UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2019] UKUT 53 (LC)
UTLC Case Number: TCR/68/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE – CONSIDERATION – COMPENSATION – Inner London residential rooftop site – 10-year Code agreement proposed – consideration to be assessed on "no network" basis – no market for non-Code uses – whether consideration nominal – relationship between consideration and compensation – whether compensation can be determined only at time Code agreement imposed – whether compensation payable for diminution in value of site by imposition of Code agreement – effect of Tribunal order – whether execution of agreement by parties required – paras 24, 25, Sched 3A, Communications Act 2003

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN:

EE LIMITED and
HUTCHISON 3G UK LIMITED

Claimants/
Code operators

and

THE MAYOR AND BURGESSES OF THE
LONDON BOROUGH OF ISLINGTON

Respondent/
Site provider

Re: Threadgold House,
Dovercourt Estate,
Islington,
London N1 3HN

Martin Rodger QC, Deputy Chamber President and A J Trott FRICS

Royal Courts of Justice
on
21-22 January 2019

Graham Read QC, instructed by DWF LLP, for the claimant
Jonathan Wills, instructed by Fladgate LLP, for the respondent

The following cases are referred to in this decision:

Cardtronics Europe Ltd v Sykes (VO) [2018] EWCA Civ 2472

Cornerstone Telecommunications Infrastructure Ltd v University of London [2018] UKUT 356 (LC)

Director of Buildings and Lands v Shun Fung Ironworks Ltd [1995] 2 AC 111

EE Ltd and another v London Borough of Islington [2018] UKUT 361 (LC)

F. R. Evans (Leeds) Ltd v English Electric Co Ltd (1978) 36 P&CR 185

Hoare v National Trust (1999) 77 P&CR 366, [1998] RA 391

IRC v Gray [1994] STC 360

Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands [1947] AC 565

Port of London Authority v Transport for London [2008] RVR 93

Raja Vyricherla Narayana Gajapatiraju v The Revenue Divisional Officer, Vizagapatam [1939] AC 302

Telereal Trillium v Hewitt [2018] EWCA Civ 26

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Introduction

1. The Electronic Communications Code ("the Code") governs the acquisition and exercise of new rights by operators of electronic communications networks to install electronic communications apparatus on, under or over land. The Code is found in Schedule 3A of the Communications Act 2003 into which it was inserted by the Digital Economy Act 2017 with effect from 28 December 2017. It empowers a court or tribunal to impose agreements providing for the exercise of Code rights on unwilling land owners. All such agreements must provide for consideration determined under paragraph 24 of the Code to be payable by the operator to the landowner. The Code also provides separately for the payment of compensation under paragraphs 25, 84 and 85, by the operator to site providers and others suffering loss and damage.

2. In May 2016 the government published an impact assessment on the anticipated effect of the introduction of the Code. It stated that in 2015 there were around 33,000 telecommunications sites in the UK which attracted a rent, of which about 22,000 were let or licenced directly to mobile network operators (the remainder being let to wholesale providers). Of the operators' sites 18,200 were greenfield sites and 4,000 were rooftop sites. It was estimated that operators paid £359m annually for rents, licence fees and business rates (which are themselves related to rental value).

3. In England and Wales jurisdiction under the Code is conferred on the Upper Tribunal and on the First-tier Tribunal by the Electronic Communications Code (Jurisdiction) Regulations 2017. Regulation 3 provides that references in the Code to "the court" include both tribunals but regulation 4 requires that proceedings under the Code must be commenced in the Upper Tribunal (which has power to transfer to the first-tier in appropriate cases). Within the Upper Tribunal Code cases are assigned to the Lands Chamber.

4. This is the Tribunal's first decision on the meaning and effect of the consideration and compensation provisions of the Code. It also raises a separate point of principle concerning the jurisdiction of the Tribunal to impose Code rights by lease.

5. This reference was commenced on 24 August 2018. The claimants, EE Ltd and Hutchison 3G UK Ltd, seek Code rights entitling them to install and operate electronic communications apparatus on the roof of Threadgold House, a block of flats belonging to the respondent, the London Borough of Islington, located on its Dovercourt Estate. The claimants currently provide coverage for the area around Threadgold House from an adjacent building which is expected to be redeveloped during 2019. They wish to replace their existing site and say that if they are unable to do so there will be a severe drop in network access for their customers in the locality.

6. At the hearing of the reference the claimants were represented by Mr Graham Read QC, and the respondent by Mr Jonathan Wills. We are grateful to them both for their assistance.

Background and procedural history

7. Threadgold House is a ten-storey block of flats with a flat roof on which stands a plant room occupying an area of about 70 m^2 (about a third of the total area of the roof); the plant room also has a flat roof. Access to the ground floor of the building is available to key holders or controlled by an entry-phone. Access from the ground floor to the tenth floor of the building is by lift or emergency staircase. Access to the roof, on which the claimants wish to install communications cabinets, is by stairs from the ninth floor. There is currently no access from the main roof to the roof of the plant room, on which the claimants wish to install their antennae, and it would be necessary for the claimants to install a hooped ladder to obtain access. The main roof is surrounded by a 1.2m high parapet wall and its surface is finished in bitumen felt. The plant room roof is 4.44m above the level of the main roof.

8. There are 55 flats in Threadgold House of which six are let on long leases to leaseholders who pay an annual service charge which has averaged about £1300 a year in the last three years. The remaining flats are let by the respondent to its secure tenants.

9. The claimants currently have apparatus on the roof of Leroy House, a high-rise building a short distance from Threadgold House. Planning permission has very recently been granted for the redevelopment of Leroy House which will require the removal of that apparatus and the loss of the site.

10. Before the commencement of the Code the claimants had identified Threadgold House as an appropriate alternative to Leroy House for the siting of their apparatus. Negotiations with the respondent produced agreement in principle over the terms on which the respondent would permit the use of the site. A payment of £21,000 a year was agreed in principle but the agreement was never completed, we assume because the valuation provisions of the new Code were thought to be much more favourable to the claimants than those of the old code which it replaced.

11. Having failed to renegotiate terms under the new Code the claimants eventually referred their claim for the imposition of an agreement to the Tribunal.

12. The reference first came before the Tribunal for case management on 19 October 2018. After a contested hearing, the Tribunal accepted that the claimants had made out a good arguable case that they satisfied the conditions under paragraph 21 of the Code for the grant of rights and that they were therefore entitled to exercise those rights on an interim basis under paragraph 26 pending the final hearing: *EE Ltd and another v L.B. Islington* [2018] UKUT 0361 (LC). The imposition of rights was subject to a condition that no intrusive works were to be carried out until planning permission had been granted for the redevelopment of Leroy House.

13. Notwithstanding the Tribunal's decision to impose interim Code rights, the respondent was entitled to put the claimants to proof of their claim that the qualifying conditions for the imposition of a permanent agreement were satisfied. Although an indication was given in the respondent's evidence served in November that the imposition of rights was no longer objected to, provided the respondent's proposed terms were accepted, it was not until service of Mr Wills' skeleton argument a few days before the hearing that the respondent's objection to the principle

of an agreement was unequivocally withdrawn. None of the claimants' contentions concerning the need for a new site at Threadgold House to enable it to maintain its network are now disputed by the respondent.

14. Issues remain between the parties over the terms of the agreement which is to be imposed, the consideration payable, and the amount of any compensation which the respondent should receive. Before turning to the substance of those issues we wish first to provide our reasons for a procedural ruling which we gave at the start of the hearing by which (subject to the resolution of an issue of jurisdiction which we will deal with shortly) we barred the respondent from objecting to the terms of the agreement proposed by the claimants with such modifications as had already been agreed between the parties; the only exception to that ruling was in respect of the quantum of compensation and consideration.

Debarring the respondent from objecting to the terms proposed

15. Until the commencement of the hearing the dispute between the parties included a large number of issues over the detailed terms of the agreement which the claimants invited the Tribunal to impose. By an order made on 22 October 2018, following the hearing at which interim rights were imposed, the Tribunal gave directions for the preparation of the reference for final determination. Those directions required the claimants to provide an electronic draft of the agreement they sought and directed the respondent to return the draft showing any proposed amendments clearly marked on it. The claimants were then to respond to the amendments identifying those which were agreed or disputed. Finally, the parties were to discuss the draft on a without prejudice basis with a view to narrowing the issues between them before filing the agreement in its final iteration together with a joint statement of the reasons for any remaining points of contention by 19 November 2018. That timetable was demanding, but it was agreed by the parties.

16. The respondent chose to ignore the Tribunal's directions concerning the draft agreement. Rather than providing a marked-up version of the agreement proposed by the claimants it relied instead on a witness statement of its expert witness, Mr Mark East, which explained in a narrative form those aspects of the proposal which the respondent found unacceptable. The witness statement had been filed on 17 October 2018, before the hearing to determine interim rights and before the Tribunal's directions. Mr East had annexed to it a document entitled "Heads of Terms" indicating in broad terms the sort of agreement the respondent would be content with.

17. The respondent's disregard of the Tribunal's direction was deliberate. When asked by the claimant's solicitors on 2 November 2018 whether they intended to provide a marked-up draft the respondent's solicitors stated that "our client's comments were included with the witness statement of Mark East and your client will not therefore be prejudiced by us not providing comments." It was not suggested at that stage that there was any difficulty in principle in the respondent complying with the Tribunal's requirements.

18. As the Tribunal explained in its decision of 19 October 2018 (at paragraph 10) regulation 3(2) of the Electronic Communications and Wireless Telegraph Regulations 2011, to which reference is made in paragraph 97 of the Code, requires the Tribunal to determine applications for the grant of Code rights within 6 months of receipt. That obligation is imposed in the public interest and is not one which either the parties or the Tribunal are free to dispense with. The Tribunal has interpreted the obligation as applying only to the acquisition of rights over new sites, and not to the renewal of rights over existing sites. The current reference concerns a new site and it is common ground that the statutory time limit applies to it.

19. The imposition of a time limit for the determination of references under the new Code means that an even higher degree of cooperation with the Tribunal and between the parties is required in these cases. The purpose of the Tribunal's direction for the service and completion of a travelling draft was to facilitate the discharge of its obligation to provide a decision within the 6 months permitted by statute.

20. As this case has already demonstrated, the burden on the Tribunal's resources caused by parties who fail to cooperate with each other and with the Tribunal is considerable. The Tribunal had been invited to approach its decision on 19 October 2018 at the level of principle, on the basis that the parties would seek to reach agreement on the detailed drafting of the necessary agreement once it was known whether interim rights were to be imposed. Unfortunately the expectation that a sensible consensus could be achieved over the detailed terms of an interim agreement which was expected to last less than four months proved unjustified. The parties agreed virtually nothing and the respondent refused even to allow access for non-invasive surveys while terms remained unresolved. Eventually on 11 December 2018 it was necessary for the Tribunal to settle the form of the agreement, going through the draft document, clause by clause, selecting between the parties' rival formulations.

21. Before the hearing our expectation had been that part of the two days allotted to it would be devoted to argument on the specific terms of the final agreement which remained in dispute. Without a marked draft from the respondent, or any document identifying its detailed alternative proposals, it was impossible for that exercise to be undertaken. The respondent appeared instead to anticipate that the Tribunal would resolve issues of principle (such as whether the agreement should be a lease or a licence, whether it should include an unlimited indemnity, or how closely access should be controlled by the respondent's employees) before allowing it a further opportunity to consider the detailed terms proposed by the claimants. That was not the procedure the Tribunal had directed. Nor was it an acceptable alternative, since the Tribunal is obliged to provide its final decision by 24 February 2019.

22. On behalf of the respondent Mr Wills explained that it had taken the view that there was a single issue which must first be determined before any further drafting could sensibly be attempted. That issue was the question of principle whether the Tribunal has power to impose Code rights in the form of a lease (as proposed by the claimants) or may only impose lesser contractual rights (as the respondent maintains). That suggested difficulty had not previously been suggested by the respondent's representatives. Assuming it to have been the true reason for the respondent's non-compliance we do not accept that it was a valid reason for ignoring the Tribunal's directions for the preparation of a travelling draft. The directions had been discussed

at the first hearing and the respondent had permission to apply for further or alternative directions if it thought them necessary; it chose not to do so. In any event, the detailed terms on which Code rights will be exercised are likely to be substantially the same whether the rights are conferred by a lease or by some alternative form of contract. Similarly, the parties' experts agree that the lease/licence issue will have no effect on the consideration or compensation payable.

23. Where a party fails to co-operate with the Tribunal to such an extent that the Tribunal is unable to deal with the proceedings fairly and justly the Tribunal has power under rule 8(3)(b) of The Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 to strike out the whole or part of that party's case. We consider that the respondent's failure in this case falls within that description. The Tribunal cannot force parties to agree, but it can require them clearly to state their case so that it can identify and determine the matters in dispute within the time limit fixed by Parliament.

24. For these reasons we indicated at the start of the hearing that the respondent would not be permitted to call evidence or make submissions on the terms of the agreement (as opposed to the consideration and compensation payable). We exempted from that prohibition the issue of principle identified by Mr Wills, namely whether the Code gives the Tribunal power to impose a lease on the parties. As that is a question of jurisdiction it is necessary for the Tribunal to resolve it and it is to that issue which we turn first.

Issue 1: Does the Tribunal have power to impose Code rights by means of a lease?

25. Under the "old code" which applied before 28 December 2017 (i.e. the Electronic Communications Code contained in Schedule 2, Telecommunications Act 1984 as amended by section 106, Communications Act 2003) Code rights could be conferred by a lease. Under paragraph 2(1) of the old code the right to execute works, keep apparatus installed on, or enter land for the statutory purpose of providing an operator's network could only be conferred by an agreement in writing between the occupier of the land and the operator. No other formalities were prescribed, and no particular form of agreement was required. Parties were therefore free to adopt any legal arrangement which suited their purpose. In practice the arrangements chosen by the parties to old code agreements often involved the creation of a landlord and tenant relationship.

26. Unless excluded by an agreement complying with section 38A, Landlord and Tenant Act 1954, a lease entered into for the purpose of conferring old code rights would create a tenancy to which Part II of the 1954 Act applied. Despite the statutes having existed side by side from 1984 until 2017 the relationship between old code rights and statutory security of tenure under the 1954 Act was largely *unexplored territory* as far as the courts were concerned (some features of that relationship are identified at section 14.6 of *The Electronic Communications Code and Property Law: Practice and Procedure* (2018), by Falcon Chambers).

27. The previous uncomfortable relationship between these parallel statutory regimes has been avoided under the new Code. The Digital Economy Act 2017, which inserted the Code into the 2003 Act, also introduced a new section 43(4) into the Landlord and Tenant Act 1954 which

expressly disapplied Part II of the 1954 Act from any tenancy the primary purpose of which was to grant Code rights (paragraph 4, Part 2, Schedule 3, 2017 Act). Part 5 of the Code contains provisions for the termination and modification of Code agreements which do not apply where the agreement is a lease to which Part II of the 1954 Act applies.

28. Mr Wills contended on behalf of the respondent that the means by which Code rights may be conferred has changed fundamentally with the introduction of the new Code, at least as far as rights imposed by the Tribunal are concerned. His submission was that Code rights cannot be imposed by means of a lease. It had originally been his intention to argue that the Tribunal has no jurisdiction to impose a lease on the parties and, in the alternative, to suggest that if there is jurisdiction it ought not to be exercised in this case. The consequence of our decision to prohibit the respondent from advancing argument on the terms of the agreement was that only the issue of jurisdiction remained open to Mr Wills.

29. In order to understand that submission it is necessary to refer in more detail to some of the provisions of the Code. An introductory summary of the structure of the Code can be found in the Tribunal's decision in *Cornerstone Telecommunications Infrastructure Ltd v The University of London* [2018] UKUT 0356 (LC) and will not be repeated.

30. A Code right may only be exercised for one of the statutory purposes specified in paragraph 4, namely, for providing an operator's network, or for providing an infrastructure system (both "network" and "infrastructure system" are defined expressions, but it is not necessary to focus on them in this reference). The expression "code right" is defined in paragraph 3 of the Code, where nine distinct rights are listed; these are now expressed in much wider terms than under the old code, as follows:

> "3. For the purposes of this code a "code right", in relation to an operator and any land, is a right for the statutory purposes—
>
> (a) to install electronic communications apparatus on, under or over the land,
> (b) to keep installed electronic communications apparatus which is on, under or over the land,
> (c) to inspect, maintain, adjust, alter, repair, upgrade or operate electronic communications apparatus which is on, under or over the land,
> (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,
> (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,
> (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."

31. Code rights may come into existence in one of two ways: they may be conferred by agreement under Part 2 of the Code, or they may be imposed by a court or tribunal under Part 4. In the latter case the Code maintains the fiction of an agreement, albeit an agreement which is imposed by order, rather than freely entered into. In whatever form they are created Code rights bind successors in title to the interest of the grantor as if they were parties to the agreement and also binds those deriving title under the grantor after the grant (paragraph 10(2)).

32. Paragraph 9 (in Part 2) provides that a Code right in respect of land may only be conferred on an operator by an agreement between the occupier of the land and the operator. Such an agreement must be in writing, signed by or on behalf of the parties to it, and must state for how long the Code right is exercisable and what period of notice is required to terminate it (paragraph 11(1)).

33. Paragraph 20 (in Part 4) provides a separate procedure by which an operator may give notice in writing to a relevant person "setting out the code right, and all of the other terms of the agreement that the operator seeks" and inviting the recipient of the notice to agree those terms. If agreement is not forthcoming the operator may apply to the Tribunal for the making of an order under paragraph 20(4) which "imposes on the operator and the relevant person an agreement between them which (a) confers the code right on the operator, or (b) provides for the code right to bind the relevant person."

34. Paragraph 22 stipulates that an agreement imposed by an order under paragraph 20 "takes effect for all purposes of this code as an agreement under Part 2 of this code between the operator and the relevant person".

35. Paragraph 23(1) provides that an order under paragraph 20 may impose an agreement which "gives effect to the code right sought by the operator" with such modifications as the court thinks appropriate. The agreement imposed must include terms for the payment of consideration by the operator to the relevant person (paragraph 23(3)), and must specify for how long the Code rights are exercisable (paragraph 23(7)). The agreement may include a term permitting termination, or a term enabling the occupier of the land to require the operator to reposition or temporarily to remove the equipment (paragraph 23(8)).

36. Paragraph 23(5) additionally provides that:

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

(c) are from time to time on that land."

37. Mr Wills began his submission by acknowledging that there was nothing to prevent parties agreeing to confer Code rights by an agreement under Part 2 of the Code which takes the form of a lease. The limited formalities imposed by paragraph 11 are not inconsistent with a lease and the Code leaves parties free to reach agreement on the terms which best suit them. Moreover, he accepted that the introduction of section 43(4) of the 1954 Act disapplying Part II where the primary purpose of a tenancy is to grant Code rights indicates clearly that Parliament intended that Code rights should be capable of being conferred by an agreement in the form of a lease.

38. Nevertheless, an agreement which is imposed under Part 4 is different, Mr Wills submitted. The definition of Code rights in paragraph 3 makes no mention of an estate in land or the grant of a lease or tenancy but instead uses general words such as "terms", "rights", and "agreement". It was obviously known that under the old code rights had been entered into by agreements which were themselves leases, and it would have been easy for Parliament to specify that a lease could be imposed if that was what was intended. It had not done so.

39. More specifically, Mr Wills submitted that the Tribunal's power to impose an agreement is limited by paragraph 23 in two relevant respects.

40. First, Paragraph 23(1) makes clear that the terms of the agreement which may be imposed are terms which "give effect to the code right sought" with such modifications as the Tribunal considers appropriate. Since possessing an estate in land is not a Code right, Mr Wills submitted that there is no jurisdiction to impose a lease on a site provider.

41. Secondly, paragraph 23(5) requires that the terms of the agreement must ensure that the least possible loss and damage is caused by the exercise of the Code right to those who occupy the land in question, who own interests in it, or who are simply present on the land from time to time. The imposition of a lease is a more onerous burden on a site provider than other lesser forms of agreement, and where there is a choice paragraph 23(5) requires that the less onerous route be taken.

42. We do not accept Mr Wills' submission, and we are satisfied that Code rights may be imposed under Part 4 by an agreement which creates a leasehold interest in land.

43. We agree with Mr Wills that the Code rights described in paragraph 3 of the Code do not include the right to acquire an interest in land, but equally we can find nothing which is inconsistent with Code rights being conferred by an agreement which, because of its other characteristics, creates a lease or tenancy.

44. As Mr Read argued on behalf of the claimants, the circumstances in which Code rights may be required are diverse, and it is not surprising that Parliament should not have adopted a prescriptive approach to the form in which they may be granted. At one end of the spectrum

Code rights may involve going on to land for a short period to cut back trees or to carry out a survey (which was the full extent of the Code right sought in *Cornerstone Telecommunications Infrastructure Ltd v The University of London*) for which it would not be necessary to acquire an interest in land. At the other end Code rights may involve keeping cabinets, masts and other electronic communications apparatus installed on land for a period of years, thereby effectively excluding the owner of the land from the area required. It may not be essential that such extensive rights be granted by lease, but the evidence of practice under the old code demonstrates that it will often be convenient.

45. On the other hand, the right to keep equipment installed on land does not necessarily involve a grant of exclusive possession. For example, the land on which an automated teller machine is located in a supermarket is capable of being concurrently in the occupation of the bank which owns the machine and the store which hosts it and to involve no grant of exclusive possession: see *Cardtronics Europe Ltd v Sykes (VO)* [2018] EWCA Civ 2472 at [81].

46. The starting point of our analysis is the absence of any express restriction in Part 4 on the type of agreement by which Code rights may be imposed. Because of the variety of circumstances in which rights may be required we do not consider it significant that the Code lacks any specific reference in Part 4 to rights being conferred by the grant or imposition of a lease. That is true both of Part 2 and of Part 4, and it is common ground that a consensual agreement to confer Code rights may take the form of a lease. In any event, it is not the case that the Code does not refer specifically to Code rights being conferred by lease. Part 5 of the Code contains termination and modification provisions which apply to agreements under Part 2. Those provisions are subject to paragraph 29(2) which specifically exempts "a lease of land in England and Wales" if its primary purpose is not to grant Code rights and if it is a lease to which Part II of the 1954 Act applies.

47. The absence of any express statutory restriction on leasing is all the more telling when two relevant circumstances are borne in mind: first, that leases were commonplace under the old code (many of which remain in existence); and, secondly, that the Digital Economy Act 2017 recognises that Code rights may be granted by an agreement which, but for the introduction of section 43(4) of the Landlord and Tenant 1954 Act (by paragraph 4 of Part 2 of Schedule 3 to the 2017 Act), could be a tenancy to which statutory security of tenure under Part II of the 1954 Act would be capable of applying. By providing that a tenancy granted for the primary purpose of conferring Code rights will not be a tenancy to which Part II applies, Parliament has further confirmed that Code rights may be the subject of an agreement which creates an interest in land. Having done so in paragraph 29 of the Code and by amendment to the 1954 Act, we regard it as inconceivable that Parliament would have conferred power on the Tribunal to impose agreements without being specific about any limitations on that power or distinctions it intended between rights conferred under Part 2 and those imposed under Part 4.

48. Mr Wills did not suggest any reason why rights acquired by imposition under Part 4 should be incapable of taking the form of a lease when rights conferred under Part 2 may do so, and we can think of none. The existence of such a significant difference does not sit comfortably with the explicit confirmation in paragraph 22 that an agreement imposed under paragraph 20 takes effect "for all purposes of [the New Code] as an agreement under Part 2". Since Code rights

may, by agreement, be granted by a lease, and since rights which are imposed take effect as if they had been agreed, it would require something clear and specific to persuade us that a fundamental difference was intended to exist in the form in which agreed and imposed rights may be created. We can find nothing in the Code which has that effect.

49. The linguistic pointers Mr Wills was able to rely on do not, in our judgment, advance his argument to any significant extent. The reference in paragraph 23(1) to an order which imposes "an agreement which gives effect to the code right sought by the operator" is not restrictive of the other terms of such an agreement. Indeed, those other terms are to be the terms sought by the operator, with such modifications as the Tribunal considers appropriate. We also think it is significant that the procedure by which terms may be imposed begins with a notice proposing an agreement given to the relevant person by the operator under paragraph 20(1). If the relevant person accepts the terms proposed, Code rights will be conferred by an agreement to which Part 2 applies (which it is agreed may take the form of a lease); if there is a dispute it is said the Tribunal's power is limited to imposing lesser rights. That is not a coherent pattern, and one would more naturally expect that an operator would be able to obtain rights in the same form however the relevant person responded to the notice.

50. Paragraph 23(5) is rather clumsily expressed but it does not obviously support Mr Wills' argument that the Tribunal lacks jurisdiction to impose a lease. It simply requires that: "the terms of the agreement must include the terms the court thinks appropriate for ensuring that the least possible loss and damage is caused by the exercise of the code right." It is not clear to us that an agreement which leaves the relevant person in possession of land on which electronic communications apparatus is present will necessarily expose that person to a lesser risk of loss and damage than an agreement which excludes them from possession (and thus from any responsibility). Indeed, much of the argument on terms and compensation presented by Mr East, the respondent's expert, was directed towards securing compensation for risks which might result from the land owner remaining in occupation. The Law Commission, at paragraph 4.49 of its 2013 Report, *The Electronic Communications Code* (Law Com No. 336), considered that a landowner "may take the view that if Code Rights are to be imposed, he or she wishes to be in the position of landlord (with the associated rights, in particular to remedies for breaches of leasehold covenants) rather than the Code Operator having a simple wayleave." At the very least, the agreed absence of any difference in the consideration payable whether rights are imposed by lease or a lesser form of agreement does not suggest that one is likely to be more of a burden than the other.

51. We should not be taken to have decided that paragraph 23(5) is irrelevant to the form of agreement which it may be appropriate to impose in any particular case, but we do not accept that it delimits the Tribunal's jurisdiction.

52. Finally, we were not shown anything in the Law Commission's report which supported Mr Wills' jurisdiction argument. Those passages to which our attention was drawn by Mr Read demonstrated (as one would expect) that the Commission was well aware that rights under the old code were often conferred by lease, and that there were advantages and disadvantages of different arrangements. There is no hint of a prohibition on imposing a lease, quite the contrary. In response to a consultee's suggestion that there was no need for a Code to regulate leases of

electronic communications sites the Law Commission explained at paragraph 1.32 of its Report that:

> "We continue to take the view we expressed in the Consultation Paper that a Code is needed, regardless of different technologies and of the different legal structures involved. In other words, leases of mast sites should be within the revised Code, as should wayleaves for cables… To recommend otherwise would generate litigation (because it would become important to establish that a given agreement was or was not a wayleave or lease) ..."

53. For these reasons we conclude that the Tribunal does have power under paragraph 23 of the Code to impose an agreement in the form of a lease. For the reasons we have already explained, the respondent is not entitled to object to the terms proposed by the claimant, which provide for a lease for a term of ten years, terminable after five years, under which consideration is payable which is to be reviewed by reference to inflation after five years. None of the terms of the agreement have been the subject of argument and our willingness to impose them in the form requested by the claimant should not be represented as signifying that the same terms will be imposed in other cases.

54. The next question is how much the respondent is to receive in consideration for the imposition of the agreement.

Issue 2: Consideration

55. Under the old code parties were free to agree the amount which should be paid for the rights conferred. If they could not agree the court had power to confer rights on an operator and to determine the terms on which they could be exercised. By paragraph 7(1) of the old code when it conferred rights the court was required to fix financial terms. Those terms were to include "such terms with respect to the payment of consideration … as it appears to the court would have been fair and reasonable if the agreement had been given willingly." In practice consideration was rarely determined by the court but was agreed at levels which reflected the value to the operator of the use of the land for its apparatus.

56. In a ministerial statement responding to consultation on the new Code and published by the Department for Culture, Media and Sport in May 2016 the government explained that the new Code "will make major changes to the way land is valued". Under the heading "Government response: How consideration is to be determined" the statement noted that the Law Commission had recommended only limited changes to the valuation provisions of the old code to eliminate any ransom element. But the government favoured further reform, as it explained in the following passage:

> "It is quite clear that the cost for "rents" in the telecommunications industry are significantly higher than those enjoyed by utilities and providers of essential services. Government is also clear that site providers should get fair value for the use of their land, but considers that this should not, as a matter of principle, include a share of the economic value created by very high public demand for services that the operator provides. The

> Government is therefore proposing that the revised code should limit the value of consideration by changing the basis of valuation to a "no scheme" rule that reflects the underlying value of the land. This is a rate that is more relevant to the nature of modern digital communications infrastructure rollout, and will work to encourage greater investment and improved network coverage."

57. Since some reliance was placed on it by Mr Wills we refer again at this stage to the impact assessment published alongside the DCMS ministerial statement (and mentioned in it). The impact assessment relied on independent economic advice which estimated that, under the new Code, "negotiated wayleave values" (i.e. agreed consideration) were expected "to reach an equilibrium at up to 40% lower than current rates." It is clear that this figure was not an estimate of the effect in an individual case of applying the new valuation criteria. The document assumed that most rights would continue to be acquired by agreement and anticipated (based on behaviour in other utility markets) that network providers "will generally want to maintain good relationships with landowners and avoid legal disputes, so they will choose to pay an element of consideration." For their part, landowners would be encouraged to agree more moderate rates in the knowledge that "if an agreement cannot be made then a court will impose a far lower wayleave settlement."

The relevant provisions of the Code

58. When the Tribunal imposes an agreement conferring Code rights under paragraph 20, it is required under paragraph 23(3) to include terms for the payment of consideration. The terms may provide for consideration to be payable as a lump sum or periodically, on the occurrence of a specified event or events, or otherwise as the Tribunal may direct (paragraph 24(4)).

59. Paragraph 24 makes provision for the determination of consideration under paragraph 23(3) as follows:

> *How is consideration to be determined under paragraph 23?*
>
> 24(1) The amount of consideration payable by an operator to a relevant person under an agreement imposed by an order under paragraph 20 must 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).
>
> (2) For this purpose the market value of a person's agreement to confer or be bound by a code right is, subject to sub-paragraph (3), the amount that, at the date the market value is assessed, a willing buyer would pay a willing seller for the agreement—
>
> (a) in a transaction at arm's length,
>
> (b) on the basis that the buyer and seller were acting prudently and with full knowledge of the transaction, and
>
> (c) on the basis that the transaction was subject to the other provisions of the agreement imposed by the order under paragraph 20.
>
> (3) The market value must be assessed on these assumptions—

(a) that the right that the transaction relates to does not relate to the provision or use of an electronic communications network;

(b) that paragraphs 16 and 17 (assignment, and upgrading and sharing) do not apply to the right or any apparatus to which it could apply;

(c) that the right in all other respects corresponds to the code right;

(d) that there is more than one site which the buyer could use for the purpose for which the buyer seeks the right.

(4) …

60. Where terms for the grant of Code rights are agreed the parties may obviously provide for the payment of consideration at whatever rate they choose, but if the matter falls to be determined by the Tribunal it must do so by applying the valuation criteria and assumptions prescribed by paragraph 24(1)-(3).

61. The basic measure of consideration is stated in paragraph 24(1) and is "the market value of the relevant person's agreement to confer or be bound by the code right". In some ways this is a surprising formulation. A "market value" is usually understood to be the value or price agreed on between a willing buyer and a willing seller in an arm's length transaction after proper marketing, and one might therefore have expected the draftsman to refer simply to the "market value of the Code right". Paragraph 24(1) expresses the basis of valuation in more elaborate terms, focusing on the value of the agreement to only one of the parties – the seller (referred to as the relevant person).

62. The underlying reason for expressing the measure of value by reference to only one of the parties may have been a wish to signal at an early stage an intention to borrow a fundamental principle from the field of compensation for compulsory purchase known as the "value to the owner" principle or the "no-scheme" principle. The most important feature of this principle is the requirement that any value attributable solely to the scheme of the authority which proposes to acquire land compulsorily must be left out of account when determining the compensation payable to the owner of the land, also known as the *Pointe Gourde* principle (*Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565). The owner of the land is to be compensated for what he has lost without regard to additional value which the owner was not in a position to realise, and which only attaches to the land because of the intention of the authority with compulsory powers to use the land for its chosen purpose. There are several references in the DCMS ministerial statement to the incorporation of the "no scheme" principle into the valuation of consideration payable under the Code, and the reference in paragraph 24(1) to the market value of the relevant person's agreement to confer or be bound by the code right carries echoes of the same approach.

63. Whatever the true purpose of expressing the measure of consideration in this unusual way, any suggestion that paragraph 24(1) requires some unconventional approach to determining market value is immediately negated by paragraph 24(2). This explains that the market value of a person's agreement to confer or be bound by a code right is the amount that, at the date the market value is assessed, a willing buyer would pay a willing seller for an agreement (on the

terms imposed under paragraph 20) in an arm's length transaction in which both parties act prudently and with full knowledge.

64. The introduction into the Code valuation criteria of the willing buyer and of a specific transaction on a particular date and terms gives an entirely conventional shape to the exercise which must be undertaken. It requires the assumption of a transaction, whether or not one would happen in reality. The transaction is to be assumed to take place in the open market with all the features present in that market in reality. As Hoffmann LJ explained in *IRC v Gray* [1994] STC 360 (in a case concerning valuation for capital transfer tax):

> "It cannot be too strongly emphasised that although the sale is hypothetical, there is nothing hypothetical about the open market in which it is supposed to have taken place. The concept of the open market involves assuming that the whole world was free to bid, and then forming a view about what in those circumstances would in real life have been the best price reasonably obtainable …"

65. The conventional shape of the market valuation in this case is subject to paragraph 24(3) which introduces a series of assumptions which must be made when assessing what the willing buyer and seller would agree for the rights imposed. The making of assumptions, often contrary to the true facts, is a familiar technique in valuations of all sorts. In the case of the Code the matters which must be assumed are absolutely critical to the outcome.

66. The first assumption is the most significant, namely that the right that the transaction relates to does not relate to the provision or use of an electronic communications network. We will refer to this as the "no-network" assumption. We prefer this to the expression "no-scheme" used in the DCMS Ministerial statement but which is not found in the Code itself. There is a clear analogy between the two concepts, but the indiscriminate use of an expression which carries so much baggage from the world of compulsory purchase would risk importing with it features which cannot be assumed to have any place in the assessment of consideration under the Code.

67. It will be remembered that Code rights are rights for the statutory purposes to install and keep installed (etc) electronic communications apparatus. Electronic communications apparatus is described in paragraph 5(1) as apparatus or structures designed or adapted for use in connection with the provision of an electronic communications network, or for sending signals by means of such a network. The statutory purposes are defined in paragraph 4 and include, in relation to an operator, the purposes of providing the operator's network.

68. The obvious purpose of the no-network assumption is to exclude from the assessment of consideration any element of value attributable to the intention of the operator to use the site as part of its network. The assumption gives effect to the policy expressed in the ministerial statement that the fair return to the site provider "should not, as a matter of principle, include a share of the economic value created by very high public demand for services that the operator provides". The presence in the market of operators who might wish to use the site to provide a

network must therefore be ignored, and the price which such operators would in practice offer for the site must not be taken into account in assessing consideration.

69. The second assumption (paragraph 24(3)(b)) is that paragraphs 16 and 17 of the Code do not apply. These provisions render an agreement void to the extent that it prevents or limits the assignment of a Code agreement or the sharing or upgrading of apparatus. The lease in this case contains no effective restriction on assignment or sharing and we heard no evidence or argument on the second assumption; we therefore prefer to postpone consideration of its meaning and effect until another occasion.

70. The third assumption (paragraph 24(3)(c)) is that the right in all other respects corresponds to the Code right i.e. the right which is being imposed under paragraph 20. It has already been provided by paragraph 24(2) that market value means the amount which would be agreed for rights conferred on the same terms as are provided for by the agreement being imposed, and it may therefore be that this assumption adds nothing of substance. It will be a question of fact in each case what use may be made of the site on the terms imposed, having regard to the no-network assumption. In this case the agreement to be imposed includes a covenant by the operator not to use the site other than for the permitted use of providing the networks of its shareholders. Despite the narrowness of the permitted use both parties approached the issue of valuation on the assumption that the rooftop site could be used for open storage. Once again, in this case we heard no evidence or detailed argument about paragraph 24(3)(c) and we have reached no final conclusion on its potential effect, but we agree with the parties' implicit acknowledgement that the no-network assumption must permit some notional relaxation of contractual terms which would otherwise limit the permitted use to statutory Code purposes only. In principle, therefore, we do not think it is impermissible to have regard to rental values achieved for other uses even where the only permitted use under the imposed agreement is a Code use.

71. The final assumption in paragraph 24(3)(d) is that there is more than one site which the buyer could use for the purpose for which the buyer seeks the right. The effect of the assumption is to neutralise any monopoly of sites which may exist in reality and to eliminate any impact on value attributable to scarcity or undersupply of land suitable for the purpose for which the buyer wishes to take it. It has not been suggested that this assumption is of significance in the present case.

The parties' respective positions

72. The claimants' notice under paragraph 20, and its statement of case for the Tribunal, both proposed the payment of £2,551.77 per annum as consideration for the grant of the Code rights which was said to match or exceed the figure which would result from an application of the paragraph 24 valuation criteria. The evidence of the claimants' expert, Mr Sladdin, was that the rooftop site had only a nominal rental value. The claimants nevertheless remained willing at the hearing to see their original pleaded figure included in the agreement, doing double service as consideration and a cushion for any items of compensation the Tribunal might consider it appropriate to award.

73. The claimants' original figure was supported by a valuation provided by Mr Ferrari of Waldon Telecomm Ltd which he explained in a witness statement provided to the Tribunal in connection with the application for interim rights. Mr Ferrari had relied on evidence of the rental value of basement storage premises in the vicinity of Threadgold House to which he applied a discount of 50% to reflect the exposed and inconvenient location of the site on the main roof of the building and a further discount of 50% for the space on the plant room roof. Mr Ferrari was not called to give evidence.

74. On the basis of his observations from the roof of the building and his researches Mr Sladdin considered that there was no market for the rights other than for telecommunications purposes. The only evidence of any other use being made of rooftops in the vicinity was of one roof used as a garden and one as the site for some solar panels, neither of which would command a rent. It followed that, applying the 'no-network' assumption, there would be no bidders in the market for the acquisition of the rights. It had to be assumed that a transaction would take place, but in the absence of any evidence of a market the consideration which would be agreed for such a transaction would be nominal. Mr Sladdin suggested a figure of £1 per annum would be appropriate.

75. Mr Sladdin also considered two indirect valuation methods which he described as (i) the basement approach, and (ii) the storage approach. Despite including this evidence in his report, Mr Sladdin considered the use of any arithmetical analysis of storage or parking rents to be "somewhat contrived" because the fundamental physical difficulties with rooftop sites and the lack of any demonstrable market demand for storage use at Threadgold House meant that only a nominal rent was appropriate.

76. The basement approach adopted the rating convention of zoning rental values and applying a percentage discount to less valuable parts of the premises. From local retail rating assessments Mr Sladdin concluded that basement storage in the locality was worth 5% of Zone A retail accommodation. In order to express the valuation consequences of the such a use he considered a further discount of 80% was appropriate to reflect the additional disadvantages of rooftop storage. This resulted in a nominal value for rooftop space.

77. Mr Sladdin also responded to Mr East's use of the rental value of open parking spaces commanding a rental of £73.35 per m^2 as a proxy for rooftop space used as storage. He discounted car park values by 99% to reflect the disadvantages of a roof-top location for storage. This gave a total rental of £88 per annum which he then reduced further to a nominal £1 because "the market would also look at the overall cost of occupation and with potential additional costs such as a service charge would choose an alternative storage location unless offered an incentive or the rental was set at a nominal amount".

78. Mr East, who has been the respondent's adviser on telecommunications issues since 2006 and who also acted as its expert witness, considered that what was to be valued was "the right to reserve space on the roof for the apparatus, to the exclusion of all other parties, including the Respondent, together with a right to carry out all other associated activities required to install,

inspect, maintain, adjust, alter, repair, share and upgrade electronic communications apparatus." He suggested that there was a value to the willing seller below which he would not deal.

79. Mr East considered that this value to the seller could best be assessed by referring to transactions for the grant of rights to install electronic communications apparatus in the earliest days of mobile communications during the 1990s. He suggested that when the market was in its infancy terms were agreed by unsophisticated and unrepresented landlords who simply did not appreciate the value of what they were granting. All of the transactions he relied on were grants by the respondent of leases for terms of ten or twenty years of rooftop sites in Islington to relatively new telecommunications companies. In each case the respondent had dealt with the matter in-house and had agreed annual rents of £6,000 or £7,000 with periodic reviews.

80. For reasons which were not really explained Mr East regarded these historic agreements as good comparables for transactions in a notional market in which rights are granted which do not relate to the use of electronic communications networks. The explanation he gave for that view was that the market was immature and the respondent was inexperienced. In effect, he seemed to be saying that because the respondent did not appreciate the value of the rights it was conferring the sum agreed therefore represented the value to a site provider of being bound by rights on the assumption that the rights did not relate to the provision or use of an electronic communications network.

81. Mr East indexed the historic rents for inflation (in some cases over as long a period as 27 years) and calculated an average rent per site of £12,640 per annum. After carrying out a number of adjustments to this figure, Mr East arrives at a valuation of the Code rights to be imposed on the respondent of £11,000 per annum, or £13,250 per annum if four dish antennae were permitted. Since the terms of the agreement allow for 4 dish antennae we take Mr East's valuation of consideration under paragraph 24 of the Code for the rights sought by the claimant to be £13,250 per annum.

82. Mr East also advanced an alternative approach based on the value of storage space (albeit that he did so under the head of compensation). He acknowledged that there was no relevant direct comparable open storage rental evidence. Instead he relied upon the rents charged by the respondent council for garages and open car parking spaces. He concluded that enclosed rooftop storage at Threadgold House, based on these comparables, would be worth £100 per m^2 per annum and open storage worth £75 per m^2 per annum. Applying these rates to the agreed areas gave a rental value of £10,500 per annum.

Discussion and conclusion

83. In his submissions in support of the respondent's case Mr Wills suggested that the approach taken by Mr Sladdin ignored the requirement to assume that a market exists, which was implicit in the concept of the willing buyer. We do not consider that criticism is justified. Where a commodity which, in reality, nobody would bid for, is to be valued the requirement to assume that a transaction will take place does not oblige the valuer to assume additionally that the market in which that transaction occurs is a competitive one. As Hoffmann LJ emphasised in *IRC v*

Gray, there is nothing hypothetical about the market in which the assumed transaction takes place. The valuation hypothesis is a tool for ascertaining the value of the commodity in the market as it actually exists, subject only to the assumption, which may be contrary to reality, that there is at least one willing buyer in that market. It is therefore essential to consider the true state of the market and to recognise that the notional willing buyer embodies the actual level of demand for the commodity which is assumed to be on offer.

84. We agree with Mr Wills' submission that the fact that there may be only one bidder in the market does not mean that the price agreed will necessarily be a nominal one. In support of that submission Mr Wills referred to *F. R. Evans (Leeds) Ltd v English Electric Co Ltd* (1978) 36 P & CR 185 (a rent review case concerning a very large factory building on a 60-acre site for which the only notional bidder would be the actual tenant). Donaldson J discussed the significance of that very limited demand as follows:

> "The fact that it is very likely that the English Electric Co. Ltd. would have been the only potential lessee is relevant, but its relevance is indirect. It does not matter whether the only potential lessee was this company or the XYZ Co. Ltd. What matters is that in the state of the market there was not likely to be more than one willing lessee. The effect of this fact is not, however, decisive because this single potential lessee is to be assumed to be a willing lessee—neither reluctant nor importunate, but willing. Just as the hypothetical lessor cannot rely overmuch on the fact that no property similar to the Walton Works is available on the market, so the hypothetical lessee cannot rely too much upon the fact that he has no competitors—he is, and is known to be, a willing lessee. Furthermore, it is known that he will remain a willing lessee so long as the willing lessor does not press his demand for rent beyond the point at which he is ceasing to act as a willing lessor and at which a willing lessee would cease to be such."

85. Additional support for the proposition that a market in which there is only one possible buyer will not necessarily result in a nominal value can be found in the decision of the Privy Council in *Raja Vyricherla Narayana Gajapatiraju v The Revenue Divisional Officer, Vizagapatam* [1939] AC 302, 316 where Lord Romer said this:

> "But if the potentiality is of value to the vendor if there happen to be two or more possible purchasers of it, it is difficult to see why he should be willing to part with it for nothing merely because there is only one purchaser. To compel him to do so is to treat him as a vendor parting with his land under compulsion and not as a willing vendor. The fact is that the only possible purchaser of a potentiality is usually quite willing to pay for it."

86. It follows that the willing buyer is not able to use the absence of demand to drive the price down to a level at which the seller would not be willing to transact. Both are willing to deal at the market price.

87. Nevertheless, if the characteristics of the premises mean that, in reality, nobody would pay anything for them, the correct conclusion may be that their market value is nominal. The consequences of an absence of demand for particular premises other than from the assumed willing buyer have been considered by the Court of Appeal in a number of rating valuation cases.

88. *Hoare v National Trust* (1999) 77 P&CR 366 concerned the rateable value of two historic houses owned by the Trust which was to be assessed by reference to their annual letting value. The Trust incurred substantial expense in maintaining the properties which no commercial party would be willing to sustain with the result that the Trust was the only potential tenant. Peter Gibson LJ said (at 387) that where there is only one potential bidder for the property in question, "the hypothetical lessor is in a weaker bargaining position." Schieman LJ said (at 381) that such a hypothetical landlord "would be faced with a situation in which, on the Tribunal's findings, there are no other bidders for the tenancy. All this points to a nominal hypothetical rent." Scott VC was of the same view, saying (at 394):

> "The facts as found by the Tribunal, regarding the annual receipts that might be obtained from each property and the annual expenditure currently being spent on the maintenance and repair of each property, make it quite unreal, in my judgment, to suppose that the hypothetical tenant would be prepared to pay any rent at all. The hypothetical tenant, the hypothetical National Trust would be accepting the obligation to meet a considerable annual deficit. Why should any hypothetical tenant be willing to add to that deficit by paying a positive rent?

89. In *Telereal Trillium v Hewitt* [2018] EWCA Civ 26, the Court of Appeal considered the rateable value of an office building in Blackpool for which it was agreed there would be no bidder in the open market at the valuation date. Henderson LJ noted that in *Hoare v National Trust* it had not been necessary for the Court of Appeal to consider "the more extreme position where, as in the present case, there was *no* potential bidder for the hypothetical lease; but the logic of the reality principle would appear to dictate that, in such circumstances, no hypothetical lease at a positive rent could have been concluded."

90. A further example of a nominal valuation is the decision of the Lands Tribunal (PR Francis FRICS) in *Port of London Authority v Transport for London* [2008] R.V.R. 93, to which Mr Sladdin referred. Nominal consideration of £50 was awarded in respect of the compulsory acquisition of rights to construct a bridge in airspace. That airspace had a special suitability for the construction of the bridge, given its proximity to roads, but that special suitability was required to be ignored in the valuation by section 5, Land Compensation Act 1961. The Tribunal concluded that there would be no market for such rights in the assumed "no-scheme world" and concluded that the value of the airspace was nominal consideration. Although the current case is different on its facts and arises under a different statutory regime, there is nothing in the Code which precludes a similar outcome if the facts justify it.

91. We consider that it would therefore be wrong to approach the assessment of consideration either on the basis that the absence of competition must necessarily result in only a nominal value, or on the basis that the assumption of a willing buyer must necessarily result in a figure which is more than nominal. The value of the land to the willing buyer will depend in every case on its characteristics and potential uses, and not simply on the number of potential bidders in the market.

92. Mr Wills also argued that the notional site provider must be assumed to have the characteristics of the respondent, a local authority with a statutory obligation to obtain best value

and with responsibilities to the residential tenants and leaseholders of Threadgold House who, on the evidence, are likely to perceive telecoms equipment negatively, and to complain when it is installed in their building.

93. It is not necessary to decide whether the notional site provider is a local authority since a duty to obtain best value cannot override the assumption that the seller is willing to deal at market value. We agree that the site provider must be taken additionally to be the landlord of all of the occupiers in the building and to owe contractual and statutory obligations to them, since that is the reality. We also accept on the evidence that residential occupiers may not welcome the presence of telecommunications equipment on their roof and may be inclined to complain about it, thus creating an additional administrative burden for their landlord (whether it is a private landlord or a local authority).

94. We do not accept Mr East's summary of what is to be valued under paragraph 24 as comprising the right to carry out all the activities required to install, inspect, maintain, adjust, alter or repair electronic communications apparatus, but not the right to provide or use it. That approach fails to give effect to the no-network assumption that the right that the transaction is concerned with does not relate to the provision or use of an electronic communications network. The rights to be assumed are the same rights as those actually imposed, but the purpose for which they are notionally granted is to be assumed to have nothing to do with the provision or use of a network.

95. Nor do we obtain any assistance from Mr East's reliance on transactions under the old Code. To use them as comparables would be contrary to the no-network assumption since they evidence the value of rights to provide and use an electronic communications network. They are also open to a number of further objections: they were based on a different statutory valuation hypothesis, i.e. consideration was to be fair and reasonable; secondly, they are historic values, the most recent transaction having taken place in March 1999 and the earliest in March 1992; thirdly the use of indexation over such a long period is wholly unreliable; and fourthly they were limited by Mr East to transactions in which the site provider was not represented and assumed to be ignorant of the true value of the rights being granted, which is contrary to the requirement of paragraph 24(2)(b) that market value be assessed on the basis that the buyer and seller act prudently and with full knowledge of the transaction.

96. We think Mr East was wrong in principle to approach the valuation on the basis that there was a certain amount that would have to be paid in consideration before the willing seller would entertain entering into any agreement, which he described as "floor level" consideration. That assumption compromises the requirement to assess market value as between a willing buyer and a willing seller in an arm's length transaction. It must be assumed that a transaction will take place. As Donaldson J put it in *F R Evans* at 193: "We are not interested in the possibilities of a failure to reach agreement. They do not exist." The need to assume a transaction is not consistent with the hypothesis that one party has a limit unrelated to the value of the property beyond which it will not budge and which might prevent such a deal taking place – that is a description of an unwilling seller.

97. We also reject Mr East's suggestion that an increased level of consideration should be determined to reflect the acquisition of a right to install up to three additional dish antennae in future. To value that right by reference to the benefit which might accrue to the claimants would be contrary to the no-network assumption under paragraph 24(3)(a).

98. We agree with Mr Sladdin that values achieved on lettings of parking spaces or for basement storage are of no real value in determining what would be agreed in the market for the right to keep installations unconnected to a telecommunications network on the roof of a ten-storey residential building. We accept his evidence that there is no demand for such space for any commercial purpose unconnected to telecommunications, but we do not accept that that conclusion dictates a nominal consideration.

99. This case is unlike the *Port of London Authority* case, and others dealing with compulsory purchase, in that the assumed transaction is not a freehold sale which divests the seller of all interest in the premises, it is the grant of a lease on identified terms and in circumstances which will require the site provider to undertake obligations to the operator. Those terms restrict what the respondent may do with the building (for example it may not repair the roof without first seeking to agree arrangements to accommodate the claimants' apparatus during the works) and oblige it to keep those parts of the building over which the tenant is granted rights (including the lifts, staircase and common parts) in good and substantial repair and condition. The parties will be in this continuing relationship for ten years and (subject to the no-network assumption) the risks and obligations which the relationship creates for the site provider must be taken into account.

100. This case is also unlike *Hoare v National Trust* or *Telereal Trillium v Hewitt* where the effect of the notional letting was to transfer expensive liabilities from the landlord to the tenant (the maintenance of a listed building, or the everyday burdens of ownership of an unlettable office block). The seller is assumed to be willing, but cannot be assumed to act under compulsion, and like any willing seller wants to obtain the best price available. Since the inconvenience of having a telecommunications site on the roof of the building is not offset in this case by any countervailing benefits, the site provider and the operator would be likely to agree that it should be reflected in the sum payable to the provider.

101. Thus, both Mr Sladdin and Mr East considered that it would be appropriate for the claimants to make a contribution towards the respondent's expenses of running the building and complying with its obligations as a payment to reflect its usage of the building. We agree. Both parties approached this topic as an aspect of compensation but we consider it more appropriately viewed in this case as relevant to the assessment of consideration for the rights conferred and obligations assumed under the agreement imposed. One consequence of treating the provision of services as a matter for compensation would be to increase the opportunity for disagreement with resulting unnecessary costs. The total sums involved are likely to be small and we consider that reasonable parties would wish to wrap them up in a single annual occupation payment for that reason.

102. In the case of the residential leaseholders of flats in the building the benefit of the respondent's obligations and the services it provides are dealt with by an annual service charge, which averaged about £1,300 a year per flat over the last three years for which figures are available. Mr Sladdin referred to this as the ceiling above which any contribution by the claimants should not rise. The periodic tenants who occupy under secure tenancies do not pay a service charge, but the value of the same services is reflected in the rent they pay.

103. The terms sought by the claimants and which the Tribunal will impose do not include an annual service charge. In a negotiation in the market we consider that a willing landlord and tenant would agree a rent which took this into account. We agree with Mr Read that the appropriate figure ought to be less than the amount individual residential tenants pay since some of the services they enjoy would not be used by the claimants. We do not agree with his submission that the claimants' contribution should be related to the number of visits its staff are likely to make annually to the building.

104. The largest service charge items are building insurance, caretaking and management, which together account for more than 70% of the total contribution of leaseholders. The claimants will benefit from all of these services, and their presence in the building will make additional demands on the respondent and its staff. The claimants also propose (at their own expense) to connect an alarm on the roof to the building's own internal fire alarm system. The hypothetical tenant must be assumed to be one who will place comparable demands on the respondent, although the specific nature of the claimants' use must be disregarded, and we consider that the enjoyment of such services would be reflected in the consideration which willing parties would agree. We also take into account that, unlike the cost of providing services, any contribution received through an annual rent will be fixed for five years until up-rated for inflation under the review clause in the lease.

105. Both parties speculated about the expense of carrying out repairs to the roof of the building and when it might be required, for which no provision has been made in the service charge years for which evidence was available. Whenever roof repairs may be required we consider that willing parties would agree to reflect the cost of such work in the rent payable by the claimants. Making assumptions which appeared to us to be reasonable, Mr Sladdin estimated that, shared equally, the annual equivalent cost of repairing a roof with an estimated life of 27 years would be £36 per flat. We have regard to that figure but additionally bear in mind there is reasonably expected to be some wear and tear on the roof by reason of the claimants' presence which might be agreed to justify a higher contribution.

106. On the basis that the nominal value of the rights themselves, on the no-network assumption, is £50, we consider that the consideration which willing parties would agree for the terms to be imposed in this case would be £1000 per annum.

Issue 3: Compensation

107. In addition to consideration payable under paragraph 24, which must be included as a term of the agreement imposed by the Tribunal under paragraph 20, the Code provides for the

payment of compensation. The relevant provisions in this case are found in paragraph 25 (which confers jurisdiction), and paragraphs 83 to 86 (which provide or incorporate more detailed rules). We will refer first to paragraph 25 and deal with some points concerning its effect, before dealing with the detailed rules, so far as they are relevant to this reference.

The compensation provisions of the Code

108. Paragraph 25 is in these terms:

What rights to the payment of compensation are there?

25(1) If the court makes an order under paragraph 20 the court may also order the operator to pay compensation to the relevant person for any loss or damage that has been sustained or will be sustained by that person as a result of the exercise of the code right to which the order relates.

(2) An order under sub-paragraph (1) may be made—

(a) at the time the court makes an order under paragraph 20, or

(b) at any time afterwards, on the application of the relevant person.

(3) An order under sub-paragraph (1) may—

(a) specify the amount of compensation to be paid by the operator, or

(b) give directions for the determination of any such amount.

(4) Directions under sub-paragraph (3)(b) may provide—

(a) for the amount of compensation to be agreed between the operator and the relevant person;

(b) for any dispute about that amount to be determined by arbitration.

(5) An order under this paragraph may provide for the operator—

(a) to make a lump sum payment,

(b) to make periodical payments,

(c) to make a payment or payments on the occurrence of an event or events, or

(d) to make a payment or payments in such other form or at such other time or times as the court may direct.

(6) Paragraph 84 makes further provision about compensation in the case of an order under paragraph 20.

109. It will be seen that the power to award compensation is very flexible. It was urged on us by Mr Read that the power was also discretionary ("the court may also order the operator to pay compensation"). We think that goes too far. The power to award compensation is expressed in that way because there are likely to be some cases where there is no need for compensation because no loss or damage will be sustained as a result of the exercise of the code rights imposed. Where loss or damage is sustained we do not consider that the Tribunal could properly refuse compensation (or refuse to give directions for the amount of compensation to be ascertained by agreement, by arbitration, or by the Tribunal itself).

110. Mr Read also submitted that the Tribunal's power to award compensation, or to give directions for its ascertainment, was exercisable once only, when the order imposing a Code agreement was made. He based this submission on the opening words of paragraph 25(1) ("If the court makes an order under paragraph 20 the court may also order the operator to pay compensation"). His suggestion was, in effect, that "if" should be taken to be synonymous with "when". The result he contended for was that unless the Tribunal could be satisfied on the balance of probability at the time it imposed the agreement that loss or damage of a particular type had been or would be sustained by the relevant person, the Tribunal had no power to order the payment of compensation in respect of it, including at any later date. He acknowledged that the consequence would be that the risk of unanticipated loss would fall on the site provider.

111. We do not accept Mr Read's submission. It is not the natural effect of paragraph 25(1) and it ignores paragraph 25(2). It would also have the unjust consequence of imposing the risk of uncompensatable loss on the site provider, which is unlikely to have been intended. The making of an order under paragraph 20 is a condition precedent of any order under paragraph 25, but in our judgment once that condition has been satisfied there is nothing to restrict the time when an order for compensation may be made. That is the obvious intent of paragraph 25(2)(b) which allows an order to be made "at any time afterwards" i.e. at any time after the imposition of an agreement under paragraph 20. It would also be contrary to the flexible terms in which the power to award compensation has been conferred.

112. Part 14 of the Code, comprising paragraphs 83 to 86, makes further provision for compensation. Paragraph 83 is purely introductory and has no substantive effect. Paragraph 86 is more important in that it establishes that, except as provided by the Code, an operator lawfully exercising rights conferred by the Code has no liability for loss and damage caused.

113. The main substance of the compensation provisions is found in paragraphs 84 and 85.

114. Paragraph 84 is headed: Compensation where agreement imposed or apparatus removed. By sub-paragraph (1) it applies only where the Tribunal makes an order for the payment of compensation under paragraph 25(1) (where an agreement has been imposed under paragraph 20) or under paragraph 44(5) (where an order has been made for the removal of apparatus). Paragraph 84 therefore has no application where an agreement has been made to confer Code rights under Part 2.

115. Paragraph 85 is headed: Compensation for injurious affection to neighbouring land etc. It provides by sub-paragraphs (1) and (2) that where an operator exercises a right conferred by or in accordance with any provision of Parts 2 to 9 of the Code in England and Wales, compensation is payable by the operator under section 10 of the Compulsory Purchase Act 1965 (compensation for injurious affection to neighbouring land) as if that section applied in relation to injury caused by the exercise of such a right as it applies in relation to injury caused by the execution of works on land that has been compulsorily acquired. Sub-paragraph (8) provides that such compensation is payable irrespective of whether the person claiming the compensation has any interest in the land in relation to which the Code right is exercised. In this case it would therefore cover claims by residents of flats at Threadgold House in respect of loss or damage they sustained as a result

of the rights exercisable by the Claimants. No such claim is before the Tribunal and it is not necessary for us to refer to paragraph 85 in any detail.

116. Returning to paragraph 84, so far as the remaining provisions apply to England and Wales, they are as follows:

> "(2) Depending on the circumstances, the power of the court to order the payment of compensation for loss or damage includes power to order payment for—
>
> (a) expenses (including reasonable legal and valuation expenses, subject to the provisions of any enactment about the powers of the court by whom the order for compensation is made to award costs or, [Scotland]),
>
> (b) diminution in the value of the land, and
>
> (c) costs of reinstatement.
>
> (3) For the purposes of assessing such compensation for diminution in the value of land, the following provisions apply with any necessary modifications as they apply for the purposes of assessing compensation for the compulsory purchase of any interest in land—
>
> (a) in relation to England and Wales, rules (2) to (4) set out in section 5 of the Land Compensation Act 1961;
>
> (b)-(c) [Scotland and Northern Ireland]…
>
> (4) In the application of this paragraph to England and Wales, section 10(1) to (3) of the Land Compensation Act 1973 (compensation in respect of mortgages, trusts of land and settled land) applies in relation to such compensation for diminution in the value of land as it applies in relation to compensation under Part 1 of that Act.
>
> (5)-(6) [Scotland and Northern Ireland] …
>
> (7) Where a person has a claim for compensation to which this paragraph applies and a claim for compensation under any other provision of this code in respect of the same loss, the compensation payable to that person must not exceed the amount of that person's loss."

117. Sub-paragraph (2) provides a list of matters for which "depending on the circumstances" compensation may be payable, including, at (b) "diminution in the value of the land". It is apparent that the list is not intended to be exhaustive: the power to order compensation "includes power" to order payment for the matters identified. In this case the relevant power is under paragraph 25(1), which, in apparently unrestricted terms, confers jurisdiction to "order the operator to pay compensation to the relevant person for any loss or damage that has been sustained or will be sustained by that person as a result of the exercise of the code right". The reference in paragraph 25 to "*any* loss or damage", the inclusive list of examples in paragraph 84(2), and the incorporation of only some of the heads of compensation available under section 5 of the Land Compensation Act 1961, all suggest that other types of loss or damage may be capable of being the subject of compensation under paragraph 25. It was however suggested by Mr Read that the only right to compensation was under the headings in paragraph 84(2), but our provisional view is that that is too narrow an approach. It is not necessary for us to reach a concluded view on that question in this reference and we therefore prefer to leave it for consideration on an occasion when it can be fully argued.

118. The parties agreed that, in assessing compensation under the Code it would be appropriate for the Tribunal to borrow the three general conditions which must be established in support of a claim for fair and adequate compensation in cases of compulsory purchase, as explained by Lord Nicholls in giving the decision of the Privy Council in *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 2 A.C. 111, 126: first, it is a prerequisite of compensation that there must be a causal connection between the acquisition and the loss in question; secondly, to qualify for compensation that loss must not be too remote; and thirdly, the law expects those who claim compensation to behave reasonably, to take the steps a reasonable person would to eliminate or reduce the loss, and to avoid incurring unreasonable expenditure.

The respondent's case on compensation

119. The respondent argued that it was entitled to compensation under each of the headings in paragraph 84(2): for expenses, diminution in the value of the land, and costs of reinstatement. Through Mr East, its valuation expert, it put forward 29 separate claims, although Mr Wills suggested that the Tribunal may prefer to give directions under paragraph 25(4) for the parties to seek to agree compensation under these headings before returning on a later occasion to enable the Tribunal to resolve any outstanding issues.

120. Mr East divided the respondent's compensation claims into three categories based on paragraph 25(5), namely, lump sum payments, periodic payments, and payments on the occurrence of an event. In the first category he included compensation for "the value of the land taken", compensation for disturbance during the installation works, for noise and nuisance, for additional wear and tear on the roof, and for the purchase of certain safety equipment. In the category of periodic payments were a variety of safety checks and management costs as well as a contribution towards the general maintenance and repair of the building. Mr East finally identified sixteen separate events or occasions when disturbance might be caused or expense incurred for which he considered the respondent should be entitled to compensation. Very few heads of compensation were supported by evidence of actual loss, or any attempt to quantify loss likely to be sustained in future.

121. It would not be convenient to the parties, or a proportionate use of the Tribunal's resources, for the lengthy compensation claims to be left over to be agreed or fought out at leisure on a subsequent occasion. Our preference is to determine (in principle at least) those claims which can be determined, to dismiss those which are speculative or unfounded, and to leave the respondent to bring a further claim in the event that additional loss or damage (not already taken into account) can be proven to have been sustained in future.

122. There is no dispute about the respondent's entitlement to reasonable legal and valuation expenses in connection with agreeing the Code agreement but no attempt has been made by the respondent to quantify these. We accept Mr Read's submission that the recoverable fees are those incurred in seeking to *agree* terms for a code agreement, and do not include costs incurred in resisting the imposition of the agreement in principle, or in attempting to compromise the reference itself (all of which are a matter for the Tribunal as costs of the reference). If the parties are unable to reach agreement on the appropriate sum they may apply to the Tribunal in this reference for determination of the sums payable.

123. Nor is there any disagreement that, in principle, the respondent is entitled to compensation for the temporary use of its land at ground level (and perhaps, if required, on the un-demised area of the roof) for a working compound and the site of a crane while the claimants' apparatus is installed. The details of the claimants' requirements are not yet known, and if appropriate compensation cannot be agreed the respondent may apply to the Tribunal in this reference for their determination. No order is required at this stage in respect of the eventual decommissioning of the site.

The diminution in value claim

124. Mr East pointed out that although the compensation and consideration provisions of the Code are separate and distinct, certain matters could be taken into account under both headings. He considered in particular that it was permissible to reflect what he called the value of the land taken under both heads and to treat any positive difference between the sum assessed in respect of that value under paragraphs 25 and 84 (compensation) and that determined under paragraph 24 (consideration) as a compensatable loss. Having arrived at a view of the appropriate level of consideration for the rights imposed by reference to historic telecommunications rents Mr East separately assessed what he said was compensation for the value of the land lost to the respondent for the term by reference to an alternative storage use. Why he thought this was appropriate was unclear, but in the event the storage use yielded a lower annual value than the historic transactions in telecommunications sites, which caused Mr East to conclude that no compensation was payable "for the loss of the land".

125. As we have rejected Mr East's assessment of consideration it is necessary for us now to consider whether the respondent is entitled to rely on an alternative claim for compensation in respect of the value of the land of which it will be deprived for the term of the agreement.

126. In its final report, *The Electronic Communications Code* (Law Com No. 336, February 2013), the Law Commission noted at paragraph 5.4 that under the old code the term "compensation" indicated a payment that compensated for a loss. It identified two main causes of such loss:

> "(1) Reduction in the value of land because it has become subject to a right. The value of the land subject to the acquired right may be less than it was beforehand, in which case the difference may be payable in compensation.
>
> (2) Loss or damage sustained as a result of the exercise of rights. This would include the cost of disruption to a business, or physical damage to a building, caused by an installation."

This was to be contrasted with consideration, as the report explained in paragraph 5.5: "Consideration is something more than compensation, and can best be described as a "price" for the grant of rights."

127. The distinction between consideration and compensation is maintained under the new Code, albeit with revised definitions. Under paragraph 84(2)(b) the Tribunal's power to order compensation for loss or damage includes power to order payment for the diminution in the

value of the land, i.e. the land which is being made subject to the Code right. Such diminution in value is to be assessed by reference to rules (2) to (4) of section 5 of the Land Compensation Act 1961, subject to "any necessary modifications". Those rules provide as follows:

> "(2) The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise.
>
> (3) The special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the requirements of any authority possessing compulsory purchase powers.
>
> (4) Where the value of the land is increased by reason of the use thereof or of any premises thereon in a manner which could be restrained by any court, or is contrary to law, or is detrimental to the health of the occupants of the premises or to the public health, the amount of that increase shall not be taken into account."

We note at this stage the omission in particular of any express incorporation of rule (6) of the 1961 Act compensation rules, which confirms that "the provisions of rule (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land." We were not addressed on the consequences of that omission, or on its potential significance for the scope of paragraph 25(1), and we reserve any further comment for another occasion.

128. The assumptions and disregards which fall to be made when assessing consideration under paragraph 24 by reference to the market value of the rights do not apply when assessing compensation under paragraphs 25(1) and 84(2)(b) by reference to the diminution in the open market value of the land as a result of the exercise of the code right. Where loss or damage has been sustained it is therefore not necessary to disregard the fact that it was in connection with the provision and use of the electronic communications network when assessing compensation. It is the fact that such a use is to be ignored when assessing consideration which enables Mr East to say (as we understand his argument) that the value of the land has been diminished as a result of the exercise of the Code rights to an extent which is not reflected in the consideration received by the site provider and that compensation should be payable accordingly. That appears to us to be the essence of Mr East's approach, although, confusingly, when assessing consideration he valued the land by reference to historic telecommunications values which he ignored when assessing compensation.

129. We can illustrate this approach by a simple example. Suppose a parcel of land is suitable for use either for storage or as the site of a mast for use in connection with the provision of an electronic communications network. The open market value of the land on an annual basis, having regard to the two uses and assessed by reference to the 1961 Act, is £x and £3x respectively. When determining consideration under paragraph 23 of the Code the more valuable network use must be ignored and the consideration will be £x a year. But the network use does not have to be ignored when calculating compensation under paragraph 84(2)(b). If such compensation is payable it would be assessed by reference to the diminution in the value of the land as a result of the inability of the owner to make use of it for the more profitable network use and being required instead to accept a sum assessed by reference to its less valuable storage

use, i.e. £3x - £x = £2x. As a result, Mr East argued, the site provider should receive a total sum of £3x being the aggregate of consideration and compensation.

130. In support of Mr East's view Mr Wills submitted that the loss of the potential to use land in a certain way is plainly capable of causing a diminution in the value to land and thus to fall within paragraph 84(2)(b). For the claimants Mr Read submitted that it would be contrary to Parliament's intention (which he said was that the cost of providing networks should be reduced) for the Tribunal to permit inflated claims for compensation effectively to make the overall '*rents*' for the telecommunications industry as high or higher than they were previously. We agree that the objective of reducing the costs of providing high quality telecommunications services is apparent in the Code's consideration provisions, particularly in the no-network assumption in paragraph 24(3)(a) which gives effect to the policy that site providers should not share in the economic value created by the very high demand for those services. But we do not agree that the same policy has any influence in the assessment of compensation. There is nothing in the Code (or the material admissible in its interpretation) to suggest the existence of a policy requiring the owners of suitable sites to bear part of the cost of providing networks through being deprived of fair compensation for any loss or damage which they suffer as a result of the exercise of Code rights.

131. On the other hand, we agree with Mr Read that it was not the intention of Parliament that the share in the economic value created by the operator's network which has been denied to the site provider in the assessment of consideration should be paid over in the form of compensation for diminution in the value of that land.

132. Compensation for diminution in value of the land under paragraph 84(2)(b) and consideration are sums payable for different things and, in our judgment, do not overlap to the degree postulated by Mr East. Consideration is a one-off or periodic payment representing the value of the right to use the land for the term, on the terms which have been agreed or imposed; it is, as the Law Commission put it, the price for the grant of the right (albeit a price determined on assumptions which disregard the purpose which gives the right most of its value). Compensation, on the other hand, is recompense for loss or damage suffered by the site provider as a consequence of the agreement reached or imposed; it is the monetary equivalent of the loss or damage sustained. A site provider which allows its land to be occupied and which receives in return the market value of that occupation on a periodic basis does not suffer loss or damage from being kept out of the use of the land or from being deprived of the opportunity to let it to someone else.

133. We acknowledge that, in practice, the valuation assumptions required to be made when assessing the amount of consideration payable prevent the site provider from realising the true value of its land. In reality, the site provider is prevented from realising that portion of the value of its land which is attributable to its suitability for use in connection with the provision of a telecommunications network. But that does not give rise to a loss for which compensation is payable under paragraph 84. For the purpose of the Code, including for the purpose of determining whether a compensatable loss has been sustained, consideration determined in accordance with paragraph 23 must be taken to be the market value of the rights conferred. We agree with the submission made by Mr Read that it was not Parliament's intention to treat entry

into a Code agreement (or the imposition of one) as, without more, an event giving rise to loss or damage.

134. To the extent that the value of the site provider's land is diminished as a consequence of the rights granted (for example because the site provider no longer has the same freedom to use the site as it had before) we consider that is capable of being fully reflected in the consideration payable under paragraph 24. If it could be shown that the value of the land had been diminished to a greater extent than had been reflected in the assessment of consideration a separate claim may be admissible. But in this case Mr East acknowledged when he addressed the issue of "aesthetic detriment" that there was no evidence that the value of buildings such as Threadgold House was diminished by the introduction of telecommunications apparatus on the roof.

135. Although none were suggested in evidence, there might nevertheless be circumstances in which the fact that the rights are to be used for the purpose of providing an electronic communications network (a fact disregarded in assessing compensation) could cause a diminution in the value of the land. It might also be possible that circumstances occurring at a later date may result in an additional loss not anticipated when consideration was assessed. If such diminution could be shown to have been sustained in future we think it likely that an additional claim would be admissible in principle, but the evidence in this case does not establish any such loss and we reach no firm conclusion on that question.

The other claims for loss and damage

136. It is unnecessary for us to deal at any length with the third head of compensation, costs of reinstatement (which includes making good any damage to the fabric of the building), as the draft Code agreement includes provision at clause 9.5 for the tenant to remove all of its equipment from the site at the end of the term and to make good to the reasonable satisfaction of the landlord any damage whatsoever caused thereby. It was suggested by Mr East in the experts' joint statement that the respondent might be put to additional expense as a result of reinstatement but no attempt was made to quantify that expense. If the respondent considers it has a valid claim for compensation when reinstatement is required it can seek to raise it at that time.

137. Additional compensation events identified in Mr East's evidence, and in respect of which he suggested that compensation should be awarded equal to "all reasonable costs incurred", might broadly be seen as a claim under paragraph 84(2)(a) for anticipated expenses. Some of these were double counting because they were matters in respect of which the consideration is payable (as Mr East appreciated, making clear that the need to treat them as separate compensation items was contingent on the Tribunal's omitting them when determining consideration). Others were unnecessary because, like reinstatement, they are already dealt with specifically under the terms of the imposed agreement or its dispute resolution provisions (such as any additional loss or damage referable to upgrading apparatus, which is covered by clause 5.1.5, or costs incurred in allowing access to areas not demised, covered by clause 4.2). Mr Wills recognised this and we appreciate that his written submissions, and Mr East's evidence, were prepared before the final terms of the agreement were known.

138. In determining consideration we have already taken into account (in lieu of a service charge contribution) wear and tear to the common parts as a result of the claimants' presence, the use of fire safety precautions, and a contribution to the cost of future general roof repairs. The claimants will additionally be contractually liable for making good any damage they cause. It is not necessary in those circumstances to assess separate figures for compensation.

139. Into the same category we would place the claim for compensation in respect of noise and nuisance. The parties agreed that the respondent's costs of management (which Mr East had included as a separate head of compensation) should be taken into account as relevant to the assessment of consideration. Mr East also argued that the respondent would incur additional management expenses in dealing with complaints from its tenants, which he valued at £8,000 a year, that being the sum allocated annually by the respondent on improving other buildings on its estate which are the site of electronic communications equipment (as a sweetener to its tenants). We have taken a contribution to general estate management, as well as the additional management burden on the respondent attributable to any initial adverse response to the claimants' apparatus, into account in determining the consideration assessed under paragraph 24. We do not consider that the sum used to improve buildings on which apparatus is located is a relevant measure of any loss to the respondent. Any tenant or leaseholder who sustains loss as a result of the installation or use of the claimants' apparatus will of course be able to make a claim of their own for compensation; we appreciate that such claims are likely to be rare, but that is not a reason for compensating the respondent for disturbance which might be caused to third parties.

140. Other aspects of estate management which Mr East argued should be the subject of compensation related to what he called the respondent's duty of care for rooftop occupation and included access arrangements, supervised attendance on site, safety audits and safety equipment to be used when the respondent's staff were in the immediate vicinity of the claimants' apparatus. Mr East anticipated that his firm, or another similar telecommunications consultancy, would act as go-between in all dealings between the claimants and the respondent and he argued that the cost of his or similar services should be recouped in compensation. It was a striking feature of his evidence that Mr East did not appear to appreciate the conflict of interest created by his dual role as expert witness and prospective beneficiary of these frequent fee earning opportunities.

141. It is of course a matter for the respondent how it chooses to deal with its commercial tenants, including telecommunications operators, but Mr East's wish list overlooks the nature of the relationship which will exist. The claimants will be entitled to a lease of the rooftop site, of which they will have possession to the exclusion of the respondent. Responsibility for the safety of the site will therefore fall on the claimants, and not on the respondent. They will be entitled to unsupervised access, and to come and go in the same way as a leaseholder of one of the flats. Costs incurred by the respondent in shadowing the claimants' compliance with their own obligations, to the extent they exceed the management function already taken into account in the assessment of consideration, are not loss and damage recoverable under paragraph 25.

142. We also reject, as double counting, Mr East's claim for compensation for "sharer income" foregone. This was said to arise in two ways. First, in the form of a notional loss of income to the respondent if the Claimant shares the apparatus on the site with a third party. Secondly, as a

loss of income from letting space to other Code operators on the part of the roof not occupied by the claimants.

143. The first of these claims is speculative but we also consider it to be inadmissible in principle for two closely connected reasons. First, having demised the site to the claimants, and having been remunerated to the degree thought fair by Parliament by the receipt of the consideration, the respondent is not in a position to exploit opportunities to lease or licence the same area to other operators. Secondly, the entitlement to share apparatus is incidental to the right to station the same apparatus on land (under paragraph 17(1)(b)) in return for which the consideration is payable and for which no additional compensation is due. The second head of "sharer income" loss is also unsubstantiated, since the draft Code agreement does not prevent the respondent from allowing the un-demised space on the roof of the building to be used by another operator.

144. Other heads of loss advanced by Mr East were also speculative or contingent. We reject, for those reasons, claims for "aesthetic detriment" (an unproven diminution in the capital value of the building due to the presence of the claimants' apparatus), "delayed repossession" (the risk of delay to a notional project to construct additional flats on the roof), and "lift and shift delay" (delay to possible roof repairs as a result of the presence of the claimants' apparatus). If any loss or damage can ever be established under these headings the respondent will be able to present a new claim for compensation supported by proper evidence.

The mechanics of imposing a Code agreement

145. Finally, we deal with the question of how the Code rights we will impose are to take effect. This was raised as an issue by the Tribunal during the hearing and we received the benefit of submissions from Mr Wills at that time and additional submissions from Mr Read in writing at a later date. Both agreed that the appropriate course was for the Tribunal to make an order identifying the Code rights to be imposed on the parties and the terms on which they were to be exercised, but that it would then be up to the parties to enter into an agreement of their own giving effect to those terms. In other words, both parties considered that the instrument by which Code rights are conferred is the parties' agreement, and not the Tribunal's order.

146. The basis of this understanding of the Code was explained by Mr Read in his supplemental submissions. He took as his starting point the statement in paragraph 9 of the Code that:

> "A code right in respect of land may only be conferred on an operator by an agreement between the occupier of the land and the operator."

Although located in Part 2 of the Code, Mr Read suggested that there was nothing to suggest that paragraph 9 was intended to be limited in its scope.

147. Mr Read also drew attention to paragraph 11 of the Code which imposes formalities for a Code agreement, in particular it must be in writing, and signed by or on behalf of the parties.

Those formalities apply in terms only to agreements under Part 2, but it was submitted that they applied equally under paragraph 20 because the Tribunal's power was to impose *an agreement*. The language of paragraph 20 was also said to suggest that the Tribunal's task was to impose an agreement rather than to make an order the effect of which would in itself be to confer Code rights.

148. Although we are grateful to both parties for their assistance on this important practical question, we have come to the opposite conclusion. In our judgment the operative instrument in imposing an agreement under Part 4 of the Code is the order under paragraph 20 itself. We are satisfied that once the order is made an agreement has been imposed and binds the parties without the need for any further document to be executed by them. That appears to us to be the clear meaning and effect of paragraph 20(4), which states that:

> "An order under this paragraph is one which imposes on the operator and the relevant person an agreement between them which –
>
> (a) confers the code right on the operator, or
> (b) provides for the code right to bind the relevant person."

149. Paragraph 20 must be read together with paragraph 22, which provides that:

> "An agreement imposed by an order under paragraph 20 takes effect for all purposes of this code as an agreement under Part 2 of this code between the operator and the relevant person."

150. Taken together these provisions seem to us to provide conclusively for Code rights to be conferred on the operator and made binding on the site provider (and any other relevant person) by force of the Tribunal's order, which has the same effect as an agreement under Part 2. In those circumstances we can see no purpose in the parties entering in to a parallel agreement conferring the same rights, and there is no reason for them to do so.

151. We do not consider that either paragraph 9 or paragraph 11 requires a different conclusion. As we have already pointed out, paragraph 11 applies only to agreements under Part 2, and the Code itself does not require writing signed by the parties for an agreement imposed under Part 4. Paragraph 9 is titled "who may confer code rights?" and any suggestion that it comprises an exhaustive description not only of who may confer rights but how they may be conferred is dispelled by paragraph 22. The same is true of paragraph 29(1), to which Mr Read also referred. An agreement which is imposed under paragraph 20 takes effect "for all purposes of this code" as an agreement between the operator and the relevant person under Part 2. An imposed agreement is not an agreement at all, except by the deeming effect of paragraph 22, but once an agreement has been imposed it applies just as much to satisfy the requirement of paragraph 9 as for any other part of the Code.

Disposal

152. For the reasons we have given we will impose an agreement under paragraph 20 for a term of 10 years from the date of our order. Although we are satisfied that the appropriate consideration is £1,000 per annum, the sum specified in the agreement will be £2,551.77 per annum for the reasons explained in paragraph 73 above. The consideration for the first year of the term is payable on the date of commencement. The terms of the agreement are those proposed by the claimants as subsequently varied by agreement between the parties and lodged with the Tribunal on 6 February 2019.

153. No compensation will be payable on the commencement of the agreement, but the respondent is entitled to its reasonable legal and surveying costs of the agreement and to compensation for loss or damage caused by the installation of the claimants' apparatus. The parties have permission to apply to quantify both heads of compensation if they cannot be agreed. All other claims for compensation are dismissed, without prejudice to the respondent's entitlement to bring future claims.

154. Under rule 10(6)(e), Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, as amended, the Tribunal has full power to award costs in references under the Code. If, within 21 days, the parties are unable to agree the costs consequences of our decision they should agree a short timetable for the exchange of submissions on costs.

Martin Rodger QC
Deputy Chamber President

A J Trott FRICS
Member, Upper Tribunal (Lands Chamber)

18 February 2019