UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE - consideration – compensation – roof top site on residential building in inner London – whether paragraph 17 conditions to be applied to upgrading and sharing rights – relationship between consideration and compensation - use of market transactions as comparables

A REFERENCE UNDER SCHEDULE 3A TO THE COMMUNICATIONS ACT 2003

BETWEEN:

CORNERSTONE TELECOMMUNICATIONS INFRASTRUCTURE LIMITED

Claimant

and

LONDON & QUADRANT HOUSING TRUST

Respondent

Re: Maple House,
3 Bournemouth Road,
London, SE15 4BH

Martin Rodger QC, Deputy Chamber President and Mrs D Martin MRICS FAAV

23-25 September 2020

Royal Courts of Justice

Oliver Radley-Gardner, instructed by Osborne Clarke LLP for the claimant
Tim Calland, instructed by Clarke Wilmott LLP for the respondent

The following cases are referred to in this decision:

Cornerstone v Compton Beauchamp [2019] EWCA Civ 1755

Cornerstone v Keast [2019] UKUT 116 (LC)

Cornerstone v University of the Arts, London [2020] UKUT 248 (LC)

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

EE v Islington LBC [2019] UKUT 53 (LC)

Norwich Union Life Insurance Society v British Railways Board [1987] 2 EGLR 137

Vodafone v Hanover Capital [2020] EW Misc 18 (CC)

Introduction

1. This reference provides a further opportunity for the Tribunal to consider the terms on which rights should be imposed under the Electronic Communications Code over a new telecommunications site on the roof of a large block of flats. In *EE v Islington LBC* [2019] UKUT 53 (LC), the Tribunal gave guidance on the proper approach to the assessment of consideration and compensation in such cases. More recently, in *Cornerstone v University of the Arts, London* [2020] UKUT 248 (LC) the Tribunal considered the terms appropriate to a Code agreement for a site on the top of a city centre commercial building.

2. The reference is brought under Part 4 of the Electronic Communications Code ("the Code") which is found in Schedule 3A to the Communications Act 2003, as inserted by section 4 and Schedule 1 of the Digital Economy Act 2017. The Code makes provision for the Tribunal to impose agreements on parties conferring rights in relation to land known as "code rights".

3. The claimant, CTIL, is a joint venture company formed by Telefonica UK Ltd and Vodafone Ltd. It does not provide an electronic communications network of its own, but installs and maintains apparatus which it makes available to its two shareholders and to others for the purpose of their providing their own networks.

4. The reference concerns a rooftop site at Maple House, Bournemouth Road, Peckham, in South London. Maple House is a modern, purpose-built, eight-storey building containing offices on the lower floors and 62 residential flats on the upper floors. It is owned by London and Quadrant Housing Trust ("L&Q"), a registered charitable social housing provider, and the flats in the building are let on a variety of tenures including shared ownership leases and periodic tenancies. Some of the flats, including four on the eighth floor of the building which have balconies, are let on assured shorthold tenancies at open market rents.

5. CTIL seeks the right to install electronic communications apparatus on the flat roof of Maple House. Most of that roof is already covered in 120 solar panels operated by L&Q itself, and it is not proposed that those panels will be disturbed by CTIL's equipment. The most visible apparatus will comprise masts at roof level on three corners of the building immediately above and visible from the balconies of three of the top floor flats. Access to the roof top area is through the common parts of the building, using either the lift or the staircase, and then by means of a hatch reached by a ladder. The hatch is kept locked and residents of the building have no access to the roof.

6. The reference is regarded by CTIL as an important test case concerning the terms to be imposed in respect of sharing and upgrading. We were told that uncertainty over these issues presents a significant obstacle to the finalisation of agreements concerning other sites.

7. When the reference first came before the Tribunal on 5 May 2020 an order was made for the imposition of an agreement for interim rights under paragraph 26 of the Code. The

work to install CTIL's apparatus had begun by the time of the final hearing of the reference.

8. At the hearing the claimant was represented by Mr Oliver Radley-Gardner and the respondent by Mr Tim Calland. Expert evidence was given on behalf of the claimant by Mr James Ogborn MRICS, and on behalf of the respondent by Mr Tom Bodley Scott MRICS FAAV. Factual evidence was given by a number of witnesses whom we will mention in due course but the parties agreed that it was not necessary for them to attend for cross-examination. We are grateful to all who have participated for their assistance.

The Code

9. We will assume a basic familiarity with the Code and at this stage we simply draw attention to some features material to the issues we have to determine. We will refer in more detail to relevant provisions as the need arises.

10. The Code came into force on 28 December 2017 and replaces the previous telecommunications code ("the old Code") in Schedule 2 of the Telecommunications Act 1984.

11. The Code sets out the basis on which code rights may be acquired and exercised by operators. Code rights are defined in paragraph 3 and include, at paragraph 3(c), the right "to inspect, maintain, adjust, alter, repair, upgrade or operate electronic communications apparatus on, over and under land".

12. Code rights 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. An "infrastructure system" means a system of infrastructure provided so as to be available for use by providers of electronic communications networks for the purpose of the provision by them of their networks (paragraph 7).

13. Part 3 of the Code makes provision for operators to assign Code agreements, to upgrade apparatus to which such agreements relate and to share its use.

14. Part 4 confers power on the Tribunal to impose Code agreements if certain conditions are satisfied. In this reference there is no dispute that the conditions for the imposition of an agreement are satisfied.

15. The terms which are to be imposed are provided for by paragraph 23. The agreement is to be one which gives effect to the code rights sought by the operator with such modifications as the Tribunal thinks appropriate. The terms are to be such as the Tribunal thinks appropriate, and must include terms as to the duration of the agreement and the payment of consideration under paragraph 24.

16. Consideration under paragraph 24 is to be determined by the Tribunal by reference to the amount willing parties would agree in a transaction subject to the provisions of the

agreement. The assessment is to be made on certain assumptions, the most significant of which is the "no-network" assumption, namely that the rights conferred by the transaction do not relate to the provision or use of an electronic communications network.

17. Paragraph 25 of the Code provides that, if the Tribunal imposes a Code agreement, it may also order the operator to pay compensation for any loss or damage that has been or will be sustained by the relevant person (which in this case means L&Q) as a result of the exercise of the code right to which the order relates. An order for compensation may be made at any time, on or after the imposition of a Code agreement.

18. The Tribunal has no power to order the payment of compensation under paragraph 25 where a Code agreement has been entered into consensually, without being imposed under Part 4.

19. Provisions concerning the modification and termination of code rights are found in Part 5 of the Code. The operator is entitled to continue to exercise code rights after the expiry of a Code agreement (paragraph 30). Where an agreement has or is about to come to an end, the operator may apply to the Tribunal for the continuation of the agreement on the same or modified terms, or for the imposition of a new agreement (paragraph 34).

The matters agreed and the issues

20. There is no dispute about the principle of an agreement being imposed, and most of the terms have been settled consensually between the parties (largely following CTIL's standard form of Code agreement).

21. The agreement will be for ten years, with an unrestricted right for CTIL to terminate it on six months' notice. CTIL will have the right to install "Equipment" on part of the roof of the building, through a riser running up the centre of the building, and in a small area at ground level, all referred to as the "Communications Site". The area required by CTIL is 73.80 sq m at roof level and 0.24 sq m at ground level, totalling 74.04 sq m. A further 167.51 sq m is defined as (shared) access space, of which 120.26 sq m is on the roof and 47.25 sq m at ground floor level.

22. L&Q agrees to insure the building and to keep the parts of the building over which CTIL has rights in a good state of repair. A temporary "lift and shift" clause provides for L&Q to carry out any essential works of repair on the roof of the building, with CTIL relocating or removing its apparatus at its own expense if necessary. The draft provides for the payment of an annual "Site Payment" which is to comprise both the consideration determined by the Tribunal and any sum the Tribunal determines should be payable by way of compensation.

23. Although all other occupiers of the building pay a variable service charge in addition to a rent, the agreed terms do not include any obligation on CTIL to pay such a charge; nor do they include any provision for the consideration to be reviewed periodically during the term.

24. The main issue concerns the terms to be imposed in relation to equipment rights, upgrading and sharing. Disagreements over almost all other terms were reduced during the hearing.

25. L&Q proposes a more restrictive agreement than is sought by CTIL in three respects.

26. First, L&Q wishes to limit CTIL's right to install electronic communications apparatus ("ECA") by reference to a list to be annexed to the agreement (referred to as an "equipment cap"). Equipment caps were a common feature of agreements under the old Code and are often sought by site providers negotiating agreements under the new Code. If an equipment cap was imposed CTIL's right to install and use ECA at the site would be by reference to that list only.

27. L&Q did not provide a list to be annexed to the agreement but in argument Mr Calland indicated that it should include all of the equipment which CTIL are currently installing, as shown on the working drawings, together with an allowance to accommodate the installation of 5G apparatus by Vodafone in the future. In evidence it was explained that L&Q's concern was for the structural integrity of the building and the consequences of increased loading and it was willing to contemplate a cap by reference to weight and height rather than tying CTIL to particular equipment, but this suggestion was not progressed in argument or in the form of a draft text. CTIL resists the only form of limitation included in the travelling draft text, an equipment list, and seeks the right to install any ECA it chooses.

28. Secondly, L&Q wishes to limit CTIL's right to upgrade the ECA it installs on the site by reference to the power conferred by paragraph 17 of the Code. There is a dispute about how restrictive paragraph 17 is, but in general terms CTIL would have no right to effect any upgrade which had more than a minimal "adverse impact" on the appearance of the ECA, or which imposed any "additional burden" on the site provider. CTIL seeks an unrestricted right to upgrade.

29. Finally, L&Q wishes the sharing of the permitted ECA to be limited to the minimum permitted by paragraph 17. Again, there is a dispute over how restrictive paragraph 17 is but if it applies it precludes sharing which would result in more than a minimal change in the appearance of the ECA installed on the building, or which imposed any "additional burden" on L&Q.

30. Once the terms of the new agreement have been settled, the Tribunal will have to determine the consideration payable under paragraph 24 of the Code and any outstanding issues concerning compensation under paragraph 25. The evidence and arguments over consideration and compensation have become more refined since the Tribunal's original guidance in *EE v Islington*¸ but the gulf between the operator's proposals and the site provider's expectations remains wide.

31. For CTIL, Mr Ogborn considered the sum properly payable as consideration should be £1,618.45 a year. The only compensation proposed was a modest contribution towards professional fees.

32. For L&Q, Mr Bodley Scott suggested a combined figure for consideration and certain items of compensation of £16,000 a year. Much of his analysis had been deployed and rejected in the recent decision of the County Court in *Vodafone v Hanover Capital* [2020] EW Misc 18 (CC) in which the current tribunal composition sat as County Court Judge and Assessor to determine an application for a new lease of a telecommunications site under Part 2, Landlord and Tenant Act 1954.

The factual evidence in outline

33. To set the scene for Mr Radley-Gardner's submissions on sharing and upgrading terms CTIL led evidence from two senior employees, Mr Iain Harris, CTIL's head of special projects, and Mr Daniel Savage, its head of engineering. Their evidence was not challenged. We have read it in full and we accept that it accurately describes CTIL's rationale for seeking unrestricted rights to share the site and to upgrade its apparatus.

34. Mr Harris explained how electronic communication networks work. It is unnecessary to refer to all of that explanation but it began by making a distinction between "passive" apparatus (the masts, cable trays, equipment cabins and lightning protection systems installed at a site) and "active" apparatus (the antennae, dishes, feeders and fibre which transmit and receive signals). A network cannot be sustained without both active and passive apparatus.

35. Mr Harris then explained the different models of sharing which have evolved in the telecommunications industry. CTIL is an infrastructure provider which offers its sites and the passive apparatus it has installed on them to third parties. These include its own shareholders, other infrastructure providers such as Arqiva, and operators in competition with its shareholders such as EE and Hutchison 3G.

36. Mr Harris suggested that the importance of sharing is reflected in public policy. Paragraph 113 of the 2012 National Planning Policy Framework, last updated in February 2019, encourages the sharing of telecommunication sites and masts in order to keep their number to the minimum consistent with the needs of consumers. The licence obligations of Telefonica, Vodafone and other operators require them to extend their coverage across the UK and sharing plays an important part in achieving that objective.

37. It is likely that during the period of the proposed Code agreement Vodafone will wish to update the apparatus it is currently installing on the Maple House site to enable it to provide 5G services and Mr Harris suggested that without the ability for CTIL to share the use of the site and the right to upgrade Vodafone would be unable to do so.

38. Mr Savage's evidence also concentrated on CTIL's need to have unrestricted rights to install and upgrade apparatus at the site during the 10-year term of the agreement. These rights were required to enable CTIL's shareholders to keep up with technological changes, to maintain existing levels of service, and to improve services by introducing 5G technology and other as yet unknown innovations. They would also enable CTIL to take advantage of the right to share the site with third parties with similar needs. Once again it is not necessary for us to refer to Mr Savage's evidence in detail. We accept that it

accurately reflects CTIL's commercial reasons for wishing to have unrestricted rights to upgrade the apparatus at the site.

39. L&Q's concerns were explained by three of its employees, Mr Daniel Saunders of its legal department, and Ms Hayley Reece and Ms Bijal Mehta both of its energy team; none of their evidence was challenged. Those concerns centre on obligations expected to be imposed on social housing providers, and other landlords of multi-occupied residential buildings, by the Building Safety Bill currently before Parliament. Following the Grenfell Tower fire in June 2017 a review of safety standards was commissioned by the government, which reported in May 2018 and led to the publication of the Bill on 20 July 2020. Assuming the legislation is enacted, a new building safety regulator will be created and every building of more than six storeys will require an accountable person to be appointed. That person will be accountable in law, and to the regulator, for ensuring building safety risks to occupants are reduced as far as is reasonably practicable, and will be required to maintain, and keep up to date, a "building safety case" which takes account of any relevant changes in the fire safety environment at the building. Proposed changes to the building which might affect fire or structural safety will be required to be notified by the accountable person to the regulator, and work will be required to be carried out by contractors with recognised credentials. Mr Saunders explained that to maintain the building safety case and comply with the obligations imposed by the new scheme, the accountable person will require knowledge of all equipment installed and works undertaken at the building which may present a fire risk.

40. Although these features of the anticipated safety regime lie behind L&Q's concerns over the terms of the agreement relating to information, access, and works, by the end of the hearing those terms had all been agreed and we therefore take it that L&Q is satisfied that it has the rights it requires to enable it to discharge its own obligations. We appreciate, however, that the new safety regime and the need to gather and hold information to satisfy it, will impose additional costs on building owners, including L&Q, and that these may be relevant to the issue of compensation. Some of these costs were referred to by Ms Reece and Ms Mehta but no attempt was made by them to anticipate and quantify them.

The general approach to disputed terms

41. Paragraph 23 of the Code explains how the terms of a Code agreement imposed by the Tribunal are to be determined. There was little practical difference between the parties on the proper approach, although they emphasised different aspects of the exercise.

42. For CTIL, Mr Radley-Gardner submitted that the starting point in the exercise is the agreement sought by CTIL and he pointed to paragraph 23(1), which 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". Taking the terms proposed by the operator as the starting point, it was then for the site provider to justify any departure from those terms. Mr Calland disputed that analysis, although he recognised that for purely practical reasons the parties and the Tribunal would be likely to use the operator's standard form of agreement as the initial point of reference.

43. We do not accept Mr Radley-Gardner's submission. As a matter of construction of paragraph 23(1) it confuses the code right sought by the operator with the terms on which that right is to be exercisable. Paragraph 23(1) says no more than that the agreement is to give effect to the code right sought by the operator; that right will be one (or more commonly all) of the rights listed in paragraph 3. We agree that that code right is the starting point for formulating the agreement to be imposed, and that the Tribunal should not modify that right unless it considers it appropriate to do so. But the terms on which the code rights conferred by the agreement are to be exercised are as described in paragraph 23(2), namely, "such terms as the court thinks appropriate, subject to sub-paragraphs (3) to (8)". That direction involves no presumption in favour of the operator's preferred terms.

44. The Tribunal has a wide discretion over terms, which it will exercise with the statutory purpose of the Code well in mind. As Lewison LJ recognised in *Cornerstone v Compton Beauchamp* [2019] EWCA Civ 1755, at [3], the enactment of the Code was part of a government strategy to help operators to extend their networks, to make mast-sharing easier, and infrastructure deployment and maintenance cheaper. The Tribunal will also have in mind the general structure of the Code, and the fact that Code rights are imposed on site providers at rates of consideration far below those which would be agreed in an open market. As the Tribunal put it in *Cornerstone v Keast* [2019] UKUT 116 (LC), at [55]:

> "It may be considered inappropriate to impose on a site provider certain obligations intended to facilitate the provision of the operator's network when the consideration receivable by the site provider is to be unrelated to the value of that network."

45. Although we reject Mr Radley-Gardner's submission as to the effect of paragraph 23(1), as Mr Calland acknowledged, from a practical point of view the operator's standard terms are likely to provide a template for negotiation. The Tribunal will usually be concerned only with those terms which the parties cannot agree, but where they do not agree there is no onus on the site provider to justify a departure from the operator's standard form.

46. The Tribunal's discretion is subject to paragraphs 23(3) to (8). Of those, sub-paragraphs (3) and (4) are concerned with consideration, which must be provided for in any Code agreement, and sub-paragraphs (7) and (8) deal with the duration of the agreement, its termination, and what are referred to colloquially as "lift and shift" provisions. Sub-paragraphs (5) and (6) deal more generally with terms and provide that 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 rights" to occupiers of the land (amongst others) whether or not they are parties to the agreement.

47. Mr Calland submitted that the effect of paragraph 23(5) was that, where the Tribunal was faced with a choice of terms, each of which was potentially "appropriate", it should favour the term which would cause least loss and damage to the owner and occupiers of the building. The objective should be to minimise the interference caused by the exercise of code rights, including to third parties who may not have a right to compensation under the Code.

48. We accept that paragraph 23(5) has an important part to play in resolving disputes over terms, but we do not think it should be viewed in isolation. It is not a prohibition on the imposition of code rights which may cause loss and damage to the owners and occupiers of the land. It is a direction to the Tribunal to incorporate terms intended to minimise loss and damage as part of an agreement which will also include terms as to consideration assessed under paragraph 24 and rights to compensation for loss and damage for the site provider and others under paragraphs 25, 44 and 84. Paragraph 24(2)(c) requires that consideration be assessed on the basis of a notional letting which is assumed to be on the terms of the agreement to be imposed by the Tribunal. As far as the site provider is concerned the loss and damage caused by the imposition of code rights is taken into account in the amount of consideration payable, and in the entitlement to compensation.

The disputed terms

49. The three main disputed terms, the equipment cap and the proposed restrictions on upgrading and on sharing, are closely connected. We will deal first with the equipment cap.

Equipment cap

50. "Equipment" is a term defined in the draft agreement and used in a number of places to give content to the rights and obligations of both parties. In particular, clause 5.1 gives CTIL the right to install, alter, adjust, repair and remove the Equipment.

51. The draft agreement proffered by CTIL defined "Equipment" as meaning electronic communications apparatus as defined in the Code and then elaborated on that definition to include, without limitation, "apparatus, cabling, antennas, dishes, equipment ducts cabins or cabinets and structures, and any ancillary apparatus, power, communications cabling, fixings or equipment". The inclusion of these additional words had always been objected to by L&Q, but in his closing submissions Mr Calland said that they were now acceptable provided an equipment cap was also provided for. Unfortunately that consensus was not reflected in the schedule of disputed terms which was supplied to us after the close of argument, in which the elaboration was again struck out but we will assume Mr Calland's instructions reflected L&Q's final position. If that assumption is unsafe, although the additional words are unnecessary we nevertheless see nothing objectionable or inappropriate in them; we understand CTIL's desire for uniformity in its agreements, so we will include them in the agreement we impose.

52. Without more, the effect of CTIL's definition of Equipment is to allow it to install any ECA it chooses at the site. L&Q objected to such an unrestricted right and put forward two reasons for the inclusion of an equipment cap.

53. Mr Calland explained that the purpose of an equipment cap was not to place an arbitrary limit on CTIL but rather to provide a baseline against which to measure the paragraph 17 conditions (accepting that the equipment may change in the process). L&Q accepted that the agreement contained safeguards in relation to works carried out on the building, but it was critical of CTIL's reluctance to supply more than outline information about what it

was installing. Moreover, L&Q's new, non-delegable obligations regarding building safety meant that it could not simply leave it to CTIL to act responsibly in future.

54. In her evidence for CTIL Ms Reece put the matter slightly differently. She explained that the purpose of the equipment cap was to prevent CTIL from installing an unlimited amount of apparatus within the Communications Site, to the potential prejudice of L&Q. The suggestion that an equipment cap might be based on the weight or height of the apparatus to be installed, rather than on a closed list, was related to this concern.

55. We do not think that either of these explanations provides a justification for an equipment cap. Nor need restrictions on upgrading or sharing, should we decide to impose them, depend on such a cap being included. Plans already exist showing the location and extent of the apparatus being installed pursuant to the agreement for interim rights imposed by the Tribunal on 5 May. Once the work has been completed the parties will be in a position to agree a photographic record of what has been installed, should either of them consider it necessary to do so. A reliable baseline from which to apply the paragraph 17 conditions could therefore be set without the need to limit the rights to be conferred by the agreement.

56. As for supplying information relating to further installations, the parties have agreed as terms of the draft agreement that copies of necessary consents will be supplied by CTIL on request, and that it will provide a construction phase plan, risk assessments, method statements, and any structural calculations for its works on reasonable request (clause 6.1). Three days' notice is to be given of the installation of new equipment or any operation other than maintenance of equipment already installed (clause 4.2.1). We do not approach the determination of terms on the assumption that they will be breached, but if they are, L&Q will have contractual remedies, including in the case of a substantial breach, the right to terminate the agreement (clause 9.2).

57. The fear that CTIL may install unlimited equipment on the roof of the building is fanciful. The agreement includes a term prohibiting CTIL from overloading any part of the building, and requiring it to take all reasonable steps to ensure that it does not make the building or any plant or machinery on it unsafe (clause 6.1). Additionally, as the Tribunal pointed out in the other recent case in which an equipment cap was sought, *CTIL v University of the Arts* at [130], in practice the amount of apparatus capable of being installed will be limited by the strength of the supporting structure and the size of the Communications Site. In this case, at roof level, the Communications Site comprises an area at each end of the building where equipment cabinets are to be housed and masts installed, and a strip around the perimeter of the building along which cable trays will run. The agreement does not permit equipment to be installed outside the Communications Site and both practically and legally the potential for significant additional apparatus is limited.

58. The disadvantages of an equipment cap were also identified in *University of the Arts* at [130]. In short, it would invite dispute, and would jeopardise CTIL's ability to provide a service to network providers for the duration of the agreement. The risk that an equipment cap would stifle the use of the site was recognised by L&Q which disavowed any wish to obstruct the additional 5G equipment which Vodafone intends, but is not yet ready, to install. But the flexible cap suggested by Mr Calland and other innovations floated in the

evidence have not been reduced to writing, nor have they featured in the travelling drafts, and they cannot therefore be considered in the limited time within which the Tribunal is required to determine this reference.

59. For these reasons we will not include an equipment cap in the agreement.

Upgrading and sharing

60. We will consider the arguments concerning upgrading and sharing together.

61. CTIL proposes that the agreement should confer on it rights "to install, keep installed, inspect, maintain, alter, adjust, repair, upgrade, operate, or remove the Equipment". With the exception of "remove", these are all code rights, as defined in paragraph 3 of the Code. In particular, the right to "upgrade" electronic communications apparatus which is already on the land is one of the code rights listed in paragraph 3(c) and the right to enter land for that purpose is a right under paragraph 3(f); the right to carry out any works in connection with "upgrading" electronic communications apparatus on the land or elsewhere is separately identified as a code right under paragraph 3(e).

62. L&Q's position is not entirely clear. The travelling draft and the schedule of terms in dispute suggest that it wishes there to be no reference to upgrading at all, but only a reference to paragraph 17. But the argument before us proceeded on the basis that it was L&Q's position that the list of rights sought by CTIL should be qualified so as to read "… upgrade *(in accordance with the provisions of paragraph 17 of the Code)*, operate …etc".

63. Paragraph 17 of the Code reads as follows:

> "(1) An operator ("the main operator") who has entered into an agreement under Part 2 of this code may, if the conditions in sub-paragraphs (2) and (3) are met—
>
> (a) upgrade the electronic communications apparatus to which the agreement relates, or
>
> (b) share the use of such electronic communications apparatus with another operator.
>
> (2) The first condition is that any changes as a result of the upgrading or sharing to the electronic communications apparatus to which the agreement relates have no adverse impact, or no more than a minimal adverse impact, on its appearance.
>
> (3) The second condition is that the upgrading or sharing imposes no additional burden on the other party to the agreement.
>
> (4) For the purposes of sub-paragraph (3) an additional burden includes anything that—
>
> (a) has an additional adverse effect on the other party's enjoyment of the
>
> land, or

(b) causes additional loss, damage or expense to that party.

(5) Any agreement under Part 2 of this code is void to the extent that—

(a) it prevents or limits the upgrading or sharing, in a case where the conditions in sub-paragraphs (2) and (3) are met, of the electronic communications apparatus to which the agreement relates, or

(b) it makes upgrading or sharing of such apparatus subject to conditions to be met by the operator (including a condition requiring the payment of money)."

64. Paragraph 17 is not straightforward and raises a number of problems. One such problem is that it treats upgrading and sharing in the same way, but the right to upgrade, unlike the right to share, is itself a Code right. It is not entirely clear whether the right in paragraph 17(1) is intended to be exhaustive. A further problem is that the paragraph includes no explanation of what "upgrade" means. It is clearly something which is done to the electronic communications apparatus to which the agreement relates. How the right to upgrade is intended to relate to the right to install apparatus, or to adjust or alter it, is less clear. A number of highly debatable questions are suggested by the combination of verbs used in paragraph 3 of the Code, which the parties have agreed should be incorporated in the agreement to be imposed on them. For example, does upgrading mean only doing something to apparatus which is already on the land, or does it also include installing new apparatus?

65. In *Norwich Union Life Insurance Society v British Railways Board* [1987] 2 EGLR 137 at 138D Hoffmann J suggested that the "torrential style of drafting" used in legal documents, and especially in leases, was often adopted out of an abundance of caution on the part of the draftsman rather than from any intention that each separate word included in the torrent should denote a distinct activity. In such cases it is generally unnecessary to distinguish between closely related activities, but when one right in a long list of potentially overlapping rights is made subject to restrictive conditions which do not apply to the other rights in that list, distinguishing between them may be of critical practical importance. We were not addressed in any detail on the meaning of "upgrade", but the effect of paragraph 17 is uncertain. As the record of litigation since the introduction of the Code in December 2017 demonstrates, uncertainty in this field produces delay, hostility and expense, and thus undermines the objectives of the Code. We bear in mind the risk of imposing on the parties an agreement of uncertain meaning, especially where the uncertainty touches on one of the fundamental purposes of the Code.

66. The arguments we did hear disclosed a clear disagreement over the extent to which paragraph 17 limits upgrading.

67. For CTIL, Mr Radley Gardner submitted that the conditions in sub-paragraphs 17(2) to (4) were intended to be highly restrictive. Unless the agreement otherwise permits, upgrading is allowed only where it involves either no adverse impact or no more than a minimal adverse impact on the appearance of the electronic communications apparatus. Where exactly the threshold of an adverse impact on the appearance of apparatus lay would be debatable in each case, but the threshold could not be crossed.

68. Sub-paragraph 17(1) gives an operator the right to upgrade or share if the conditions in sub-paragraphs (2) and (3) are met. Sub-paragraph 17(5) renders any contractual limitation on the exercise of that right void. Mr Radley-Gardner submitted that paragraph 17 represented the minimum rights that it was thought could safely be imposed automatically as an accompaniment to any Code agreement.

69. The Law Commission was not responsible for the drafting of the Code, but the view that paragraph 17 is intended to reflect the lowest common denominator for sharing and upgrading, a floor rather than a ceiling, is supported by reference to its report. Law Com 336 considered the arguments for and against restrictions on sharing and reached the conclusion at paragraphs 3.39 to 3.45 that unrestricted rights were not appropriate and that, in almost every case, they should be the subject of negotiation or determination by the Tribunal. Having pointed out that upgrading and sharing may have serious technical implications, the report explained at paragraph 3.42:

> "So in general, it is not possible for Code Operators to have an automatic right to share or to upgrade equipment. Such rights must be negotiated for, or granted by the tribunal; it may be right for there to be additional consideration payable, depending upon the market itself. The same goes for rights to maintain and repair equipment, which cannot be conferred automatically; the range of technical implications, from access to safety to structural integrity, is such that automatic rights cannot be given and it is for the parties to negotiate them or for the tribunal to confer them."

70. The Law Commission took the view, in paragraph 3.45, that an exception should be made for "clearly identifiable cases where upgrading and sharing have no physical implications at all", such as the addition of fibre in a duct, which can be achieved without impact on the land.

71. The view of paragraph 17 taken by L&Q was much more benign. Mr Calland submitted that the conditions which it imposed on sharing and upgrading were not nearly as restrictive as CTIL suggested. Upgrading was a broad concept which meant improving something by replacing or adding to it, and the basic premise of paragraph 17 was that this was permitted. Any upgrading would necessarily have an effect on the appearance of the apparatus, but a mere change would not necessarily involve an "adverse impact", which implied something significant and damaging. The first condition would not prevent CTIL from swapping one piece of equipment for another which was larger or of a different shape, and would allow it to add two or three further pieces of equipment so long as the overall impression was not, as Mr Calland put it, "altogether worse".

72. Similarly, the "no additional burden" condition must be understood in the context that paragraph 17 was permissive, and it did not mean that no change at all was permitted. The correct comparison was between the "burden" of the agreement as a whole, before and after the proposed change, and the net effect would have to be "considerably worse" before the intended upgrading fell outside paragraph 17.

73. We do not accept Mr Calland's submissions. They are inconsistent with the statutory language which sets the standard of change at a much lower level than he acknowledged. We agree that the correct question under the first condition is not whether the proposed upgrade would have an adverse impact on the appearance of the host land or building, but whether it would have such an impact on the appearance of the electronic communications apparatus itself. However difficult it may be to determine whether a change has caused an adverse impact on the appearance of a steelwork frame festooned with antennae, it is clear that any adverse impact which is more than minimal is prohibited by the condition. Similarly, any additional burden on the site provider is contrary to the second condition. The notion of an additional burden is explained in sub-paragraph (4) and extends to any additional adverse effect on the site provider's enjoyment of its land, or any additional loss, damage or expense. The absence of a *de minimis* exception to the second condition, in contrast to the first, must mean that the condition is to be read literally, and that "no" additional burden means just that. Mr Calland's submission that the use of the word "burden" denotes something weighty or significant, so that a change will not amount to an additional burden unless it makes matters considerably worse for the site provider, cannot be reconciled with sub-paragraph (4) which sets the threshold at a much lower level.

74. Mr Calland's submission is also inconsistent with the policy explained by the Law Commission. It is clear from the example in paragraph 3.45 that the unrestricted right to upgrade or share was intended to be available only where the proposal had no physical implications for the site provider. Where there were such implications the Law Commission intended that upgrading and sharing should be the subject of negotiation and an additional payment of consideration at a rate set by the market.

75. As the Tribunal explained in *Cornerstone v University of London* [2018] UKUT 356 (LC), at [50], it is necessary to be cautious when using the Law Commission's report as an aid to interpretation of the Code. Not only did the Law Commission not prepare a draft Bill of its own to accompany Law Comm 336, but the arrangements which it recommended included consideration set by the open market at a level which reflected the true economic value of Code rights. The "no-network" assumption, which eliminates any sharing in the value of Code rights between site provider and operator, was substituted by Parliament. When the Law Commission referred in paragraph 3.42 to upgrading and sharing rights being negotiated for, or imposed by the tribunal, with the possibility of additional consideration set by the market, it was not describing the Code as enacted under which a true market based consideration is not available.

76. Despite the re-balancing of the Law Commission's recommendations in the Code as enacted, we consider that Law Comm 336 provides valuable guidance on the policy underlying paragraph 17 of the Code, which has plainly been modelled on paragraph 3.45. The reference to "clearly identifiable cases where upgrading and sharing have no physical implications at all" is an apt description of the scope of paragraph 17 (although it begs the question what upgrading means).

77. For these reasons we accept Mr Radley-Gardner's submission that paragraph 17 represents the irreducible minimum, in terms of upgrading and sharing rights, which an operator is entitled to under a Code agreement. An operator may request the specific code right to upgrade, and if it is granted in unrestricted terms paragraph 17 will not limit its exercise. It

is undesirable for the extent of upgrading or sharing to be left unclear and it is open to an operator to ask the Tribunal for unqualified rights, or for a site provider to seek to impose conditions as stringent, but not more stringent, than those in paragraph 17. When either party makes such a request the Tribunal must determine what is appropriate having regard to paragraphs 23(2) to (8).

78. There was no dispute before us that the Tribunal has jurisdiction to impose terms regarding upgrading and sharing which are less restrictive than paragraph 17 allows. In *University of the Arts* the Tribunal proceeded without questioning its jurisdiction to modify the effect of paragraph 17 and for the reasons we have already given we have no doubt that it was right to do so. The onus is on the party wishing to depart from paragraph 17 to justify its request. As the Tribunal said in *University of the Arts* at [188],

> "We take the view that the starting point is paragraph 17, which was drafted to express policy framed in full knowledge of the importance of sharing and upgrading. If the claimant wants more than the minimum it should justify that. However, if the claimant can show that in this particular case there is little or no reason why the safeguards of paragraphs 17(2) and (3) should be included then that may be a reason to exclude them."

79. As it explained in its evidence, CTIL wishes its upgrading and sharing rights to be unrestricted because it cannot predict what the changing needs for a site are from time to time, and in particular what technological changes the near future might bring. It fears that a portfolio of agreements with restrictive upgrading and sharing rights may prevent it from achieving what its OFCOM licence and regulation 3(4) of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 both require. Those concerns were fully rehearsed in Law Comm 336 and we need not describe them in greater details. The consequence of rights limited by the paragraph 17 conditions would be, as the Law Commission anticipated, that CTIL would either have to pay for additional rights outside of the Code regime without the benefit of the no-network valuation assumption or it would have to terminate its agreement and seek a new agreement by negotiation or from the Tribunal with all the additional delay and expense that would entail.

80. For L&Q, Mr Calland emphasised that its primary concern was over the implications of unrestricted upgrading and sharing rights for its responsibilities under the new building safety regime. He submitted that the Tribunal should give particular weight to the direction in paragraph 23(5) to impose terms which ensure the least possible loss and damage is caused by the exercise of the Code rights. The way to achieve that, he submitted, was for upgrading and sharing rights to be limited by the paragraph 17 conditions. If CTIL wished to upgrade or share the apparatus at the site to a greater extent than those conditions permitted it should, on each occasion, either seek L&Q's agreement or, if agreement could not be reached, it should terminate the agreement on six months' notice, as permitted by clause 9 of the draft, and apply to the Tribunal for a new agreement giving it the rights it considered it required.

81. L&Q did not express significant concerns about the effect electronic communications apparatus would have on the appearance of the building (although its expert Mr Bodley

Scott suggested that compensation may be required in the event of a diminution in the rental value of the top-storey flats). L&Q also accepted that the conditions in paragraph 21 for the imposition of an agreement were satisfied, which necessarily entailed acceptance that any prejudice caused to it would be capable of being adequately compensated in money, and that the public benefit likely to result from the imposition of an agreement outweighs such prejudice.

82. We do not regard the minimal rights conferred by paragraph 17 as appropriate for an agreement between an infrastructure provider and a site provider for a term of ten years. Both the duration of the agreement and the nature of CTIL's business are relevant considerations.

83. As far as upgrading is concerned, it is not possible to know how communications technology will develop in the next ten years, but it is reasonable to expect that improvements will occur. One such improvement which is already being deployed is 5G; it is likely that there will be others although what form they will take is speculative. Any such improvement will arguably involve "upgrading" within the meaning of the Code. Upgrading is a code right in itself, and the facilitation of new technology is one of the objectives of the Code. For those reasons it would not be appropriate to impose terms which may significantly impede upgrading. To do so would diminish the public benefit which is the object of the agreement and which justifies its imposition on financial terms significantly less valuable than the market would demand. In our judgment the paragraph 17 conditions would be likely to have that effect, making it necessary for CTIL to negotiate for each new item of equipment it wished to install, slowing down delivery and increasing costs for CTIL and ultimately for the consumer. The elaborate work-around suggested by Mr Calland, with the agreement having to be terminated and replaced by a new agreement on different terms, is a most unattractive prospect, given the number of sites at which that exercise would have to be repeated and the risks it would create of incurring professional fees out of all proportion to the benefits achievable for either party.

84. The fact that CTIL is an infrastructure provider, hosting apparatus belonging to others, is relevant to the issue of sharing. The essence of CTIL's business model is sharing. Without an equipment cap, which we have rejected as too inflexible, it is difficult to see how any active electronic communications apparatus could be added to the passive apparatus provided by CTIL without imposing an additional burden on L&Q. When compared to the use of the site by CTIL alone the installation of apparatus by any network provider whom CTIL might wish to host would be liable to involve some additional loss, damage or expense to the site provider by the coming and going of additional contractors. If the code rights which L&Q agrees should be conferred on CTIL in the public interest cannot be shared with network operators, because they would breach the paragraph 17 conditions, there would be little point in conferring those rights at all.

85. The terms which we consider appropriate are terms which permit upgrading without limit, but which cause the least possible loss and damage (consistent with the achievement of the purpose of the agreement) by curtailing the number of persons entitled to make use of CTIL's passive infrastructure. The way to achieve that is by restricting the number of persons with whom the use of that infrastructure may be shared without satisfying the

paragraph 17 conditions. There is at least one example of such an arrangement in the evidence.

86. CTIL's primary purpose in acquiring the site is to enable it to host apparatus belonging to its shareholders, Telefonica and Vodafone. The public benefit on which CTIL principally relied in its statement of case and in its evidence filed to make out the paragraph 21 conditions, flowed from the services provided by Telefonica and Vodafone and the benefits of the code rights to their customers. Those benefits can be achieved by permitting sharing by not more than two operators who, in the first instance, are likely to be CTIL's shareholders, but whose identity may change over the term of the agreement.

87. Additional sharing would be permitted within the limits imposed by paragraph 17, although whether in practice this will be possible or attractive to operators is not clear. Mr Harris described a variety of sharing arrangements, including the sharing of active apparatus which may reduce the burden on the site provider, and other innovations may make additional sharing within the paragraph 17 conditions viable.

88. We do not consider that unrestricted sharing of electronic communications apparatus on the roof of a large residential building is compatible with the direction in paragraph 23(5) to include terms appropriate for ensuring that the least possible loss and damage is caused to the occupiers of the building. We bear in mind that the more users of the apparatus there are, the more traffic there will be through the common parts of the building, the more checks L&Q will reasonably wish to make on the suitability of those working on its roof, and the more burdensome it will become to L&Q to comply with its own building safety obligations.

89. For these reasons clause 5.1 of the agreement will be in the form proposed by CTIL, permitting upgrading without reference to paragraph 17 of the Code. Clause 8.1.3 will provide that the Operator may, without the Grantor's consent:

> *8.1.3 share the Rights with up to two providers of electronic communications networks and providers of infrastructure systems, and*
>
> *8.1.4 otherwise share the Rights if the conditions in paragraph 17 of the Code are satisfied.*

90. There was one other small disagreement over the period within which CTIL will be required to give notice of any assignment of the agreement or sharing of the rights conferred by it. CTIL did not suggest that notice should not be required, but proposed that it need be given within up to two months. L&Q proposed a period of 21 days. We were shown no agreement in which CTIL had agreed the term it proposed; the closest was a requirement to give notice as soon as reasonably practicable and in any event within no more than two months. The other examples we were shown required notice of sharing within 21 days or 28 days. We can see no reason for any delay and clauses 8.2 and 8.3 will stipulate a requirement of 21 days.

Consideration and compensation

91. The valuation evidence presented to the Tribunal in *Islington* was rudimentary, and the Tribunal's attention was mostly devoted to analysing the open market valuation assumptions required by paragraph 24 of the Code, and in particular the "no-network" assumption. The Tribunal noted that the proposed grant of the lease of part of the roof of a residential building would impose restrictions and obligations on the site provider for a period of 10 years, but that the terms to be imposed did not include a variable service charge. The Tribunal considered that a willing landlord and tenant would agree a rent which took the benefit to the operator and the cost to the landlord of those restrictions and obligations into account. Having attributed a nominal value of £50 to the land over which rights were to be acquired, the Tribunal determined that the consideration which would be agreed by willing parties on the particular terms to be imposed was £1,000 per annum.

92. *Hanover* concerned a car park site in a commercial setting. The evidence and analysis presented to the County Court was more detailed than the Tribunal had received in *Islington* and for the first time it included evidence of the behaviour of professionally advised parties negotiating in the real market for telecommunications sites, and of the value they attribute to the obligations assumed by the site provider and the benefits received by the operator. Where there was evidence of the parties' own analysis of the consideration they had agreed in the shadow of the Code it was apparent whether account had been taken of the no-network assumption. We have received a limited amount of such evidence in this case, this time focussing on residential buildings. As a result, we are in a stronger position to provide guidance on appropriate levels of consideration for sites of this type than was the Tribunal in *Islington*.

93. In *Hanover* the Court was required to determine the rent on the renewal of a lease of a telecommunications site under the Landlord and Tenant Act 1954. The rent was to be at the open market level, but disregarding the improvements carried out by the operator and its previous occupation of the site. The parties agreed that, in the open market, any negotiation over the terms on which a new site would be let would be influenced by the consideration which would be imposed by the Tribunal on a reference under paragraph 20 of the Code. The Court therefore considered how the Tribunal would approach the assessment of consideration under paragraph 24 of the Code, having regard to the no-network assumption. At [89], the Court was assisted by an analytical framework suggested in argument. It was proposed that the factors which would influence the hypothetical parties negotiating a new letting in the open market against the background of the Code would comprise six stages:

(a) The first stage was to assess the alternative use value of the site, which would be the rental value of its current use or of the most valuable non-network use. This would be a matter of evidence and would depend entirely on the location of the property and land values in that location. Parking spaces next to a sports ground or an airport would have a higher value than on an industrial estate.

(b) Secondly, if additional benefits would be conferred on the tenant by the letting an allowance should be made to reflect it. Transactional evidence in *Hanover* provided one example, the letting of part of a secure car park at the Gillingham Vehicle Testing Centre in which the tenant had been prepared to pay an additional £1,000 a year for the benefit of a manned security gate.

(c) Thirdly, if the letting would have a greater adverse effect on the willing lessor than the alternative use on which the existing use value was based, this should also be reflected by an adjustment.

(d) Fourthly, consideration would have to be given to the fees payable by the hypothetical landlord for negotiating the rent with the hypothetical tenant's representatives. The evidence demonstrated that operators routinely make a contribution to these on new Code lettings and renewals.

(e) Fifthly, legal fees would be incurred in conveyancing following agreement of the rent, and once again the evidence shows that operators usually make a contribution to these.

(f) Finally, consideration would need to be given to the possibility that the hypothetical tenant will pay an additional amount by way of an inducement to secure the letting.

94. We consider the first three stages of this framework are likely to be necessary components of most valuations by the Tribunal under paragraph 24. There may be cases in which the first stage provides a complete answer, because the site has some substantial alternative use value, but even then the exercise of working through each stage is likely to be a useful check.

95. Any assessment of the market value of the site provider's agreement to confer and to be bound by Code rights, as required by paragraph 24(1), must begin with the value to the site provider of the land over which the rights will be exercised and which will no longer be available for its current use. But there may be a more valuable alternative use. The no-network assumption dictates that the value of the site as part of an operator's network is to be disregarded, but not its value to any other prospective tenant in the market; if the evidence shows that the site could realistically be turned to some alternative use, its value for that use must also be taken into account. Consideration of the current or alternative (non-network) use value is therefore the first stage of the assessment. In *Hanover* that alternative use was as part of a car park; in *Islington* there was no alternative use, so a nominal value of £50 a year was applied.

96. A paragraph 24 determination assumes that the hypothetical transaction is subject to the provisions of the agreement to be imposed by the Tribunal's order (paragraph 24(2)(c)). The hypothetical landlord will therefore assume obligations to the hypothetical tenant to insure the building and to maintain it, and the tenant will be entitled to enjoy those benefits without having to provide them for itself. The benefits to the tenant of those obligations would be a factor in the negotiation of consideration, unless they were taken into account by a different term of the agreement, such as a fixed or variable service charge. Consideration of the value to the tenant of those benefits is therefore the second stage of the assessment.

97. Although the rights conferred by the agreement and which will bind the hypothetical parties must be assumed not to relate to the provision or use of a network, they must be

assumed in all other respects to correspond to the code rights which the operator will enjoy (paragraph 24(3)(c)). The burdens which the hypothetical parties would expect to fall on the landlord will therefore be the same burdens as will fall on the actual site provider. The retention of the site as simply an area of rooftop, or car park, or field, would entail little or no expense for the hypothetical landlord, especially if none of the other occupants of the building or land had any rights or reason to go there. Its use for the erection, retention and maintenance of steel structures which will be visited regularly by a variety of contractors is likely to involve the landlord in expense which would otherwise have been avoided. That expense would also be taken into account in the hypothetical negotiation.

98. It is at this point that we enter the border country between consideration under paragraph 24 and compensation under paragraph 25. The border is not a well-defined line on a map, and some of the financial consequences of a Code agreement may be equally well accommodated by additional consideration under paragraph 24 or an award of compensation under paragraph 25. Paragraph 24(2)(c) directs that consideration be determined on the basis that the transaction is subject to the provisions of the agreement to be imposed. In a real negotiation the rent which the parties agreed would reflect any adverse financial consequences for the landlord which were not separately accounted for. If the proposed use was expected to create an administrative burden for the landlord, or to have an impact on other property belonging to the landlord, those would be part of the package of advantages and disadvantages to which the parties would attribute a single composite price. But where the Tribunal imposes an agreement under paragraph 20, it is given power under paragraph 25(1) to order the operator to pay compensation to the site provider for any loss or damage that has been or will be sustained as a result of the exercise of the code rights to which the order relates. Moreover, as the Tribunal concluded in *Islington* at [111], by paragraph 25(2)(b) it retains the power to order the payment of compensation at any time after imposing the agreement, and may do so by a lump sum, by periodical payments, on the occurrence of an event, or otherwise as it determines under paragraph 25(5). By paragraph 84(2) the power to order compensation for loss and damage includes power, depending on the circumstances, to order payment for expenses incurred, including legal and valuation expenses, diminution in value of the land, or costs of reinstatement.

99. The existence side by side of an entitlement to consideration reflecting the provisions of the agreement and a right to claim compensation for loss and damage sustained as a result of the exercise of the rights conferred by the agreement is a peculiarity of Code agreements imposed by the Tribunal under paragraph 20. It requires care by the Tribunal to avoid double counting when making the original order or in the event of a claim for compensation at a later date.

100. In *Islington* a variety of compensation claims was advanced some of which involved loss and damage which might or might not eventuate as a result of the exercise of the rights being imposed. At [121] the Tribunal explained its preferred approach as follows:

> "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."

101. The fact that the landlord under a Code agreement imposed by the Tribunal will have a continuing right to claim compensation also requires care in the assessment of evidence of transactions involving consensual Code agreements. Compensation under paragraph 25 is available only "If the court makes an order under paragraph 20" and the statutory right to compensation for loss and damage caused by the exercise of Code rights does not apply to voluntary agreements under paragraph 9 of the Code (*Islington*, at [114]).

102. The parties to a consensual Code agreement must therefore either make contractual provision for compensation or must reflect the risk of loss and damage caused by the exercise of the code rights in the consideration they agree. This difference in the availability of compensation is an important distinction between an imposed agreement and a negotiated agreement. It means that evidence of the headline figure payable under a negotiated agreement is unlikely, without access to a detailed breakdown from at least one side, to provide much useful evidence for the Tribunal. The loss and damage anticipated in any particular case will depend on the characteristics of the particular site. Unless the Tribunal has access to the parties' own analysis of the sum agreed between them it may be difficult to analyse comparable transactions. It also means that the figures which the Tribunal awards when it imposes an agreement (which must assume a continuing right to seek compensation under paragraph 84 for loss and damage caused by the exercise of the rights) are unlikely to provide a complete guide for parties negotiating terms for whom the only relevant statutory right to compensation will be for injurious affection to neighbouring land under paragraph 85 (which is available whether the code agreement has been agreed or imposed (*Islington*, at [115]).

103. Whether it is by an additional sum by way of consideration, or in the form of an award of compensation payable at the time of the agreement, or the acknowledgement of a prospect of compensation in the future, an assessment of any additional adverse effect the Code agreement may have on the site provider, as compared to the use assumed at the first stage, should therefore form the third and final step in the determination under paragraph 24.

104. In *Hanover* the Court did not need to distinguish between consideration and compensation, because it was not exercising the jurisdiction to impose a Code agreement under paragraph 20 and the rent to be determined under section 34 of the Landlord and Tenant Act 1954 took into account all the consequences of the new tenancy. The fourth and fifth stages of the *Hanover* consideration framework were therefore necessary to take account of the practice in the market of operator tenants paying the landlord's costs of obtaining valuation and legal advice when a Code agreement is entered into voluntarily. Those costs were not otherwise provided for by the terms of the new tenancy and an adjustment to the rent payable would therefore have been required. As the site provider under a Code agreement imposed by the Tribunal has a right to compensation for those expenses under paragraphs 25(1) and 84(2)(a), those stages have no part to play in our assessment of consideration under paragraph 24. There is therefore no fourth or fifth stage.

105. As for the sixth stage in the *Hanover* analysis, as the Court concluded at [96], the payment of inducements which is a feature of the real market is not relevant to a negotiation in a hypothetical open market where the site provider is assumed to be willing to proceed with the transaction at the open market rent. In a determination of consideration under the Code no addition to reflect an inducement is permissible, so the sixth *Hanover* step is never reached. When considering evidence of comparable transactions it may also be necessary to eliminate any element of an agreed rent which is attributable to inducements, to enable a proper comparison to be made with the paragraph 24 hypothesis.

106. The evidence we have heard in this reference suggests that, in the market, consideration and ascertainable heads of compensation are often wrapped up in an inclusive annual site payment. We will distinguish between the different amounts which would be agreed as consideration under paragraph 24 and compensation under paragraph 25.

Access to information

107. Before considering the evidence presented to the Tribunal we make some observations about access to information about transactions. In the week preceding the hearing a dispute blew up between the parties about a lease granted to CTIL for a mast site at 22 Whitehall. Mr Bodley-Scott was aware that there had been a transaction, and mentioned it in his evidence, but details of it were not available to him; nor did Mr Ogborn seem to have access to the information. Unaccountably neither of them appears to have asked CTIL to supply details of the transaction. For its part, CTIL kept its cards close to its chest, and did not see fit to share information with its own expert about this roof top transaction or any other to which it had been party.

108. When, at the last minute, CTIL was asked by L&Q's solicitors to disclose details of the transaction its solicitors maintained that it could not be relevant. In the end we have placed little weight on the Whitehall agreement, but its relevance was not a matter to be determined by CTIL or its solicitors. An application to the Tribunal was required before a redacted version was eventually supplied on the afternoon before the hearing along with other helpful background to transactions to which the claimants were party. Both expert witnesses and the Tribunal were hampered in their preparation and in their consideration and assessment of the evidence by the timing of this disclosure.

109. The Tribunal does not order disclosure as a matter of course, and leans against indiscriminate disclosure. But parties should not lose sight of the Tribunal's power to direct disclosure where it is necessary to do so, as it was in this case. It is part of the duty of solicitors to consider and agree what directions for the exchange of information and disclosure of documents should be sought from the Tribunal at the case management hearing. Expert witnesses should also consider between themselves before they prepare their reports what information they reasonably require to enable them to provide their evidence. Where that information is held by one of the parties the experts should request it, and it should be provided. If it is not provided an application should be made to the Tribunal, but compulsion ought not to be necessary. The Tribunal stated in *Cornerstone Telecommunications Infrastructure Limited v University of the Arts London* [2020] UKUT 0248 at [67]:

> "Disputes would be avoided if material can be shared, as a matter of courtesy and helpfulness even where there is no obligation to do so."

It is disappointing that the reluctance to share information continues, creating unnecessary mistrust between the parties, and delays which frustrate the work of the Tribunal.

Evidence for CTIL

110. Mr Ogborn referred to no transactional evidence and maintained that the consideration due for the rooftop site of 73.80 sq m should be a nominal figure of £50, based on the Tribunal's decision in *Islington* where a rooftop site had no credible alternative use. To this he added a sum of £112.28, to reflect £12.50 per annum for the 0.25 sq m at ground level (£50 per sq m per annum) capitalised for 10 year at 2%. His suggested consideration was therefore a single lump sum figure of £162.28 payable at the commencement of the agreement.

111. Mr Ogborn also took account of the benefit to CTIL of the obligations assumed by L&Q, but he regarded an annual "service charge" contribution to reflect those benefits as compensation under paragraph 25, although he acknowledged that the Tribunal in Islington had assumed an annual allowance for this when determining appropriate consideration at £1,000 per annum. (In principle, we think an allowance to reflect these benefits can only be part of consideration; as L&Q is already obliged to maintain the building's structure and the common parts the only compensation element would be for any additional expense to which it was put in doing things it was not already doing).

112. Ms Mehta, of L&Q's energy team, provided details of the cost of services to which the residential occupiers in the building had contributed through the service charge over the previous four years, and an estimate for the current year. The cost is split evenly between the units, irrespective of floor area, and includes a sinking fund.

113. Mr Bodley Scott analysed the current year estimate and proposed a charge to CTIL of £1,456.17 per annum. This excluded the cost of services of benefit to domestic and commercial occupiers only, such as refuse bins and water supply maintenance. Mr Ogborn agreed this figure and having done so proposed an 'all-in single occupation payment' of £1,568.45 per annum. This comprised the agreed charge for services and £112.28, his lump sum equivalent for occupation of 0.25 sq m at ground level.

114. Mr Ogborn had made use of no transactional evidence. However, he responded to Mr Bodley Scott's transactional evidence in his supplemental report and in the joint statement.

Evidence for L&Q

115. Mr Bodley Scott's first report ran to over 600 pages including appendices. His supplemental report ran to over 500 pages and was neither free standing, nor a simple supplement to the earlier report. This exhaustive approach was not helpful and most of the documents exhibited to the reports were unnecessary.

116. The experts agreed a joint statement shortly before the hearing, including a schedule summarising 21 pieces of comparable evidence relied on by Mr Bodley-Scott, with comments by both experts. We found this summary very helpful. The Tribunal's standard directions require expert witnesses to agree the details of transactions on which they intend to rely before they prepare their initial reports. Had they done so in this case a great deal of the material put before the Tribunal could have been omitted.

117. Mr Bodley Scott, in his revised report, adopted two possible approaches to the valuation. The first was a market value approach based on evidence of new lettings for masts on rooftops, which he analysed to conclude a 'rental' figure of £16,000 for Maple House.

118. His second approach involved separate assessment of consideration and compensation to reach a site payment of £14,750 per annum. Consideration was put at £3,000 per annum, to include the service charge element of £1,456.17. Compensation was assessed using a compulsory purchase claim structure at £11,750 per annum.

119. Mr Bodley Scott's compensation breakdown assumed use of the Communication Site for six additional solar panels, and that the additional income generated would be £37.50 per annum. He later agreed that this would be fairly reflected by a nominal sum of £50 per annum. Other heads of claim included injurious affection to top floor flats resulting in a loss of rental income of £4,900 per annum, and 'disturbance' claims for managing access at £2,700 per annum, managing the letting, including upgrade work, at £1,800 per annum, £500 for annual radio frequency ("RF") surveys, £305 for annual RF awareness training and monitoring, and £1,500 for the occasional use of a generator.

120. Mr Bodley Scott subsequently accepted that any compensation claim for loss of rental income should be left until the installation was complete and any impact could be evidenced. This reduced his compensation figure to £6,850 per annum and the proposed aggregate site payment to £9,850 per annum, which he felt was too low.

121. Having set out itemised 'disturbance' figures in his second valuation approach, and wishing to identify compensation separately from consideration, Mr Bodley Scott suggested that the rental figure of £16,000 per annum from his first approach could be said to reflect £14,445 for consideration and £1,555 for compensation. He split his 'disturbance' figures so that consideration would include £5,250 for the costs of managing access, managing the letting and 50% of the allowance for a generator. The compensation element of £1,555 would account for RF surveys, awareness training and monitoring, plus 50% of the allowance for a generator.

122. Numerous pieces of transaction evidence were provided by Mr Bodley Scott, but the majority were of no value because they were the product of negotiations entered into before the Code took effect. Each lease included a self-serving caveat asserting that the terms and figures agreed should not be taken as setting any precedent for terms or values under the Code because the parties were already committed in some unspecified way by the time the Code commenced.

123. Mr Bodley Scott defended the inclusion of such evidence on the basis that in many cases the final terms of the agreements were different from those originally proposed, so changes had been made to reflect the new Code. We accept that these caveats were included at the insistence of the operators, and that site providers had nothing to lose by their inclusion. We also accept that in many cases certain terms were renegotiated after the Commencement of the Code. In one case a pay-away provision in the event of sharing was removed, but there is little or no evidence that other financial terms were renegotiated. The fact remains, however, that consideration negotiated before the commencement of the Code cannot be taken as a reliable guide to values on the no-network assumption required by paragraph 24. Nor is evidence of lettings of existing sites of much value, as it does not reflect the statutory hypothesis of a new letting.

Helpful transaction evidence

124. Evidence of new rooftop lettings negotiated after the commencement of the Code provides the most helpful guide to what the parties to a consensual agreement for a letting at Maple House would agree. There was evidence of three such lettings. We were also assisted by email correspondence from agents involved in the negotiations which explained the context and components of the final settlements.

125. Brookstone Court, Peckham Rye is a very good comparable being a very recent letting to CTIL of a new mast site on a residential building within one mile of Maple House. The lease is for 10 years from 1 July 2020 at an annual 'site payment' of £6,495. As both parties were professionally represented this agreed figure may be taken to include both consideration and compensation. Background analysis from CTIL's own files confirmed that this was so and revealed that the annual payment comprised consideration of £3,580 (£32,430 adjusted for inflation at 2% for five years then divided by 10) and compensation of £2,915 (£26,000 adjusted for inflation at 2% for five years then divided by 10).

126. The consideration element of the site payment, totalling £32,430, included a nominal £50 for roof space; a charge for services of £21,630 (£2,163 per annum); an additional charge of £10,000 (£1,000 per annum) for management of access over restricted areas; and lump sums of £375 each for power and fibre access routes. The compensation element of £26,000 included £4,000 for the initial build and £22,000 as a provision for facilities management arising from possible future upgrade work.

127. We note that the Brookstone Court lease permits upgrading without constraint within the Communications Site (the area over which rights have been granted). Sharing is also permitted 'in accordance with the Code; and with Telefonica and Vodafone'. Although this formulation is not as clear as it might be we interpret it as having a similar effect to the terms we intend to impose at Maple House i.e. that at Brookstone Court CTIL has an unrestricted right to share with Telefonica and Vodafone, but any additional sharing is permissible only in compliance with the paragraph 17 conditions.

128. We are aware that the Brookstone Court agreement was one of a number between CTIL and the London Borough of Southwark, but no adjustment was suggested by either party to reflect this.

129. At Queen Anne Court, Raeburn, Sheffield an agreement for a new mast site and shared use of an equipment room on the roof of a residential building was completed in September 2019 between a housing association and a different Code operator. The agreement is a licence for 10 years with effect from 28 May 2018 at an annual fee of £8,000 to be reviewed annually in line with RPI. The operator agreed to pay, in addition to the licence fee, a reasonable proportion of the cost of providing services from which it would benefit. The equipment which may be installed is defined at the outset and while the original equipment may be upgraded, additions or alterations may only be made with the site provider's consent, which is not to be unreasonably withheld or delayed. Sharing is permitted only in accordance with the Code or to a group company of the licensee, again subject to the site provider's qualified consent.

130. Very little further information is available about the transaction, other than that the site provider was professionally represented by an experienced agent who informed Mr Bodley Scott that the sum agreed was a blend of consideration and compensation. The date of commencement is six months after the introduction of the Code and the licence contains no operator's caveat, so there is nothing to suggest that the figure was influenced by the old Code basis of assessment. Without further information the Queen Anne Court evidence is not as helpful as Brookstone Court, and there are potentially significant differences between the terms agreed and the terms to be imposed at Maple House. However, the figure of £8,000 is broadly in line with Brookstone Court and is half the level suggested by Mr Bodley Scott. It suggests a similar scale of site payment for a rooftop mast on a residential building, in a location elsewhere in the country, under an agreement with more restrictions on equipment but similar provisions for sharing.

131. The letting to CTIL by the Secretary of State for Housing, Communities and Local Government of the new rooftop mast site at 22 Whitehall was the most contentious of the transactions in evidence before us. The letting was for 10 years from 5 April 2019, at an annual site payment of £16,000. It permits unrestricted upgrading but has built into it an access protocol appropriate to a Government building. All access visits must be escorted and four access visits per year are included within the agreement. Beyond that each visit incurs a charge according to a scale which varies with length of visit and time of day/week. Site sharing is permitted 'pursuant to the Code', which we take to mean subject to the conditions in paragraph 17, requiring written notice within two months of any assignment or sharing dealings.

132. Background material revealed that the final 'wrapped up' annual payment of £16,000 was reduced from a figure of £30,000 originally under discussion before the Code became effective. The Secretary of State's valuer had proposed £18,000 per annum, which was justified by reference to the 40% discount on old Code rents anticipated by Nordicity, the consultants who had modelled the effect of the no-network assumption on behalf of the Government during consultations on introduction of the Code. CTIL's internal material showed that it justified the settlement figure of £16,000 as the annual equivalent, at 5%, of anticipated landlord costs over the 10 year term totalling £123,500. These were said to include access costs, access management system costs, supervision costs and six figure legal costs associated with the need to vary a financial agreement relating to the property. No separate compensation was to be payable to reflect disturbance during the initial installation of the apparatus. Although the Secretary of State did not seek to recover these

exceptional legal costs it is likely that CTIL would have appreciated that in the event of disagreement on the figure proposed a claim for compensation to recoup that expenditure would have been open to the Secretary of State.

133. Whilst the site payment for 22 Whitehall appears superficially to support the figure which Mr Bodley Scott reached using his market value approach, this is not a good comparable. The site is a London roof top and there is no evidence of a significant alternative use value, but the building and its occupation are otherwise quite unlike Maple House and the costs incurred by the landlord in making access available are of an entirely different order. The background information indicates that the settlement figure was influenced by special circumstances (including exceptional legal costs and the absence of any additional compensation for disturbance during the installation phase, which at Maple House is the subject of separate claims which are not yet before us). None the less, the general lease terms are informative to us in that they permit unrestricted upgrading but sharing only pursuant to the Code. It is also informative to note that the agreed site payment reflected an annual equivalent of anticipated future costs to be incurred by the site owner in providing access, in addition to the sums already accounted for within the lease terms.

Discussion

134. Following the approach we have already discussed, the first step is to address the existing or alternative use value of the site. For the rooftop area this has been agreed by both experts to be a nominal £50. Whether this should be an annual payment or a lump sum may be a difference between them, but one which will be subsumed within other components in either case. For what it is worth we do think that willing parties negotiating a ten-year arrangement would be likely to agree an annual payment. A further £12.50 per annum was proposed by Mr Ogborn for the small area at ground floor level and this was not disputed, so an existing use value for the site itself of £62.50 per annum is arrived at.

135. The second step is to consider the additional benefits conferred on the operator by the letting, for which additional payment would be warranted. A simple example of a benefit to the operator at Maple House is the maintenance by the owner of an eight-storey building on which the operator can mount and operate its equipment. Like all other users of the building, the operator benefits from L&Q's annual expenditure incurred in repairing, maintaining and insuring the building, usually recouped through a service charge. It is very helpful that the experts have agreed that the appropriate annual contribution by CTIL to those services which will benefit it would be £1,456.17.

136. This takes the agreed total after the first two steps to £1,518.67 per annum – say £1,500.

137. The third step requires any greater adverse effect on the site provider than the existing or alternative use to be reflected in a payment. The site is not currently used for any other purpose and the only alternative use suggested was for six solar panels to be added to the existing array of 120. We would not expect that use to have any greater effect on the site owner than the current use. It follows that any adverse effects on L&Q arising from the exercise of the code rights by CTIL should be taken into account either in the form of additional consideration or in the form of compensation.

138. Mr Bodley Scott identified a number of adverse effects which he said would be imposed on L&Q by the agreement. He costed these at a total of £6,800 per annum, itemised:

Managing access	£2,700
Managing the letting, including upgrade work	£1,800
Annual RF survey	£500
Annual RF training	£300
Right to use a temporary generator	£1,500
	£6,800

139. My Bodley Scott acknowledged that L&Q did not currently undertake RF surveys or RF training. Nor was there evidence that site providers generally incur these costs. We are therefore not persuaded that such notional costs would be agreed in the open market as an appropriate addition to the consideration payable. If L&Q finds that it does incur these costs then it will be in a position to make a claim for compensation, provided it can establish that the expenditure satisfies the three conditions for "fair compensation" identified by Lord Nicholls in *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 2 AC 111, PC, at 125).

140. The right to use a temporary generator is a term of the agreement. The evidence from which Mr Bodley Scott derived his figure of £1,500 was of specific agreements for permanent generators. We do not think they provide a reliable guide to any additional consideration parties could be expected to agree for an opportunity which is unlikely to be made use of except in the event of a significant failure of power supply to the building. As a head of compensation we regard any adverse effect from a temporary (emergency) generator to be speculative. Like the cost of RF surveys and training which may never be incurred, we consider any loss arising out of the use of a generator should be the subject of a compensation claim if they arise.

141. The sum of £2,700 suggested to reflect the cost to L&Q of managing access was assessed by Mr Bodley Scott assuming an 'in-house' cost of £150 per visit (compared with £175 plus VAT charged by his firm). It assumed 18 visits per year, an average recorded by his firm for mast sites let by Sussex and Surrey Police. The figure of £1,800 for managing the letting assumed that if this were outsourced to a surveying firm the charge would be 10% of the rent – at £18,000 (the figure Mr Bodley-Scott originally proposed).

142. The agreement allows CTIL the rights to full and free access over the common parts of the building to get to the roof, and obliges L&Q to provide keys or key fobs necessary to enable CTIL to exercise those rights. No other occupier of the building has access to the roof, and the cost associated with providing access from the common parts to the roof is not a cost taken into account in the service charge payable by other occupiers. Although CTIL's access is to be "full and free", the agreement also obliges CTIL to give L&Q notice that it will be coming in to the building (three days' notice or 24 hours' notice, depending on the purpose of the visit). We were told that L&Q would wish a representative to be present when access to the roof was being taken, and we think that is

reasonable in a residential building with solar panel array on the roof (we should not be taken to imply that in other circumstances a site provider's wish to be present during works on a roof top site would be unreasonable). L&Q will also wish to keep a careful record of work done on the building and the identity of those undertaking that work.

143. No other occupier of the building has the right to come and go through the common parts for the purpose of installing substantial equipment on the roof, or to share the right to do so with third parties. The agreement obliges CTIL to provide copies of all necessary statutory permissions, licences and approvals for works being done on the building, together with plans, risk assessments and structural calculations if available. Considering, recording and keeping this material will incur costs for L&Q. We anticipate that the costs associated with the work currently being undertaken to set up CTIL's apparatus on the roof together with its shareholders' active apparatus will be covered by compensation claims arising under the agreement for interim code rights which are not currently before us. Once the site is set up, however, future works incurred when that apparatus is upgraded or new apparatus is installed will result in further costs.

144. Costs incurred in connection with the provision of general access (over and above the access available to other occupiers) and costs incurred in connection with future upgrading or additions to the equipment originally installed could both be the subject of claims for compensation. But those costs are much less speculative than the costs associated with RF training and the temporary use of a generator. There is a high degree of likelihood that costs will be incurred on both counts. If it is possible to do so we therefore consider that the likely burden of access and upgrading costs would be taken into account by parties negotiating in the open market. The sums involved are unlikely to be substantial (judging by Mr Bodley Scott's estimates and other evidence) and we also consider it likely that the parties would wish to avoid the cost and uncertainty of repeated, possibly numerous, very small claims for compensation by agreeing a sum to reflect the grant of access, upgrading and sharing rights as part of the consideration payable throughout the term.

145. We do not consider that the inclusion of additional consideration to reflect sharing and upgrading rights offends the no-network assumption. The assumption is concerned with the purpose for which the rights are to be exercised, not the nature of the rights themselves, and the consideration is to be assessed on the basis of all the terms of the agreement being imposed. The notional parties should therefore be taken to anticipate that the operator and its sharers, and both their contractors, will come and go through the building to the same extent and causing the same degree of disruption as CTIL may be expected to in reality.

146. Nor do we consider that including in consideration a sum to reflect costs which could equally be the subject of compensation claims creates a risk of double counting or of excessive compensation. The Tribunal's power to award compensation under paragraph 25 is a discretionary one, and any claim for additional compensation for matters now anticipated would be unlikely to succeed. It is true, of course, that any sum included in consideration determined now may not exactly match losses incurred during the term awarded. But the power to award compensation under paragraph 25 is very flexible and permits a prospective award, so in principle the incorporation of a figure having the same effect into consideration would not seem to be objectionable. Additionally, Mr Bodley Scott has advanced prospective compensation claims on behalf of L&Q and it must be

assumed to be prepared to take the risk that an award at this time may fall short of some eventual total.

147. A further reason for the Tribunal to include anticipated costs in its assessment of consideration is that that is what happens in the market (where the alternative of coming back at a late stage for compensation is not generally available). The evidence shows that parties negotiating new agreements are able to place a price on the rights we are here considering. One exceptional example is at 22 Whitehall, where a charge per visit above a threshold was agreed. Another more useful example is Brookstone Court.

148. The evidence of the Brookstone Court agreement suggests that, in addition to a service charge allowance, the sum payable by the operator was justified on the basis that it would include an annual allowance of £1,000 for management of access over restricted areas and a further allowance of £22,000 (paid at £2,429 per annum) for future "facilities management" during the term relating to unrestricted upgrades and permitted sharing. The term in question was ten years and the parties could not know with any certainty how often upgrading and sharing rights would impose a burden on the site provider, but they were nevertheless able to reach an agreement on what would be an appropriate figure.

149. We can therefore compare Mr Bodley Scott's combined figure for managing access and upgrading of £4,500 per annum with the equivalent Brookstone Court figure of £3,429 per annum. The difference is modest in absolute terms and not surprising given the range of activities which the exercise is intended to reflect. We take comfort that the transactional evidence is of a recent strong comparable and shows that, in a consensual agreement under the new Code, additional money would be paid within the site payment to reflect the adverse effects of management burdens imposed by it.

150. In our judgment consideration under the paragraph 24 hypothesis would be agreed between willing parties at £5,000 per annum. This would reflect a nominal site value. It would also take account of the benefit to the operator of the site provider's responsibilities for building maintenance and insurance in the order of £1,500. An allowance of £1,000 would reflect the additional burdens of managing access across the common parts and onto the roof. Finally, it would include an allowance to reflect the anticipated costs to the site provider of the operator's rights to share the benefits of the agreement with up to two others and to upgrade the apparatus at the site without restriction.

151. This figure is considerably higher than the sum of £1,000 which the Tribunal would have awarded in *Islington* had the operator not offered to pay the sum it had proposed in its paragraph 20 notice. It is about £1,500 lower than the sum agreed for the comparable on which we have mainly relied, Brookstone Court. That discrepancy arises almost entirely because the sum which the parties agreed in this case to reflect the benefit of services provided by the site provider was much lower than the amount apparently agreed at Brookstone Court. We would have preferred a neater conclusion, but we do not think we would be justified in disregarding the parties' agreement on the value of benefits conferred at this site.

152. The only item for which we award compensation under paragraphs 25 and 84 is for L&Q's reasonable legal expenses in advising on and completing the agreement. We were told these amounted to £3,068 (which does not include costs incurred in the proceedings themselves). No claim was made in respect of valuation expenses. CTIL had proposed a contribution of £3,000 towards professional fees, but there is no reason not to award the sum actually incurred. Paragraph 84(2)(a) gives an entitlement compensation for reasonable legal and valuation expenses which may not be the same in every case and which need not be reduced to a conventional figure.

Disposal

153. We will make an order imposing an agreement on the parties in the terms they have agreed with the additional provisions we have determined. The annual consideration will be £5,000 and the compensation payable will be £3,068.

154. We would add, for the assistance of parties in other cases, that while each reference must be determined on the basis of the evidence presented to the Tribunal, the evidence we have considered in this case gives us no reason to expect that the market value of a site provider's agreement to confer code rights over a roof top site on any different residential building will be much more or less than the sum of £5,000 we have determined. As the comparison between Brookstone Court and Maple House indicates, there may be features of a particular building which justify a modest range, but we would not expect variations to be significant one way or the other. The evidence does not suggest that there is much difference between the value of a site on a residential building in Inner London or in Sheffield and we would be surprised if values in other parts of the country were not in the same narrow bracket.

Martin Rodger QC
Deputy Chamber President

Diane Martin MRICS, FAAV
Member

14 October 2020