing the obligations in the licence agreement". On the Judge's approach, such "primary responsibility" could depend on arrangements which operators have made between themselves of which the site provider is ignorant. With respect, I agree with Mr Watkin's submission that in terms of certainty the Judge's solution is the worst.

61. A site provider would, I think, find it easier to apply APW's approach than the Judge's. It would normally be in a position to know whether an assignee had entered into a deed of covenant in its favour. Not only, however, is there no mention of such a step in the Code, but a requirement for such a deed could have odd consequences. On APW's case, the operator who is a "party to a code agreement" is the last one to have had both the benefit and the burden. If, therefore, the code agreement were assigned twice, and the first assignee gave a covenant but the second did not, the first assignee would be the

"party to a code agreement" even though it no longer had the benefit of it, the original operator was also still liable on it and the current operator was duly paying the licence fee. Further, an operator with the benefit of a code agreement could choose if and when to become a "party to a code agreement" by giving a covenant; could do so only immediately before making an application under paragraph 33 of the Code; and seemingly need only covenant to comply with the code agreement's obligations for the future. A further question would arise as to whether it would be good enough for the operator to give a covenant limited to the period during which it had the benefit of the agreement. The fact that the Code does not address such points weakens APW's case.

62. Mr Watkin stressed that an operator which, because it had only the benefit of a code agreement, could not take advantage of Part 5 of the Code, would have Part 4 available to it. He also made the point that Part 6 restricts a site provider's ability to remove electronic communications apparatus and that the Tribunal cannot make an order for removal if there is an undetermined application under paragraph 20(3). However, Part 4 is evidently designed to cater for those lacking code rights, not those who already have code rights continued pursuant to paragraph 30 of the Code. In fact, Lady Rose said in *Compton Beauchamp*, at paragraph 18, that "it is sufficiently clear from the Code read as a whole that Part 4 does not apply to code agreements to which para 30(2) applies".

63. In the end, notwithstanding the Judge's careful and thoughtful decision, I have arrived at a different conclusion on when an operator will be a "party to [a code/the] agreement" within the meaning of Part 5 of the Code. In my view, an operator with merely the benefit of a code agreement is such a party. That approach is not in every respect easy to reconcile with the terms of Part 5, but it seems to me to fit those terms better than either the Judge's solution or APW's. Part 5 says nothing about "assuming the primary responsibility for performing the obligations" or entering into a deed of covenant in favour of the site provider, nor uses the word "burden". Further, the Code's purpose appears to me to support On Tower's contention that benefit alone can suffice. Parliament was aiming to "make it easier for communications providers to deploy and maintain their infrastructure" and, more specifically, to enable operators exercising code rights conferred by expired agreements to continue to do so. Treating the operator who is now exercising the code rights in question as a "party to [a code/the] agreement" within the meaning of Part 5 serves those aims. Parliament can be expected to have wished such an operator to be able to require a change to an expired agreement under paragraph 33 and to be informed of, and in a position to object to, an attempt to terminate the agreement under paragraph 31. That understanding of Part 5 also achieves some certainty and is not unfair on site providers. While it might suit site providers better for operators to have to apply under Part 4 rather than Part 5, not least because Part 4 does not include an equivalent to paragraph 35, it is not apparent that Parliament thought that site providers should have that advantage.

64. It follows that, in my view, the FTT was right to decline to strike out On Tower's applications and the Judge was right to dismiss APW's appeal.

Other matters

65. The conclusions I have arrived at above make it unnecessary for me to consider the alternative arguments which On Tower advanced in respect of paragraph 12(1) of the Code and benefit and burden principles.

Conclusion

66. I would dismiss the appeal, albeit for reasons which differ from those of the Judge.

Lord Justice Holgate:

67. I agree.

Lord Justice Foxton:

68. I also agree.