UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE – CODE RIGHTS – CONSIDERATION – sharing and upgrading – equipment list – consideration for a rural site with nearby housing – access - compensation

A REFERENCE UNDER SCHEDULE 3A TO THE COMMUNICATIONS ACT 2003

BETWEEN:

ON TOWER UK LIMITED

Claimant

and

J H & F W GREEN LIMITED

Respondent

Re: Dale Park,
Madehurst,
Arundel,
West Sussex,
BN18 ONP

Judge Elizabeth Cooke and Mrs Diane Martin MRICS FAAV
27-29 October 2020
Royal Courts of Justice

Oliver Radley-Gardner for the claimant, instructed by Pinsent Masons LLP
Kirk Reynolds QC and Fern Schofield for the respondent, instructed by Eversheds Sutherland (International) LLP

The following cases are referred to in this decision:

Arqiva Services Limited v AP Wireless II (UK) Ltd [2020] UKUT 195 (LC)
Cornerstone Telecommunications Infrastructure Limited v Ashloch [2019] UKUT 388 (LC)
Cornerstone Telecommunications Infrastructure Limited v Compton Beauchamp [2019] EWCA Civ 1755
Cornerstone Telecommunications Infrastructure Limited v Fothringham LTS-ECC-2020-07
Cornerstone Telecommunications Infrastructure Limited v London & Quadrant Housing Trust [2020] UKUT 282 (LC)
Cornerstone Telecommunications Infrastructure Limited v University of the Arts, London [2020] UKUT 248 (LC)
EE Limited and Hutchison 3G Limited v London Borough of Islington [2019] UKUT 53 (LC)
Vodafone Limited v Hanover Capital Limited [2020] EW Misc 18 (CC)

Introduction

1. The claimant has a telecommunications mast and other equipment on a small woodland site on the Dale Park Estate, within the South Downs National Park, pursuant to a lease granted in 1999. The lease expired in March 2019, and the claimant seeks a new lease under Part 5 of Schedule 3A to the Communications Act 2003, known as the Electronic Communications Code ("the Code").

2. The respondent, as the freehold owner of the site, does not object to the grant of a new lease but a number of its terms have not been agreed and have to be determined by the Tribunal. The reference was heard on 27 to 29 October 2020; the first day of the hearing, when the witnesses of fact were cross-examined, was conducted by remote video platform, and the following two days (expert witnesses and closings) were held in the Royal Courts of Justice. We are grateful to the parties for agreeing to this arrangement, which avoided a number of journeys into London and meant that witnesses of fact did not have to travel. The claimant was represented at the hearing by Oliver Radley-Gardner, and the respondent by Kirk Reynolds QC and Fern Schofield, and we are grateful to them all.

3. The terms in dispute are:

    a. What equipment can the claimant install?

    b. Should there be any limit on the claimant's right to upgrade its equipment?

    c. Should there be any limit on the claimant's right to share the site?

    d. What should be the consideration payable by the claimant to the respondent?

4. The Tribunal must determine the terms of the agreement other than consideration, and then decide the consideration. We have structured our decision accordingly.

The factual background

5. The claimant, formerly known as Arqiva Services Limited, is a wholesale infrastructure provider (referred to in telecoms jargon as a "WIP"). Its business is the provision of masts, cabinets and other equipment for the use of mobile network operators. Its equipment is inert or passive, so to speak; the network operators' equipment, such as fibre and antennae, brings it to life and creates electronic communications networks. One of the innovations of the Code was that it enabled infrastructure providers, as well as network operators, to acquire Code rights provided that they have been designated as "Code operators" by Ofcom under section 106 of the Communications Act 2003.

6. The claimant has been so designated, like another infrastructure provider well-known to the Tribunal, Cornerstone Telecommunications Infrastructure Limited, and unlike another, Mobile Broadband Networks Limited. Unlike either of those companies, the claimant is

not owned by an operator and provides infrastructure on a neutral basis, whereas CTIL and MBNL provide it primarily for their own shareholders, EE and Hutchison 3G in the case of MBNL and Telefonica and Vodafone in the case of CTIL.

7. The Dale Park estate is described by Mr Rupert Green, director and company secretary of the respondent, as a historic piece of land, in private ownership since at least 1780 and acquired by the respondent in the 1930s and 1940s. There are 39 residential dwellings on the estate as well as about 2,205 acres of farmland, farm buildings and woodland. The site stands in the central part of the estate, within 500 metres or less of 14 dwellings and 100 metres of a public footpath. It is approached along a road or track, 0.8 miles long, that leads to the public highway; 75% of the road is tarmacked, 20% is surfaced with hardcore, and the rest (nearest the site) is a wooded track.

8. Of the nearby dwellings, the site is particularly close to two: it is 20 metres from the garden of Homewood House and 42 metres from the garden of Home Farm House. Mr Henry Green, also a director of the claimant, gave evidence as the tenant of Home Farm House where he and his family have lived for 19 years (so they moved in after the mast was installed). We say more later about his evidence and about Mr Rupert Green's evidence.

9. The 1999 lease was contracted out of the provisions of Part II of the Landlord and Tenant Act 1954. It gave the claimant unlimited access to the site, and the rights to upgrade equipment and share the site subject to provisions for payment to the lessor – as was usual under the old Code (that is, the Code's statutory predecessor, Schedule 2 to the Telecommunications Act 1984).

10. The respondent would have preferred the claimant to leave the site and remove its equipment on expiry of the 1999 lease, but accepts that the claimant has the right to a new agreement. It suggested an alternative site, further away from houses; it is not clear just how far that discussion went and it is not relevant to what the Tribunal now has to decide.

11. Following the reference to the Tribunal the parties have been able to agree all the terms of the new lease save for those set out at paragraph 3 above. The lease requires the claimant to pay for maintenance of the access track, to give notice of non-emergency access, not to put anything on the site that will be a legal nuisance or injure the respondent or its adjoining premises, to comply with regulations, to comply with planning law and to give the respondent notice of any planning application. The claimant gives covenants that protect the respondent from being in breach of its obligations to its mortgagee, HSBC.

The provisions of the Code

12. The Code regulates the legal relationships between Code operators and the occupiers of the land that they need to use, and makes provision for the conferral of Code rights by agreement. In practice of course Code rights are conferred by leases or licence agreements, some of whose terms are not Code rights. Code rights are listed in paragraph 3 of the Code, and in this case it will be helpful to have them set out as follows:

"For the purposes of this code a "code right", in relation to an operator and any land, is a right for the statutory purposes—

(a) to install electronic communications apparatus on, under or over the land,

(b) to keep installed electronic communications apparatus which is on, under or over the land,

(c) to inspect, maintain, adjust, alter, repair, upgrade or operate electronic communications apparatus which is on, under or over the land,

(d) to carry out any works on the land for or in connection with the installation of electronic communications apparatus on, under or over the land or elsewhere,

(e) to carry out any works on the land for or in connection with the maintenance, adjustment, alteration, repair, upgrading or operation of electronic communications apparatus which is on, under or over the land or elsewhere,

(f) to enter the land to inspect, maintain, adjust, alter, repair, upgrade or operate any electronic communications apparatus which is on, under or over the land or elsewhere,

(g) to connect to a power supply,

(h) to interfere with or obstruct a means of access to or from the land (whether or not any electronic communications apparatus is on, under or over the land), or

(i) to lop or cut back, or require another person to lop or cut back, any tree or other vegetation that interferes or will or may interfere with electronic communications apparatus."

13. The "statutory purposes" referred to there are set out in paragraph 4; they are the purposes of providing the relevant operator's network, or of "providing an infrastructure system", and an "infrastructure system" is defined in paragraph 7 as "a system of infrastructure provided so as to be available for use by providers of electronic communications networks for the purposes of the provision by them of their networks".

14. Paragraph 20 provides that where an operator and a site provider cannot reach agreement about the conferral of a Code right, an agreement conferring the right may be imposed upon them by the Tribunal. The Tribunal may make such an order if both the conditions set out in paragraph 21 (2) and (3) are met:

"(2) The first condition is that the prejudice caused to the relevant person by the order is capable of being adequately compensated by money.

(3) The second condition is that the public benefit likely to result from the making of the order outweighs the prejudice to the relevant person.

(4) In deciding whether the second condition is met, the court must have regard to the public interest in access to a choice of high quality electronic communications services."

15. We observe that the test refers to "the Code right" that the operator wants, rather than to the entire agreement, and accordingly our understanding is that the test applies to each disputed Code right separately.

16. Paragraph 23 of the Code says that an order under paragraph 20 may impose an agreement that gives effect to the Code rights sought by the operator, "with such modifications as the court thinks appropriate". The agreement:

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

17. Other paragraphs of the Code relate to specific Code rights, and we shall have more to say later about paragraph 24 (consideration). Paragraph 25 enables the Tribunal to order the operator to compensate the site provider for loss or damage, not only when it makes the paragraph 20 order but also at any time afterwards if an application is made.

18. Paragraph 17 of the Code provides 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)."

19. Paragraph 17 closely follows the recommendations of the Law Commission in its report, *The Electronic Communications Code* (Law Com No 336, 2013). The Law Commission opened its discussion at paragraph 3.29 by referring to regulation 3(4) of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 ("the 2003 regulations") which states that operators "where practicable, shall share the use of electronic communications apparatus." The Law Commission was also keenly aware of the rapid development of technology and the need to "future-proof" a new code and to enable operators to keep abreast of developments. But it recognised that landowners have concerns about the impact of upgraded equipment on their land and their concerns about having multiple operators on site.

20. The Law Commission recommended that landowners should continue to receive for their sites a market rent that reflected the value of the land to the operator. Its discussion of sharing and upgrading was set out in that context, and recognised that it was common practice under the old code for landowners to require additional payment for sharing and upgrading, to be paid at the point when those rights were exercised (often known as "payaway"). The conclusion of the Law Commission's discussion was that landowners should continue to be able to exact those payments (paragraph 3.42) except where the sharing or upgrading had no physical or visual impact on the site provider (for example where it took place within a duct or a cabinet, paragraph 3.48).

21. That recommendation was set out at paragraph 3.51 and 5.83, to the effect that an operator was to have the right to share and upgrade ECA provided that the sharing or upgrading

took place within a structure and could not be seen from the outside, and that it imposed no burden on the site provider. Any term that prevented, or imposed an obligation to pay for, such sharing or upgrading would be void. The consideration payable was to be calculated on the basis that those limited rights to share and upgrade had not been conferred, in other words, they were to cost nothing.

22. The Law Commission's recommendations thus gave the site provider a share in the value to the operator of the right to share and upgrade, unless it was invisible and had no impact on the site provider, and would have perpetuated the practice of requiring payaway.

23. Paragraph 17 operates in a very different context.

24. Gone is the site provider's share in the value of the site to the operator. Consideration is to be calculated, under paragraph 24, on the assumption that the rights granted "do not relate to the provision or use of an electronic communications network." Gone therefore is the rationale behind the recommendations on which paragraph 17 is based, which was that rights to upgrade and to share, beyond the minimum provided for in that paragraph, should be negotiated (or imposed by the Tribunal) and paid for, because any consideration for the right to upgrade is likely to be minimal on the basis of the "no network assumption".

25. What remains therefore is a basic right to upgrade and share (which goes some way beyond what the Law Commission envisaged since there is no requirement that the effect be invisible) which operators have in all cases even if the agreement is silent on upgrading and sharing. Anything else has to be negotiated or imposed by the Tribunal. But there is no reason to suppose that anything else needs special justification or will be hard to establish. To that extent we respectfully disagree with the view of the Lands Tribunal for Scotland in *Cornerstone Telecommunications Infrastructure Limited v Fothringham* LTS-ECC-2020-07 where it said at paragraph 20 that it would require "pretty compelling evidence" to go beyond what is provided in paragraph 17. Evidence, yes, but there is no hint in the Law Commission's report or in government policy, or the Code itself, that rights to share or to upgrade beyond those contained in paragraph 17 might be unusual or generally unnecessary. Quite the contrary, although as the Tribunal said in *Cornerstone Telecommunications Infrastructure Limited v University of the Arts, London* [2020] UKUT 248 (LC) at paragraph 194, the imposition of the paragraph 17 conditions is a useful starting point.

26. What also remains is fast-moving technology with which operators – whether network operators or infrastructure providers – need to keep up, and government policy that encourages sharing wherever possible so as to minimise the installation of intrusive ECA, the duplication of mast sites and so on. We mentioned above the provisions of the 2003 regulations; the claimant has drawn to our attention part 10 of the National Planning Policy Framework which says at paragraph 113:

> "Use of existing masts, buildings and other structures for new electronic communications capability (including wireless) should be encouraged."

The disputed terms about equipment, upgrading and sharing

27. There are three terms in dispute. The first is about equipment; the rights to install and keep electronic communications apparatus ("ECA") on land are Code rights (paragraph 3(a) and (b) of the Code, see above). The claimant wants the agreement to grant the right to install and keep on site any ECA, whereas the respondent wants the agreement to permit the claimant to install and keep specified equipment on the land, with the agreement listing the ECA that is on site now so that there is no right to add or substitute any other ECA.

28. The second and third disputes are very similar; the claimant wants the right to upgrade its equipment, without qualification, and to share its equipment with mobile network operators, without qualification. The right to upgrade equipment is also a Code right (paragraph 3(c)). The respondent is willing to grant the rights to share and upgrade but wants both rights to exist only on the two conditions set out in paragraph 17(2) and (3) of the Code (see above).

29. The claimant's position in relation to all three of these terms is determined by its role as a provider of infrastructure. Its business depends upon the sharing of its ECA, and it does not wish to be limited in its ability to do so. The business of sharing necessarily involves the addition of ECA; without the ability to do that, it may be unable to share (beyond the sharing arrangements currently in place) because its customers will not be able to install their equipment (such as antennae on the mast). All operators need to be able to upgrade because of the fast-moving development of telecommunications technology, but that requirement is particularly acute for the claimant because it has to be able to provide what its customers require; without the right to upgrade its passive infrastructure, it may not be able to offer something that is industry standard in a couple of years' time.

30. The claimant's further concern is that the result of the Court of Appeal's decision in *Cornerstone Telecommunications Infrastructure Limited v Compton Beauchamp* [2019] EWCA Civ 1755 is that the operator cannot revert to the Tribunal for additional rights once the agreement has been imposed. It appears that the draftsman of the Code intended that that should be possible (see *Cornerstone Telecommunications Infrastructure Limited v Ashloch* [2019] UKUT 388 (LC) at paragraph 82, and *Arqiva Services Limited v AP Wireless II (UK) Ltd* [2020] UKUT 195 (LC) at paragraph 176) but the Court of Appeal's reading of the Code appears to make it impossible. There is, as Mr Radley-Gardner put it, no "cut and come again"; the rights conferred by the agreement, whether agreed or imposed, cannot be extended by an application under Part IV of the Code. The site provider may of course confer further rights by agreement, but no doubt at a price of its own unhindered by the Code's policy on consideration.

31. The respondent's concerns about the addition of ECA to the site and about upgrading are equally linked to the fast development of technology; the introduction of 5G is anticipated to require a new mast, perhaps a taller mast, perhaps noisier equipment. And it wants to know who is sharing the ECA because of its need to look after its tenants and to know who has access along the track. The factual evidence given for the respondent, summarised below, expands on those concerns.

32. The respondent's requirement for a list of equipment is linked to its stance about upgrading: it needs to know what is on site at the outset so that it can tell whether equipment has been upgraded and whether the conditions in paragraph 17 have been met. Indeed the two terms go together; unless the parties are to indulge in a pointless dispute about what is an upgrade and what is an extra piece of kit, there is little point in having any limitation on the right to upgrade if there is no limitation on the right to add or change the equipment, and vice versa.

33. This is not the first time that the Tribunal has had to look at this group of terms, and the present reference is an opportunity to summarise what the Tribunal has said to date and to explain its approach to the problem.

The factual evidence

34. With that legal context set out, we look at the factual evidence offered by the claimant and the respondent in relation to the disputed rights to install ECA, to upgrade and to share.

35. Evidence for the claimant was given by Sarah Burrows, an Estates Surveyor; among her responsibilities are the negotiation of lease renewals and rent reviews for the claimant. In her witness statement she described the site and explained that the infrastructure on it is currently shared by EE Limited and Hutchison 3G UK Limited. The site is used to provide telephone networks for the public, and also by EE Limited for the Emergency Services Network. She explained that in 3 to 5 years' time it is likely that 5G technology will be installed at the site, which will require a new mast. It is therefore vital that the agreement should permit that installation. She said that the size of the site limits what can be put on it, and pointed out that it lies within the South Downs National Park and therefore has a high level of planning protection. In her second witness statement she commented on some of the evidence given for the claimant, and we come back to that below.

36. In cross-examination Ms Burrows expressed understanding about the respondent's concern about the visual impact of a new mast but pointed out that it is surrounded by trees. She agreed that the point of a new mast would be to have one that is stronger and able to accommodate more ECA, and that it would be taller than the present one although she could not say by how much. It would not be any more visible from nearby because of the tree canopy.

37. We also heard evidence of fact from Mr Simon Halley, the claimant's Head of Assets; his role is to develop property strategies and initiatives and to provide support for the claimant's property portfolio. He gave evidence of the importance in terms of government policy, and to the claimant's business, of its being able to share its ECA, and to be able to add and upgrade ECA. He quoted the terms of Ofcom's direction under section 106 of the Communications Act 2003, which recognised the value to the public of the claimant's operations. This evidence was not challenged in cross-examination and we do not need to add to what we have said already about the fundamental importance to the claimant of these rights to add equipment and to upgrade its ECA.

38. Mr Halley then discussed the implications of the limitations that the respondents seek to impose, which he said would be at odds with government and Ofcom policies. Again this was not challenged in cross-examination.

39. Mr Halley expressed views about the respondent's motivation for resisting the rights that the claimant requires; that evidence is not relevant to what we have to decide and we disregard it.

40. For the respondent, evidence of fact was given as we indicated above by Mr Rupert Green as a director of the respondent and by his cousin Mr Henry Green as the tenant of Home Farm House.

41. Mr Rupert Green explained the respondent's concerns about sharing, namely the extra traffic on the access track and the security risk arising from unknown individuals roaming around. In his second witness statement he expressed the view that upgrading would also lead to extra access requirements, and perhaps also to a need for more power, which would require fuel deliveries for a generator and generate more noise. Noise might have health implications for tenants troubled by constant buzzing from the equipment. Tenants may be subject to "invasive drones flying over their properties – particularly at weekends or bank holidays". He expressed concern about the site getting "uglier and uglier" if new technology is "monstrous in size and/or sight". He is sceptical of the protection afforded by the planning system, and troubled by the lack of any restriction on the height of the new mast. He wishes to protect the amenity of the park, as well as to ensure access to the respondent's farmland.

42. Mr Henry Green has lived at Home Farm House for 19 years and the mast has been there throughout, 42 metres from his boundary. He reported that he has noticed background noise from the site at night, in winter, on clear nights with a light southern breeze. He confirmed in cross-examination that he has visited the site to check that it is the source of the noise. It has kept him awake. He has not complained to the claimant because he felt that the noise was unavoidable. The claimant wrote to Mr Henry Green the day before the hearing offering to come and investigate the noise.

43. He confirmed that the mast is presently visible from various points in his garden, and said that he is concerned that a new mast will be more visible.

44. He said that last winter the timber edge of his driveway was broken by the claimant's visiting operative. He did not report this. In addition, a few weeks ago a drone repeatedly flew over his property. He found this very intrusive. In cross-examination he confirmed that he had reported the incident to the claimant and had received an apology.

45. Mr Henry Green also expressed concern about radiation; but when taken to the agreed terms of the lease, in which the claimant has agreed to follow the ICNIRP recommendations and to provide the respondent with information about exclusion zones, he accepted that his concerns were met. Equally Mr Rupert Green accepted that radiation was no longer a concern.

46. Ms Burrows in her second witness statement commented on the respondent's evidence of fact. As to the effects of sharing, she said that currently there are about 20 visits each year, and it is not anticipated that that will change. She denied that the presence of sharers would be a security risk, let alone that it would lead to "unknown individuals roaming around the estate". She repeated the claimant's apology for the incident with the drone, and confirmed that the damage to the timber edging was not reported to the claimant at the time and expressed the wish that any future incidents be reported so that they could be investigated.

Discussion and conclusion about the disputed terms

47. It is convenient to begin with the rights to install and keep ECA on site, and to upgrade. Both are Code rights listed in Paragraph 3 of the Code.

48. Both parties accept that the fact that a claimant wants a right does not mean that it automatically has to have it; nor is it the case that a respondent can insist on whatever terms it wants. Both parties argued that the Tribunal has a judicial discretion as to the terms of the agreement and must engage in a balancing exercise between the needs of the parties.

49. Our understanding of the Code is that the Tribunal may (not "must", so there is a discretion) confer a Code right on the claimant provided that the conditions set out in paragraph 21 are met. The relevant conditions are paragraph 21(2) and (3): the prejudice it will cause to the respondent must be able to be compensated by money and that prejudice must be outweighed by the public benefit that will ensue from the conferral of the right, bearing in mind "the public interest in access to a choice of high quality electronic communications services".

50. The Tribunal is further required by paragraph 23(5) to include the terms that it considers appropriate to ensure "that the least possible loss and damage is caused by the exercise of the code right" to the respondent and to people who are on the land from time to time. Code rights are not absolute; a right to install ECA, for example, may be to install a short

or long list of ECA or to install unlimited ECA. The Tribunal may, by the agreement which it imposes, give effect to the code right sought by the operator with such modifications as it thinks appropriate (paragraph 23(1)) and on such terms as it thinks appropriate (paragraph 23(2)). The consideration arising from paragraph 23(5) may lead the Tribunal to confer a Code right in less extensive form than the claimant wants; alternatively, that consideration may instead prompt the Tribunal to grant the right as requested but to add conditions for the protection of the respondent and its tenants and employees insofar as the agreed terms of the lease do not already do that. As the Tribunal (the Deputy President and Mrs Diane Martin MRICS FAAV) put it in *Cornerstone Telecommunications Infrastructure Limited v London and Quadrant Housing Trust* [2020] UKUT 282 (LC) at paragraph 48, paragraph 23(5) of the Code:

> "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 to the site provider and others under paragraphs 25, 44 and 84."

51. We turn to the conditions in paragraph 21 and the respondent's evidence as to the prejudice it will suffer if the claimant gets the Code right to install unlimited ECA, and the Code right to upgrade it without restriction. We were unimpressed by Mr Reynolds QC's assertion that the new mast could be hundreds of metres tall, and that safety regulations could require it to be festooned with lights and covered in dayglo paint to prevent aircraft from flying into it. The size of this site (6.76 metres x 9.98 metres, or about 67.5 sq feet) makes that sort of scenario as practically impossible as it is implausible. But we take seriously the concerns expressed by Mr Henry Green and Mr Rupert Green about traffic, noise, security and the visual intrusion of a taller mast. There are bound to be such worries; the advance of technology creates a practical need for the claimant and an alarmingly unknown future for the respondent.

52. However, that alarm seems to be exaggerated. There has been one drone flight, so far as is known, in the course of a twenty year term, and complaint produced an immediate apology; there is no evidence that flights in the future will be more frequent or intrusive. There has been one incident of damage to property, so far as is known, in twenty years, and it was too minor to be the subject of complaint. There is noise, but again it has not prompted a complaint until the present reference, and there is now an offer to investigate.

53. The respondent's witnesses pay little regard to the provisions of the agreement. Its terms forbid the claimant to cause a nuisance to the respondent or to cause it loss or injury. If it contravenes those terms the provisions of paragraph 25 of the Code enable the respondent to seek compensation, and we see no reason why an injunction would not be available in the event that Mr Rupert Green's fears of "constant buzzing" were realised.

54. It was acknowledged by the claimant's witnesses that there may be some disturbance arising from the installation of a new mast for 5G in a few years' time, although no evidence about this has been offered and the scale of upgrading works is not yet known. This is illustrative of the uncertainty which causes concern to the respondents.

55. The claimant's evidence of the public benefit of what it seeks is unchallenged, and there is no basis on which we could conclude that it is outweighed by the limited prejudice that the respondent is able to show. Moreover that prejudice can be compensated by money. The respondent is a limited company so will not itself suffer from noise or inconvenience, but it has responsibilities to its tenants and has its own farming activities; all the difficulties anticipated can be addressed by communication with the claimant and if they cannot be resolved they would all appear to be able to be compensated. By contrast the difficulties that a limit on equipment or on upgrading would cause the claimant are extensive; the requirement to negotiate, outside the protection of the Code (because of the effect of *Compton Beauchamp*, see paragraph 30 above), for permission for every new antenna (etc) would be an expensive and time-consuming burden for it to sustain.

56. Accordingly the conditions in paragraph 21 are met and the Tribunal may impose these rights. Should it modify them in light of the need to cause the least possible loss and damage to the respondent? We think not. There are ample protections in the agreement, combined with the control exercised by the local planning authority and the extra protection afforded in the National Park. Our answer to that might be different if this were a roof with a specific weight-bearing capacity, or if there were other specific concerns that were not within the protection afforded by the agreement itself and by planning law; but that is not the case here.

57. Our conclusion is reinforced by the difficulties caused to the claimant and to all operators by the constraints that appear to have been introduced by the Court of Appeal's decision in *Compton Beauchamp*, although in the circumstances of this case and in the light of the claimant's business need it would have been the same in the absence of that issue.

58. We turn now to the right to share the site, which is central to the claimant's business and is also extremely important at a policy level as we pointed out above (paragraph 19).

59. As with upgrading, paragraph 17 operates as a floor; these are the minimum rights that an operator is to have. It was the Law Commission's intention that if the claimant was to have any more extensive right to share it would have to be paid for, and that has turned out to be a more limited right than the Law Commission intended. But the right to compensation for any loss or damage caused by more extensive sharing rights remains.

60. But on what basis can the operator claim more extensive sharing rights than are provided for in paragraph 17? The reasoning we adopted in connection with the right to install equipment and the right to upgrade will not assist here because the right to share is not a Code right. Instead the Tribunal has a discretion whether or not to impose such a term, subject to the constraint of paragraph 23(5).

61. That does not mean that if the right to share without limitation will cause loss or damage it will be not imposed; it may be modified to minimise damage, or the Tribunal may impose it but also impose other terms, if needed, to minimise loss or damage in accordance with paragraph 23(5). In making that choice it may be helpful to think in terms of a balancing process between the claimant's requirements and the respondent's concerns, but the Code does not put it like that. Perhaps a better way to look at it is as follows.

62. First, the Tribunal should consider the term the operator seeks and the reason why it needs the term in question in order to pursue the business for whose purposes it received its Ofcom direction and in light of the public interest in a choice of high quality telecommunications services.

63. Second, the Tribunal will consider the concerns or objections raised by the respondent and whether in order to minimise loss or damage in accordance with paragraph 23(5) the term should not be imposed, or should be imposed to a limited or qualified extent.

64. If those concerns do not prevent the imposition of the term and do not require its qualification, then the Tribunal will consider whether, in imposing that term, it should also impose further terms to minimise loss or damage.

65. With that in mind, we turn to the unlimited right to share that the claimant seeks.

66. In the present case the answer to the first question is very clear: without the ability to share the claimant is out of business and cannot fulfil its statutory purpose (see paragraph 13 above). Moreover as a neutral host it needs an unrestricted right to share; there is no case for restricting that right to any particular network operator or to a specified number of operators. (by contrast with what the Tribunal decided in *London and Quadrant*, see paragraph 89 of that decision). To limit that right by reference to the conditions in paragraph 17 would be very onerous for the claimant.

67. Our views on the second will be clear from what we have already said. However genuine the respondent's concerns, they are not really reflected in reality nor founded on evidence. The agreement, and planning law, provide the protection that the respondent needs from the levels of nuisance and disturbance that can realistically be anticipated. The particular concern about sharing is the presence of unknown persons on the site, but the site is shared already and that has had so little impact that Mr Rupert Green was at the time he made his first witness statement unaware that the site was shared (paragraph 15 of that statement). In *London and Quadrant*, by contrast, on a rooftop site, extended sharing rights would have caused obvious difficulties as a result of the increased footfall within the building (paragraph 88); on a site in woodland that traffic does not have the same effect as it does within a building. The conditions set out in paragraph 17 are not needed in view of the safeguards built into the agreement and the availability of compensation.

68. Accordingly the agreement to be imposed on the parties will confer on the claimant an unrestricted right to share the site.

Consideration and compensation

69. Having determined the terms of the lease, we turn to the consideration payable for it and to compensation. There is no claim for compensation apart from the usual claim for legal and valuation fees incurred by the respondent outside the litigation. We deal with that claim

separately below, after we have determined the level of consideration payable annually and including, as we shall explain, elements that might well be regarded as compensation but which are best determined now in order to avoid future claims for loss and damage that can properly be predicted at the outset.

70. In the paragraphs that follow we begin with the provisions of the Code, and then look at the approach taken in earlier determinations of consideration by this tribunal and by the lands Tribunal for Scotland. We look at the special considerations relevant to a renewal. We then turn to the expert evidence given for the parties, and finally to our analysis and conclusion.

The provisions of the Code

71. The Code provides both for the payment of consideration for the grant of Code rights and for compensation for loss or damage sustained by the site provider as a result of that grant.

72. Paragraph 24 says this:

> "(1) The amount of consideration payable by an operator to a relevant person under an agreement imposed by an order under paragraph 20 must be an amount or amounts representing the market value of the relevant person's agreement to confer or be bound by the code right (as the case may be).
>
> (2) For this purpose the market value of a person's agreement to confer or be bound by a code right is, subject to sub-paragraph (3), the amount that, at the date the market value is assessed, a willing buyer would pay a willing seller for the agreement—
>
> (a) in a transaction at arm's length,
>
> (b) on the basis that the buyer and seller were acting prudently and with full knowledge of the transaction, and
>
> (c) on the basis that the transaction was subject to the other provisions of the agreement imposed by the order under paragraph 20.
>
> (3) The market value must be assessed on these assumptions—
>
> (a) that the right that the transaction relates to does not relate to the provision or use of an electronic communications network;
>
> (b) that paragraphs 16 and 17 (assignment, and upgrading and sharing) do not apply to the right or any apparatus to which it could apply;

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

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

73. The calculation of consideration is to be done, therefore, on the basis of what has come to be known as the "no network assumption."

74. Paragraph 25 makes provision for compensation:

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

75. It is important to note that parties to an agreement imposed by the Tribunal can revert to it later to claim compensation under paragraph 25; those who reach agreement without litigation cannot, and therefore have to take care to make provision for any anticipated need for compensation in the terms of their agreement.

76. In the present case no compensation is claimed save for legal and surveying costs that would have been incurred absent the litigation, which the claimant accepts are payable. We revert to that in the closing paragraphs of our decision.

Consideration and compensation: experience to date

77. There have been very few Tribunal decisions about consideration under the Code. In *EE Limited and Hutchison 3G Limited v London Borough of Islington* [2019] UKUT 53 (LC) the Tribunal set the level of consideration for a rooftop site at £1,000 per annum. In *Fothringham* the Lands Tribunal for Scotland had to consider a new rural site, with a term of ten years; it ordered consideration of £600 per annum, save for the first year when £1,500 was payable in order to reflect the additional inconvenience and risk to the site provider of the installation of the mast. In *London & Quadrant* the rent for a roof top site was set at £5,000 per annum because the Tribunal had far more evidence before it than it had in *Islington*, and was able to make an assessment of the sort of costs that the respondent would incur as a result of the grant of the rights (see in particular paragraph 150).

78. That might seem to merge the concepts of consideration and compensation, and indeed it does as the Tribunal explained:

"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."

79. Accordingly in setting the level of consideration we expect to include an allowance for loss or damage that can be predicted, so as to save the respondent from having to make almost inevitable claims later; that does not prevent it from making claims under paragraph 25 for anything that cannot now be anticipated and quantified.

80. In *Vodafone Limited v Hanover Capital Limited* [2020] EW Misc 18 (CC) at paragraph 89 the county court accepted a framework for the determination of consideration, which of course was directed to the section 34 exercise. However, in *London and Quadrant* the Tribunal adopted the first three stages of that framework, and it is agreed by the parties to the present reference that they could be applied in the assessment of consideration here. The Tribunal described the steps as follows at paragraph 93 in *London and Quadrant*:

"(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."

Valuation on a renewal

81. This is the first reference in which the Tribunal has had to determine the consideration under paragraph 24 and compensation under paragraph 25 for a lease renewal under Part 5 of the Code.

82. The decision *Hanover* was a county court decision and concerned a lease renewal under section 34 of the Landlord and Tenant Act 1954, which proceeds on a different valuation hypothesis. Section 34 makes provision for the disregard of the tenant's occupation of the site, of its goodwill and of the rental value of its improvements. None of those points appears in the Code.

83. We asked the parties to make submissions about whether we should assume vacant possession of the site in assessing consideration on a renewal under Part 5. It was common ground that the Code does not require an assumption of vacant possession and we should not make one. Moreover, we are not required to depart from the reality that the site has planning permission, pre-existing supplies of electricity and fibre, concrete foundations and a secure perimeter fence.

84. Mr Radley-Gardner submitted for the claimant that the code right applicable to a renewal is the right to keep the ECA on a site where it is already installed. The rights to be valued are in relation to land, which excludes the apparatus. The hypothetical site provider for a renewal is in the same position as the real site provider; there is no place for any uplift in consideration to allow for the inconvenience of the initial installation, such as was awarded in *Fothringham*. We agree, but of course we have to consider in due course the effect on the site provider of the installation of the new mast.

85. For the respondent it was pointed out that, if the existing ECA is disregarded, rights granted under the Code include the right to install apparatus throughout the 10 year term and the right to install a generator on the respondent's adjacent property. Here, where the rights are broad and may be used repeatedly during the term, consideration should reflect that benefit. We agree; for this reason consideration determined at the outset of the term is going to include some element of consideration for predictable inconvenience.

86. With all this in mind we turn to the expert evidence given for the parties.

Expert evidence for the claimant.

87. For the claimant, expert evidence was given by Mr Colin Cottage MRICS IRRV of Ardent Management limited. He has many years' experience of advising on compulsory purchase

and compensation; more recently he has advised the claimant on consideration and compensation in relation to telecommunications sites.

88. Mr Cottage considered that the sum properly payable as consideration should be £500 per annum. His report reviewed the agreed lease terms, the requirements of paragraphs 24 and 25 of the Code, and the interpretation of those paragraphs in decisions of this Tribunal and the Lands Tribunal for Scotland. He adopted a three step approach; first, he assessed the existing or alternative use value of the site; second he assessed any benefits that the tenant might receive and the impact on the respondent of the rights to be imposed; finally he stood back to consider if the valuation seemed reasonable in the context of the value of surrounding land, Tribunal decisions and other transaction evidence for telecoms sites.

89. The site is 67.5 square metres within a cleared area of woodland. Mr Cottage reviewed potential uses of the site as agricultural land, grazing land for horses, open storage, keeping of poultry or domestic animals and as ancillary residential land. He concluded that there was no real demand for a site of this size in its location, but attributed a nominal value of £100 per annum.

90. In his second step Mr Cottage added another £100 per annum, doubling the nominal value, for the right to erect the mast structure (which he likened to a flag pole) on the site. In his opinion, a willing landlord would not feel it necessary to negotiate any further consideration to reflect the impact of rights of access, rights to upgrade and share the ECA, nor for rights to trim trees, to connect to an electricity supply, and to use a generator in the event of a power outage. He thought that a further £150 per annum would be agreed for the right to enter the landlord's other property during the 10 year term in order to carry out works, which might be intrusive. Finally, Mr Cottage added £100 per annum for the inclusion in the lease of a tenant's rolling break clause after five years, which he considered to be unusual and therefore of material benefit to the tenant.

91. The total of those four payments reached £450, which Mr Cottage rounded to £500 per annum before standing back to consider if that seemed reasonable as his third step. He thought that that would be the equivalent of rent for three acres of arable land or five acres of pasture land, and that a willing landlord would consider it fair for this small site. At £10 per week he considered that the willing tenant would also consider this a reasonable price.

92. Mr Cottage went on to compare the figure of £500 per annum with the £600 per annum awarded in *Fothringham* and considered it was reasonable for the rent here to be lower since the tenant in that case did not have to contribute to repair and maintenance of the access route. He viewed the higher first year rent of £1,500 awarded in *Fothringham* to be without relevance here where the installation is already in situ and there would be no greater risks and obligations in the first year. He added that if this was found to be incorrect as a matter of law then the additional £900 paid in the first year in *Fothringham* could be matched in the present case by adding £117 per annum as equivalent to £900 over the 10 year term at a yield of 5%.

93. Finally, Mr Cottage considered the proposed level of rent in the context of other transaction evidence. He was able to obtain evidence of only two new lettings, both to CTIL. One was on a residential development site and the other at the Royal Welsh Showground, so neither was directly helpful as evidence here. He turned next to evidence of rents agreed on lease renewals provided by the claimant and by CTIL. A list of 84 transactions completed between November 2018 and September 2020 had been supplied, from which Mr Cottage screened out sites on industrial and other non-rural types of land.

94. 24 of the remaining renewal transactions were for rural sites in the Midlands and south of England, with completions between March 2019 and June 2020. Mr Cottage spoke to the agents who negotiated and settled the transactions and prepared a schedule to show the rents being paid under previous agreements, the rents under the new agreements and details of any transition or incentive payments made in addition to rent. He confirmed that for the 23 transactions completed by the claimant, the lease terms were generally similar to those proposed at Dale Park.

95. Annual rents for the claimant's 23 renewals ranged from £1,000 to £3,000 with 13 at £1,500, six at £2,000 and two at £2,500. In addition to the annual rent, 16 of the transactions included additional transitional arrangements, or one-off incentive payments. These 16 leases included additional caveats in their recitals stating:

> "(D) Notwithstanding the valuation criteria set out in paragraph 24 of the New Code, the government policy is that parties are encouraged to agree a rent to avoid legal proceedings. The Parties have agreed the Rent payable under this Lease, which is lower than the rents payable under the Former Lease, to reflect government policy in relation to the New Code. This is considered by the Tenant to be higher than the consideration that might be assessed by reference to paragraph 24 of the New Code should the matter have been referred to the Tribunal for determination.
>
> (E) the Tenant has agreed in good faith to pay a Transitional Payment …(*specific details)* to enable the Landlord to transition from the rent level received under the Former Lease to the lower Rent. The Parties agree and acknowledge that the Transitional Payment does not constitute a precedent for agreed rents under the new Code and shall not be used as an open market rent comparable for the purposes of rent review or any other purpose."

96. Mr Cottage concluded that the levels of rent agreed by the claimant for renewals were not a reliable indicator of consideration under paragraph 24 for a number of reasons. Importantly, the rents were a blend of consideration and compensation, because they were consensual agreements where there would not be a further opportunity to seek compensation at the Tribunal (see paragraph 75 above). In addition, the claimant's approach to renewals had been driven by a need to reduce the levels of site payments as

swiftly as possible whilst avoiding protracted negotiations and maintaining good relationships with site providers.

97. Mr Cottage therefore adjusted each transaction to his opinion of a Code rent by deducting a figure to reflect the value of what he called an "incentive payment" within the agreed rents, which he said was how the claimant approached renewal negotiations. In 19 cases £1,000 was deducted. In two instances the figure was £1,500, in one £500 (from £1,000 annual rent). For the highest figure of £3,000 no deduction was made as the figure was said to represent alternative use value on a very large site. This resulted in adjusted rents at £500 for 16 sites, £1,000 for four sites and at £1,500 and £3,000 each for two further sites.

98. Finally, Mr Cottage examined in detail the transactions for the six sites closest to Dale Park, in Wiltshire, Berkshire, Surrey, East Sussex and West Sussex. The lowest figure was for a lease renewal to CTIL in February 2020 for a single sum of consideration at £287 and a single sum of compensation (excluding fees) at £2,277. Background from Gerald Eve, who acted for CTIL, revealed that the value was based on freehold values of £17.79 per square metre (six times woodland values on a per hectare basis) decapitalised at 4.5% to £0.80 per square metre, giving £36 per annum for a 45 square metre site. This was recapitalised at 4.5% for the 10 year term to give a lump sum of £287. No details were provided to support the one-off compensation payment of £2,277. Notably the lease permitted sharing 'pursuant to the Code', which is usually understood to mean only within the limits imposed by paragraph 17.

99. The highest of the six rents, at £2,500 per annum, was agreed for a renewal to the claimant completed in December 2019. The site of 132 square metres in Pack Saddle Wood near Mapledurham is larger than the Dale Park site but otherwise has many similarities being set in woodland on a rural estate and accessed by a metalled drive shared with other users. In this instance the other users are members of the adjoining golf club. The higher level of rent was said by the agent who negotiated the settlement to reflect the impact of shared access, with potential for conflict of use, and a significant drop from the previous passing rent. However, the terms in the lease concerning access were the standard terms seen in the claimant's other leases, with no mention of special access arrangements. No other transitional arrangements or incentive payments were made. Mr Cottage deducted £1,000 to adjust the rent back to £1,500.

100. Rents of £1,500 had been agreed for the remaining four sites and Mr Cottage adjusted them to £500. Transitional arrangements providing additional value had been included in three of those settlements, and the associated recitals were included in the leases. The fourth transaction was notable for the fact that the previous passing rent was only £707.08, so the new rent of £1,500 was in itself an incentive.

101. In conclusion, after standing back to consider contextual evidence, Mr Cottage considered that £500 per annum was a reasonable amount for consideration under paragraph 24 for the site at Dale Park.

102. With regard to compensation, there was no claim made by the respondent, other than for fees, and Mr Cottage saw no evidence to support any claim at this stage.

Expert evidence for the respondent

103. For the respondent we heard expert evidence from Mr Tom Bodley Scott MRICS FAAV of Batcheller Monkhouse. He is a rural practice surveyor with 30 years' specialist experience in telecommunications.

104. Mr Bodley Scott adopted two approaches to valuation. The first was a market value approach based on transaction evidence to reach an opinion of rent at £5,500 per annum, which he revised in his supplemental report to £7,000 per annum. His second approach was described as 'by reference to alternative use' by which he reached an opinion of £7,800 per annum, made up of £6,300 for consideration and £1,500 for compensation, together with a one-off payment of £1,000 for any initial building and commissioning works.

105. For his primary approach Mr Bodley Scott provided a schedule of 15 transactions taking effect between August 2017 and July 2020. 11 of the transactions were of no assistance to us because caveats within the leases confirmed that they were the product of negotiations entered into and contractual commitments made before the Code took effect. An example is as follows:

> "This Lease was legally completed after the Code came into force and the parties therefore recognise that the Code applies to it, as a matter of law. Its terms, however, were negotiated and the parties became contractually committed to them, before the Code came into force. The terms of this Lease do not therefore set any precedent for the terms which the parties would otherwise have agreed under the new Code."

106. The Tribunal has stated in both *Hanover* and *London & Quadrant* that consideration which is the product of negotiations and commitments made before the introduction of the Code cannot be taken as a reliable guide to values on the no-network assumption required by paragraph 24.

107. At the hearing Mr Bodley Scott explained why he was persisting in a view that the Tribunal has already rejected. He said that he has undertaken further research and has established that the caveated rents were, despite the caveat, nevertheless calculated on the basis of the Code's requirements. He produced correspondence which he said showed that negotiation stopped and re-commenced once the Code was introduced, and that the caveated rents were set at similar levels to the old Code rents because of the inclusion of rights beyond what the Code provides, in particular rights to share the site and to upgrade equipment.

108. We do not accept that explanation. The correspondence Mr Bodley Scott produced did not come close to establishing that the caveated rents were in fact calculated as prescribed by paragraph 24. The additional benefits to which he referred could not account for the equivalence of these rents with old Code levels.

109. There is nothing in the further material that Mr Bodley Scott has produced that changes our view about the rents that are caveated with the words to the effect of those quoted in paragraph 105 above. We repeat; they are useless in assessing consideration on the no-network basis. We are surprised to have to say this a third time.

110. Turning to the transactions that do not carry that caveat, two concerned mast lease renewals under the 1954 Act to Sussex Police, who are not a Code operator. The rents of £5,500 and £5,750 per annum are not, therefore, evidence helpful to an assessment of consideration under paragraph 24 of the Code.

111. Of the remaining two transactions, one was a lease renewal to Arqiva at Gillingham Vehicle Testing Centre in May 2019 for a rent of £5,000 per annum. Mr Bodley-Scott included this as evidence because it had no caveat linking it to pre-Code negotiations. This evidence was put before the Tribunal by the operator in *Hanover*, where the figure was revealed to be based on alternative use as a car park and to include a sum of £1,000 per annum for the benefit of a manned security gate.

112. The remaining transaction from Mr Bodley Scott's list of 15 was a lease renewal to Arqiva on an industrial estate in Rotherham with effect from July 2020 at a rent of £1,500 per annum. It does not bear close comparison with the rural site at Dale Park.

113. In his analysis of the 15 transactions Mr Bodley Scott excluded the three lowest figures and based his opinion of rent (in his first report) at £5,500 on the average of four rents taking effect in 2019. These included the two Sussex Police lease renewals, the car park site at Gillingham and a new Code letting in Ampleforth, North Yorkshire with a caveat.

114. As we said above, in his second report Mr Bodley Scott revised his figure for rent calculated on his primary approach to £7,000. He felt that an additional £1,500 was justified by the grant of access along the long drive and the use of a generator.

115. In Mr Bodley Scott's second, or alternative use, approach he assessed the alternative use value of the site at £50 per annum. That figure does not appear to be part of his assessment of consideration. His figure of £7,800 was arrived at as follows.

116. First, Mr Bodley Scott reviewed evidence of agreements granting access rights to Network Rail in West Sussex and Abergavenny, and to Northumbrian Water in Durham, concluding that the value of access rights to the site was £5,000 per annum. Second, £1,300 per annum was added, based on evidence of one-off payments of between £5,000 and £15,000 being offered to landowners in the locality for new Code agreements. Mr Bodley Scott deducted

£2,000 as the likely level of early completion or incentive payment within that total, and then decapitalised £13,000 to £1,300 per annum over a 10 year term. He said that this sum reflected non-network benefits conferred by the Code agreement.

117. Third, Mr Bodley Scott looked at compensation. His report included a number of reports of difficulties – including damage, and health and safety concerns - experienced by site providers as a result of the behaviour of operatives on telecommunications sites. None of those incidents related to the present site, and we do not regard them as relevant to the present reference, particularly in light of the minimal evidence of disturbance that the respondent has presented. It is not entirely clear what impact this evidence had on his opinion about compensation, but it is likely to have inflated his assessment of what would be an appropriate sum.

118. Mr Bodley Scott took the view that compensation of £1,500 per annum should be paid to cover the alternative use value of the land at £50, the cost of radio frequency ("RF") training and surveys at £980 and the right to use a generator at £450. He proposed a further one-off payment of £1,000 for access during the installation or set up phase of works at the site.

Discussion

119. In the paragraphs that follow we comment generally upon the expert evidence and the comparables that the experts relied upon, and then approach the question of consideration by using the three-stage approach adopted in *London and Quadrant*.

120. We found the evidence provided by Mr Bodley Scott to be of very little help. His two alternatives of £7,000 and £7,800 both exceed the current passing rent for the site at £6,011.92, which tells us that Mr Bodley Scott has not accepted, or not understood, the basis upon which consideration under paragraph 24 of the Code is to be assessed.

121. Mr Bodley Scott did not accept that Mr Cottage's comparables were useful. His only explanation for that was that they are renewals, which he felt the Tribunal would regard as less useful evidence than the considerations agreed for new sites. However, in the absence of any meaningful range of evidence of new lettings the new Code renewals are obviously more helpful than the caveated transactions which reflect levels of rent under the old Code.

122. Under lengthy cross-examination Mr Bodley Scott remained insistent that evidence of transactions where the leases contained caveats could be used in evidence without adjustment. He remained insistent that evidence of rents agreed with a non-Code operator was of assistance in a paragraph 24 assessment. He remained insistent that evidence of amounts paid for rights of access where a site owner had ransom value was directly applicable to the value of access to a mast site under a Code agreement, even though under paragraph 24(3)(d) it is to be assumed that more than one site is available. If Mr Bodley

Scott expresses these views in further references to the Tribunal it is likely that they will be rejected without the need for cross-examination.

123. By contrast we derive much assistance from Mr Cottage's comprehensive schedule of transaction evidence and commend the claimant for making this available. Once the original list had been reduced to 24 renewals for rural sites from the Midlands southwards we do not think it was essential to narrow it further to the six sites closest to Dale Park. Given the similarity of all the 23 agreements entered into by the claimant, those six sites were not likely to be any more or less relevant as a result of being in the same or adjoining counties.

124. The essence of the evidence on lease renewals agreed by the claimant is that rents of £1,500 or above were the norm, whether or not additional transitional or incentive payments were made. We note that in recitals to the 16 leases with transitional payments the claimants stated that they (as tenant) considered the rent agreed to be higher than would be determined by this Tribunal under paragraph 24 (although in all cases several thousand pounds less than that agreed in the caveated transactions relied upon by Mr Bodley Scott). The evidence suggests that rents of £1,500 per annum and above were sufficient to induce site owners to enter into agreements for lease renewals, supplemented in these cases by the incentive of additional transitional arrangements.

125. Where there was no transitional payment in addition to a rent, no paragraph 24 caveat was added to the recitals. We can discern no pattern of rent, date, location, lease term or agent to explain why there would not be a caveat on rent, in the form of paragraph D set out above (paragraph 95) in the agreements without transitional payments, in view of the way Mr Cottage describes the claimant's pattern of negotiation and in view of the fact that the seven transactions without caveats include the two highest rents of £3,000 and £2,500, along with two at £2000 and three at £1,500. These rents were evidently sufficient to induce site owners to enter into agreements for lease renewals without additional transitional arrangements, and the claimant did not feel the need to add a paragraph 24 caveat.

126. However, they are at the higher end of the range of renewals that Mr Cottage provided and there is no obvious reason for that. Turning to the rest of his comparables, where the most commonly occurring figure is £1,500 per annum, Mr Cottage explained that the claimants' approach was to make offers at a level sufficient to achieve agreement with site owners whose rent was being reduced, and that those settlements will have reflected commercial reality rather than consideration of the no-network assumptions required under paragraph 24. The commercial realities were that the claimants were able to secure immediate savings in the levels of rent being paid, whilst avoiding the costs and delays of reference to the Tribunal. For their part, the site providers were able to gain certainty of future income, protection from the costs of a reference to the Tribunal and protection from exposure to the Tribunal's interpretation of consideration with a no-network assumption.

127. We accept that an uplift to reflect that commercial reality was included in those rents; and we note that despite the absence of a caveat there is likely to have been an incentive element in the higher rents referred to at paragraph 125 above, as Mr Cottage indicated was the case for the Pack Saddle site (with a rent of £2,500), which was one of the six he analysed closely.

128. We also accept Mr Cottage's point that the renewal rents agreed by the claimant needed to reflect both consideration and compensation to the site owners. However, we were presented with no evidence for the broad adjustment of £1,000 per annum which Mr Cottage had made to most rents and which he said was the additional incentive or commercial reality payment, agreed outside the constraints of the Code. If that was the case, then the majority of agreed rents were three times higher than the level of consideration which would be appropriate with a no-network assumption. That ratio seems unrealistic.

129. We take the view that Mr Cottage's assessment of consideration calculated under the Code was underestimated (we say more about this below), and we think that his assessment of the commercial inducement was over-generous. We take the view that the maximum inducement might be a doubling of the no-network rent. If that is how the figure of £1,500 was arrived at, then that would suggest a no-network consideration of £750 in those cases. We come back to that figure after looking at the three stages of the framework adopted in *London and Quadrant*.

130. The first stage is assessment of the alternative use value of the site, which the experts agree to be nominal and no more than £100 per annum.

131. The second stage is an allowance for any additional benefits conferred on the willing tenant, over and above that alternative use value, by the terms of the agreement. Mr Cottage added £350 per annum altogether (see paragraph 90 above), which he rounded to £400. He acknowledged that the rent was low, and the figures he added were of the same scale, but we think that a negotiation would result in figures of a larger scale.

132. Mr Bodley Scott in his secondary assessment added £1,300 per annum for non-network benefits (paragraph 116 above), other than access, conferred by the agreement; but this figure was calculated by his own deconstruction of one-off incentive payments so is not a useful figure.

133. We take the view that the additional benefits conferred on the claimant beyond the site itself valued for its alternative uses, looked at on the assumption that the additional benefits do not relate to the provision and use of an electronic communications network, include the rights to keep there the existing mast or other tall structure, to maintain connections to an electricity supply, to enter onto the other land of the landlord - for temporary works or to install an emergency generator - and to carry out pruning or trimming of the landlord's trees. There is also the benefit of the tenant's rolling break clause after five years.

134. We take the view that while Mr Cottage has underestimated the value of these benefits, Mr Bodley Scott has exaggerated their value. Doing the best that we can, we allow £600 per annum at this second stage of the *London and Quadrant* exercise.

135. Mr Bodley Scott argued for a further benefit. He described access to the site, over a private estate road and track of some 1.3 kilometres (0.8 miles) in length, as a benefit which he valued at £5,000 per annum. Mr Cottage maintained that access is a factor in the letting of all mast sites and should not be valued separately. Moreover, it would be included within the alternative use value as there could be no letting without access. The point was also made in submissions that there is, in fact, a disadvantage to the claimant in having such a long access route to their mast. Whilst there is merit in Mr Cottage's argument that rights of access are a standard feature of agreements for mast site lettings, we think that the situation at Dale Park is sufficiently different for access to be a feature of negotiation for remuneration, not as an additional benefit but at the third stage when we look at adverse effects on the lessor.

136. The third stage requires adjustment for any adverse effect on the willing lessor, over and above the alternative use, created by the letting. Mr Cottage allowed nothing under this head. Mr Bodley Scott in his secondary assessment added £1500 per annum including the right to use a generator and the cost of RF training and surveys, plus a one-off figure of £1,000 for access during installation and set-up of the site. In *London and Quadrant* at paragraph 139 the same claim for RF training and surveys was considered to be speculative, in the absence of evidence that such activities were carried out by most site owners. We make no allowance for it; it could be a head of claim for compensation when actually and necessarily incurred. Any claim relating to access for installation and set-up is not appropriate where the reality is that the site is established and the mast is in situ; but of course there is going to be upgrading work, including the installation of a new mast which we discuss below.

137. We consider that at this site it is the right of access, together with the known future replacement of the mast, which has the potential to cause adverse effects on the respondents. As explained in *London and Quadrant* at paragraph 97 the burdens which the hypothetical parties would expect to fall on the landlord will be the same burdens as will fall on the actual landlord as a result of the rights conferred by the agreement. In that case, installation of a mast on the roof of a residential building was still to happen, and there was a foreseen future upgrade, both of which events would impose obvious management burdens in connection with the provision of access, in addition to access for regular maintenance activity. At Dale Park, even before any upgrade, there will be regular access to the heart of a private rural estate, in close proximity to let residential properties. In recognition of that, the agreed terms of the lease provide for access to be restricted, except in emergency, to daylight hours. However, we have granted unrestricted rights to share the ECA, which widens the scope of operators and contractors who will make use of the access rights and thereby the potential, perceived or actual, for conflict of use with others on the estate. Mr Bodley Scott's figure of £5,000 per annum for access is wildly excessive,

but we consider that there should be recognition of the intrusion being imposed upon the respondents in their management of the estate and its tenants.

138. A particular concern of the respondents is the shadow of the future upgrade activity, involving the installation of new ECA which cannot currently be specified, and which may (or may not) be bigger, more powerful, noisier, more unsightly, and involve a taller mast. The shadow is deepened by the prospect of inevitable disruption and additional access during that upgrade activity. This burden is one of perceived risk to the future amenity of the historic estate, which lies in a National Park. No evidence was presented to us that the existing mast has an adverse impact on the levels of rent that can be achieved for the two residential properties in closest proximity to it. That may be because the lettings are to family members or connected parties, and not at market rent. Should the impact of future upgrading of the ECA have an impact on rental levels, temporarily or permanently, there is an opportunity for a future compensation claim, in the absence of agreement, under paragraphs 25 and 84. The perceived risks to amenity are less tangible, but would be in the mind of a hypothetical willing landlord entering into the agreement which we are imposing.

139. We consider that for this site, with its particular attributes, the adjustment to be made for the adverse effects on the respondents of regular access by sharers of the site, of the occasional use of a generator, of increased access during upgrading activities, and of loss of amenity resulting from the new mast itself, should be £500 per annum. In view of what we have included in respect of the replacement of the mast and other upgrading activities, we take the view that we would have awarded a similar figure by way of compensation had this been a new letting of a bare site with a new mast still to be installed.

140. Our cumulative figure for consideration is therefore £1,200 per annum, being £100 for alternative use, £600 for benefits to the claimant and £500 for burdens upon the respondent.

141. We can test this figure firstly against the evidence of a consensual rent of £2,500 agreed for the Pack Saddle site, let on similar terms and with similar attributes to the Dale Park site, being in woodland, on a rural estate, and having an access shared with other users. We stated earlier that the level of consensual rent agreed by the claimant might feasibly be double that of a strictly no-network consideration, and our figure would fit that hypothesis.

142. Our second test is to consider how well the figure of £1,200 per annum sits alongside the suggested no-network rent of £750, derived from the evidence of numerous renewal agreements entered into by the claimant. We have explained the special circumstances of this site, being a rural site but with dwellings in close proximity, which give rise to burdens valued at £500 in the third stage of the *London and Quadrant* framework. Without those special circumstances the value of burdens might well be no more than a nominal £100, and a figure of £750 reflecting a nominal site value, general additional benefits and nominal burdens would be appropriate.

Compensation: professional fees

143. Finally we turn to the routine matter of compensation for the respondent for legal and valuation fees outside the litigation, to which the claimant agrees it is entitled.

144. The respondent claims £7,957.90 together with VAT by way of transactional legal costs incurred in negotiating the agreed terms of the draft lease, and has provided a breakdown of those costs. It also seeks £4,000 together with VAT for the valuation fees that it would have had to incur in any event. It points out that negotiations narrowed 23 disputed terms to only three, and that this took 7 months, at least eight "turns" of the travelling draft and a great deal of correspondence.

145. The respondent argues that because the claimant regarded this as a test case it proved particularly difficult to reach agreement.

146. The claimant in response argues that more information is needed about the breakdown of the legal costs. It is not clear to us whether that argument was made without sight of the respondent's schedule of costs.

147. We have looked at the schedule carefully. The items listed, on which the solicitors have spent time, are the reviewing of the draft lease, emails, telephone calls, and updating the draft lease. There is no mention of activities specific to the litigation. We allow the costs in full as claimed.

148. We have no information, however, about the way the valuation expert's £4,000 is calculated. The respondents were entitled to take valuation advice, of course, but they are not entitled to reimbursement of Mr Bodley Scott's fee for preparing his report or any other "Tribunal facing" document. We invite the respondents to submit a breakdown, which Mr Bodley Scott will be able to provide, showing how the £4,000 is calculated.

Conclusion on consideration and compensation

149. Accordingly, the claimant is to pay £1,200 per annum by way of consideration (which includes an element of compensation as discussed), and £7,957.90 + VAT by way of compensation for legal costs. We will make a separate order in respect of valuation fees if the respondents provide the information we have requested within 21 days of the date of this decision.

Judge Elizabeth Cooke

Diane Martin MRICS FAAV

15 December 2020

Addendum on compensation for valuation fees

150. We have been supplied with a breakdown of the valuation fee of £4,000 incurred by Mr Bodley Scott. The itemised schedule gave rise to 72 chargeable hours including the litigation work; Mr Bodley Scott has adjusted the time charged to 26.25 hours so as to take out time spent on litigation-related work such as reading witness statements, collecting and reading substantial lease evidence and preparing expert reports. At £230 per hour plus £57 travel expenses that gives rise to a charge of £6,095 before VAT, and the respondents seek £4,000. Accordingly the respondents say that whereas the £4,000 was queried on the basis that it might include work on the litigation, that work has already been excluded.

151. The claimant argues that the fee remains unrealistically high. It has provided examples, from the transactions used in comparable evidence, to show that this amount exceeds considerably the level of agents' fees that have typically been reimbursed to site providers where consensual agreements were reached.

152. The claimant submits that much of the time spent gathering comparable evidence was excessive for a firm with experience in the field, and that not all work in the schedule should have been charged at a partner rate of £230 per hour. It submits further that the claimant would expect the valuer to perform a desktop valuation for consensual deals, making a site visit only if special features of the site made it necessary. Finally the claimant argues that the fees are disproportionate to the level of consideration but, of course, that is simply a reflection of the way that consideration is assessed under the Code and not a useful measure of appropriate professional input.

153. We do not agree that a valuer should be expected to perform only a desktop valuation for a 10 year letting under a new statutory regime. Moreover, this site does have special features which warrant a site inspection, being located in the heart of a rural estate in close proximity to two residential properties.

154. However, there is considerable force in the claimant's argument that this is a large figure in the context of fees reimbursed in other transactions. The site is not so unusual as to take it far outside the range of fees referred to by the claimant. Moreover, as the claimant says, many of the comparables would have been known to Mr Bodley Scott already, and we think he has perhaps over-estimated the work he would have had to do absent the litigation.

155. We accept the necessity for a site visit but regard the £4,000 claimed as excessive for those two reasons, even in the light of the special features of this site and the new statutory regime. We determine that the level of professional input which was appropriate to a consensual agreement on this site is fairly reflected by a fee of £3,000 before VAT.

Addendum on costs

156. There are two applications for costs before the Tribunal.

The claimant's application

157. The claimant seeks an order that the respondent pay 75% of its costs for the period up to 28 September 2020, to reflect the fact that many of the terms of the agreement were agreed, and 100% thereafter because it was successful on the issues of consideration, the equipment cap, upgrading and sharing. It argues that assessment should be on the standard basis, save that because Mr Bodley Scott persisted in giving evidence that the Tribunal had rejected in two previous decisions the costs relating to consideration should be assessed on the indemnity basis. It is said that Mr Bodley Scott was not impartial and that his conduct was inconsistent with his duty to the Tribunal. The claimant also argues that the respondents have been uncompromising and combative, although it accepts that save as regards financial terms this was within the norm of hard fought litigation.

158. The claimant also points to a number of settlement offers that it made before the trial, and says that it beat some of those offers in the eventual award of consideration.

159. The claimant seeks a payment of £100,000 on account, its bill of costs indicating a total claim of £264,557.47

The respondent's application

160. The respondent, on the other hand, seeks an issues-based costs order.

161. As to the agreed terms, the respondent says either that the claimant should pay its costs of these, since all were capable of agreement, or that each side should bear its own costs, or that costs should be awarded specifically for each term, depending upon which side succeeded in the negotiation.

162. The respondent says that the claimant should be responsible for the respondent's costs relating to the legal charge, because it was for the claimant to check the title and the charge was there for all to see on the land register. The claimant, in response, points out that the respondent raised the issue of the legal charge very late in the day, when witness statements were being prepared.

163. The respondent argues that so far as the disputed terms as to sharing and upgrading are concerned the claimant should pay its costs, or each party should bear its own costs, or (if the respondent is to pay the claimant's costs) the claimant's costs should be capped because it was motivated not by concerns about this site but by its desire for a precedent.

164. The respondent points out that the claimant should not be awarded the transactional costs that it would have had to incur in any event absent the litigation.

165. The respondent seeks its costs in relation to compensation, being its legal and surveying fees.

166. Finally, the respondent changed its expert witness because the claimant objected to the one originally appointed. The respondent says that it should have the costs occasioned by that exchange since it was made at the claimant's request.

Discussion and conclusion

167. This was a reference where, eventually, the vast majority of the disputed terms were agreed between the parties. Those terms that remained in dispute were indeed hotly disputed, but not improperly so.

168. Both parties criticise each other's conduct of the litigation. The behaviour of both has been typical of parties to telecommunications disputes and we see no difference between them. The Tribunal is unimpressed, as usual, by the attempts of both parties to extract a costs penalty from litigation conduct in these circumstances; it would be futile and disproportionate for the Tribunal to conduct an enquiry into the levels of aggression or standards of courtesy on the two sides and we will not do so.

169. We do not accept that any entitlement of the claimant to costs should be reduced because it is perceived by the respondent to have wanted a precedent; the Tribunal accepted the claimant's arguments in relation to an equipment cap, site sharing and upgrading in relation to this site and on those terms the claimant was successful.

170. Nor do we accept criticism of the claimant for not accepting the suggestion of a stay in the reference pending the Supreme Court's decision in *Compton Beauchamp*. It was appropriate to proceed and we do not think, in view of the claimant's business model, that its concerns about upgrading, sharing and the range of permitted equipment would necessarily have been assuaged even had the Court of Appeal's decision in *Compton Beauchamp* been overturned.

171. Nor do we accept that the claimant was hasty in issuing the reference; we accept the claimant's explanation as to why it needed to seek new terms.

172. On the other hand, we do not accept that settlement offers made by the claimant before the trial should determine the outcome on costs. Even where the claimant did better, eventually, on consideration, those offers involved other terms, and it is not possible simply to say that the claimant made an offer, without prejudice save as to costs, that the respondent failed to beat.

173. In considering what order to make we can distinguish three groups of issues.

174. The first is a group of issues where neither party was wholly successful. They were:

a. the agreed terms. Some were resolved in the claimant's favour, some in the respondent's, some were a compromise, and the negotiations on each term will or may have been influenced by the outcome of other terms. It would be both unrealistic and disproportionate for the Tribunal to make a term-by-term order.

b. The legal charge. Each side blames the other; the respondent says the claimant should have spotted the issue, the claimant says the respondent should have raised the matter. We take the view that ether party could have checked the position earlier and neither is predominantly to blame.

c. The transactional expenses that the claimant would have had to incur absent the litigation. We accept that the claimant has not claimed these costs.

d. The respondent's costs relating to compensation since neither side's argument was wholly successful.

e. The costs occasioned by the respondent changing its valuer, because no finding has been made as to whether the claimant's challenge was proper.

175. If we were going to make an issues-based costs order we would have ordered that the parties pay their own costs on these issues. Most of them did not generate a high level of costs; but the agreed terms will certainly have done so, and we think far more than the claimant's suggestion of 25% of its costs to 28 September 2020.

176. Second, there are the costs relating to the consideration. This was a very expensive issue (we note that the claimant's valuation expert charged over £51,000 for his work) and the most hard-fought of all the issues. Neither side was wholly successful; the claimant's expert witness argued for £500 per annum, the respondent's expert witness argued for £7,000 or £7,800 per annum, and the Tribunal awarded £1,200 per annum. Both parties were some way off, therefore, but the claimant was closer in terms of the amount and was realistic in its methodology. If we were minded to make an issues-based costs order we would have ordered the respondent to pay perhaps one third of the claimant's costs relating to consideration.

177. We refuse the claimant's application for indemnity costs relating to consideration. We have made the Tribunal's views about Mr Bodley Scott's evidence clear in our decision and if evidence is given on the same basis in a future case that may have costs consequences, but it would not be appropriate to impose any on this occasion when the decisions in *Vodafone Limited v Hanover Capital Limited* [2020] EW Misc 18 (CC) and in *Cornerstone Telecommunications Infrastructure Limited v London & Quadrant Housing Trust* [2020] UKUT 282 (LC) were published so shortly before the hearing in this reference.

178. The third group of terms is the equipment cap, sharing and upgrading. The claimant was wholly successful on these issues and, again, they were expensive ones and must have accounted for more than half of the costs of the trial. The respondent's argument that there

should be a cap on those costs because the claimant was looking for a precedent are not accepted.

179. In light of those points, what order should the Tribunal make? The choice is between a requirement that the costs be analysed in the assessment process and allocated to specific issues, which will be time-consuming and likely to provoke further dispute, and a broad-brush order that the respondent pay a percentage of the claimant's costs. We take the view that the latter is to be preferred, on the basis that many of the issues here were interconnected and it may be very difficult to separate out work on specific terms.

180. The claimant has suggested that the respondent pay 75% of its costs, rather than 100%, up to 28 September 2020 to reflect the fact that some terms were agreed. As the respondent points out, terms were being agreed in mid-October so the September date is too early, and we also regard the percentage suggested by the claimant as unrealistic. Indeed, any cut-off by date is impossible since the claimant is not entitled to the whole of its costs of the trial itself.

181. The percentage of the claimant's costs payable by the respondent must be, we think, less than 50% to reflect the fact that on so many issues neither party was successful. We determine that the respondent is to pay 40% of the claimant's costs, to be assessed on the standard basis if not agreed.

182. We decline to order an interim payment; the respondent has permission to appeal the Tribunal's decisions about sharing and upgrading, and if it is successful then the question of costs will have to be reconsidered.

Judge Elizabeth Cooke Diane Martin MRICS FAAV

10 March 2021