UPPER TRIBUNAL (LANDS CHAMBER)

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Royal Courts of Justice,
Strand, London WC2A

13 July 2022

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE – NEW AGREEMENT – terms of renewal of a lease of an existing site – relevance of restrictive user covenant in intermediate lease – consideration – consideration for unexceptional rural site determined at £750 – whether compensation available for inability of site provider to use site – paras 23, 24, 25, 34, 84, 85 of Schedule 3A, Communications Act 2003

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN:

EE LIMITED AND HUTCHISON 3G UK LTD

Claimants

-and-

(1) DAVID PAUL STEPHENSON
(2) AP WIRELESS II (UK) LTD

Respondents

Re: Pendown Farm,
Pendown Cross,
Truro,
Cornwall

Martin Rodger QC, Deputy Chamber President

Heard on 24-26 May 2022

Oliver Radley-Gardner QC, instructed by Winckworth Sherwood LLP for the claimants
The first respondent did not attend
Wayne Clark, Fern Schofield and *Mike Atkins*, instructed by Eversheds Sutherland International for the second respondent

The following cases are referred to in this decision:

Cornerstone Telecommunications Infrastructure Ltd v Ashloch [2021] EWCA Civ

Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd [2019] UKUT 107 (LC)

Cornerstone Telecommunications Infrastructure Ltd v Fotheringham LTS/ECC/2019/06

Cornerstone Telecommunications Infrastructure Ltd v London and Quadrant Housing Trust [2020] UKUT 282 (LC)

EE Ltd and Hutchison 3G UK Ltd v *Affinity Water Ltd* [2022] UKUT 08 (LC)

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

EE Ltd v Morris [2022] EW Misc 1 (CC)

Harbinger Capital Partners v Caldwell [2013] EWCA Civ 942

On Tower UK Ltd v Green [2022] 4 WLR 27

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

Introduction

1. This reference is brought by the claimants under paragraph 34 of the Electronic Communications Code for an order requiring the parties to enter into a new lease of an existing telecommunications mast site at Pendown Farm near Truro in Cornwall ("the Site"). The principle of an order is not opposed. The issues in the reference concern the terms of the proposed new lease, the rent payable, and the need for compensation for loss or damage which may be sustained by the respondents as a result of the exercise of the rights and whether it can be determined at this time.

2. The claimants ("EE/H3G") are both "operators" within the meaning of the Code. They jointly own an estate of leased telecommunications sites which they manage through a joint venture company known as Mobile Broadband Network Ltd ("MBNL").

3. The first respondent, Mr Stephenson, is the owner of Pendown Farm, including the Site. He has not been an active participant in the reference.

4. The second respondent, AP Wireless II (UK) Ltd ("APW"), is a property investment company active in the telecommunications sector. Its business involves the aggregation of existing telecommunications sites by the acquisition of leasehold or freehold interests in them. It seeks to insert itself between the original site provider and the operator, so enabling it to receive the rent due for the site and to deal directly with the operator in occupation, including when the time comes for the grant of a new lease. APW then aims to make use of its scale and resources to profit from its sites. It has a large portfolio in the UK and Ireland comprising many thousands of sites.

5. At the hearing of the reference EE/H3G were represented by Mr Oliver Radley-Gardner QC and APW by Mr Wayne Clarke, Ms Fern Schofield and Mr Mike Atkins. Evidence concerning the disputed lease terms was given by Mr Noel Lester of MBNL and Mr Nicholas Ward of APW. Valuation evidence was given by Mr Jonathan Stott MRICS, of Gateley Hamer, for EE/H3G and by Mr Robyn David Peat FRICS of George F White, for APW.

The relevant provisions of the Code

6. The relevant statutory provisions are very familiar to these parties and were largely taken as read during the course of their submissions. The Tribunal is required by paragraph 34(11) of the Code to determine the terms of the new lease of the Site in the manner described in paragraph 23 and the rent, or consideration, as provided by paragraph 24. By paragraph 23(2) the new lease is to contain such terms as the Tribunal thinks appropriate subject to the minimum requirements in sub-paragraphs (3) to (8). Amongst these is the requirement that the terms imposed must ensure "that the least possible loss and damage is caused by the exercise of the code rights" to those who occupy the land or own interests in it (paragraph 23(5)).

7. The consideration to be determined under paragraph 24 represents the market value of APW's agreement to confer the Code rights. It is to be ascertained by reference to the

amount that a willing buyer would pay a willing seller for the agreement in a transaction at arm's length on the basis of assumptions identified in paragraph 24(3). The most important assumption is that the transaction does not relate to the provision or use of an electronic communications network (the so-called "no-network" assumption).

8. Paragraph 25 confers a power on the Tribunal to order the operator to pay compensation to the site provider for any loss or damage that has been or will be sustained as a result of the exercise of the Code rights.

The Site

9. The Site is located on elevated ground in one corner of a large arable field. It comprises a fenced compound measuring 5.2m x 3.5m (18.2 sq. metres) which is reached by an unsurfaced track following field boundaries over clay ground for about 600 or 800 metres from the B3284. The access is wet in places and the ground is liable to rutting.

10. The Site immediately adjoins land earmarked for the upgrading of the A30 between Chiverton and Carland Cross. Although it is now some distance from the route of the road, when the upgrading is completed the Site will be within a few metres of the new carriageway.

11. The Site currently hosts a 17m monopole, with ground level cabinets to which a supply of electricity is provided by a third party utility supplier. 300 or 400 metres from the Site are some former agricultural buildings now used for storage. The nearest residential building is even further.

12. The Site was let to EE/H3G by Mr Stephenson in 2011 for a term of 13 years expiring on 16 May 2019. Since its contractual expiry the lease has been continued by paragraph 30 of the Code.

13. In July 2019 APW was granted an intermediate lease of the Site and adjoining land by Mr Stephenson for a term of 50 years. It paid a premium of £48,000 by four instalments, the last of which will fall due later this year. The intermediate lease is at a peppercorn rent and demises an area slightly larger than the Site, totalling 10m x 10m, which includes the "set down" or working area over which EE/H3G have easements under their subsisting lease.

14. By clause 11 of APW's intermediate lease it has an unrestricted right to underlet the premises demised to it and it is agreed that it is the appropriate party to grant any new lease under the Code.

15. The intermediate lease imposes no repairing obligation on APW, nor any other onerous requirement except an obligation to make good any damage caused by the exercise of the rights conferred on it.

16. The use of the land demised by the intermediate lease is restricted to "any communications use". APW additionally covenanted not to erect any signs on the land.

17. EE/H3G's lease was contracted out of the security of tenure provisions of the Landlord and Tenant Act 1954 and it is agreed that, having served the necessary notices, it is entitled to seek renewal of the lease under paragraph 33 of the Code.

The issues

18. The parties have reached agreement on many of the terms of the proposed new lease. It is to be for a term of 10 years at the rent determined by the Tribunal, subject to review after 5 years by reference to the retail prices index. It is to include a tenants' break clause exercisable after five years on various contingences. Previous disagreement over access and safety was resolved amicably in the course of the hearing.

19. By the conclusion of the hearing disputes remained over a number of points of principle and various detailed terms of lesser significance. A decision is required about: the form of the rent review clause; control over the introduction of a temporary generator; upgrading and sharing of apparatus; a redevelopment break clause in favour of APW; and some details of EE/H3G's repairing obligation and indemnity covenant.

20. In addition to consideration payable under paragraph 24 of the Code, compensation is claimed under paragraph 25. It is agreed that APW is entitled to receive its reasonable legal and valuation expenses but there is a live issue concerning its entitlement to compensation for its inability to exploit the land demised by the intermediate lease as a result of being required to grant the new lease of the Site to EE/H3G.

Disputed terms

21. I will deal with the disputed terms in the order in which they appear in the draft lease.

Rent reviews

22. The parties agree there should be an RPI rent review on the fifth anniversary of the term commencement date and on every fifth anniversary thereafter; although the new lease will be for a term of only 10 years, the right to a review on the tenth anniversary will allow the rent to be uprated as the lease continues under paragraph 30 of the Code.

23. The only dispute is over whether there should be a further opportunity to review the rent (this time to its open market value) on the occurrence of certain contingencies. One of these is if "the tenant" loses its status as a Code operator (Mr Clarke clarified that this was intended to refer to both joint tenants, and this ambiguity should be cured by an addition to the current drafting). A further trigger sought by APW is where the tenant exercises its right to assign the lease to a non-Code operator. A third triggering occasion was found, on closer examination, to be a sub-set of the second and can be deleted.

24. In principle it seems to me to be appropriate, given the highly restrictive terms on which paragraph 24 requires the rent for the lease to be determined, that in the event the lease is no longer in the hands of a Code operator and no longer contributing to the achievement of the

objectives of the Code, those restrictions should be relaxed by a rent review to current open market value. If the Site would command a higher rent in the hands of someone other than an operator, the Code's policy of promoting improvements in telecommunications for the public benefit does not require that the site provider should be kept out of its fair share. Subject to the modifications I have indicated, APW's proposed amendments to the travelling draft lease should be incorporated in the final version.

Emergency generator

25. The parties agree that EE/H3G should have the right to bring a power generator on to the Site in the event the mains electricity supply fails. APW wishes to have some control over the location and specification of that generator by including a condition that the position of the generator in the set down area should be approved by it and that the generator should cause "no more than minimal noise or disturbance taking account of the surrounding environment". Neither of these qualifications seems appropriate to me.

26. No convincing explanation has been given why APW desires to have a say in the location of the generator in what is already a very small area. Given its location and extent, the suggestion that APW may wish to undertake some activity of its own in the set down area which the presence of a generator might interfere with appears fanciful. Mr Clarke suggested that the location of a generator could be agreed in advance and need not cause delay in an emergency, but APW has not proposed a location and in practice the issue is likely to be considered only when the introduction of a generator becomes necessary. At that point the proposed clause would create an opportunity for APW to control and potentially delay the deployment of the generator in what is likely to be a situation of considerable urgency from EE/H3G's perspective. Such an opportunity would confer no benefit on either party, unless APW sought to extract a fee for giving its consent.

27. As for the suggestion that the noise of the generator should be limited, the proposed restriction is ambiguous and does not provide any measure of what would amount to "more than minimal noise or disturbance taking account of the surrounding environment". A generator, of necessity, is likely to create "more than minimal noise". In this case, the site to which it would be deployed is remote. The only person whom Mr Clarke suggested might be disturbed by a noisy generator was an employee of APW conducting some activity within the set down area. That prospect is, as I have already said, fanciful. It seems equally unlikely that this remote rural location will be the subject of residential development within the term of the lease. The suggested restrictions on the introduction of a generator are therefore disallowed.

Upgrading

28. The claimants' standard form of lease (which forms the starting point for the terms under consideration) includes an unrestricted permission to the tenant to install electronic communications equipment and to renew, upgrade, substitute, add to or remove it. APW wishes to qualify this unrestricted right by introducing a proviso that any such upgrading should have "no adverse impact, or no more than minimal adverse impact, on the appearance of the equipment; and should impose no additional burden on the landlord." APW's

suggested qualification of the right to install new equipment mirrors the minimum rights guaranteed to operators by paragraph 17 of the Code. EE/H3G oppose the introduction of these qualifications.

29. Explaining why equipment rights should be restricted, Mr Clarke referred to the need to balance the interest of the operator in upgrading its equipment with the desire of the site provider not to be subject to adverse visual impact. He referred to what Davis LJ had said in *Cornerstone Telecommunications Infrastructure v Ashloch* [2021] EWCA Civ 90 at [100]:

> "The underlining competing considerations reflect the fundamental dichotomy between the provision of communication services for the public benefit on the one hand and the need for acknowledgment of private property owners' rights on the other hand; and the delicate balance that needs to be struck and maintained between the two."

30. In *On Tower UK Limited v Green* [2022] 4 WLR 27 the Court of Appeal approved the view of the Tribunal that the rights guaranteed by paragraph 17 of the Code are the minimum upgrading terms which it may be appropriate to include in a new agreement, rather than a ceiling on what should be permitted. In that case an operator sought upgrading rights comparable to those sought by EE/H3G in this reference. The site provider resisted the grant of unrestricted rights claiming to fear that the consequence would be excessive traffic noise, security issues and visual intrusion. The Tribunal took those concerns into account but found them to be exaggerated and considered that other terms of the agreement adequately protected the site provider against nuisance and rendered the proposed restrictions unnecessary. It imposed unrestricted upgrading rights and the Court of Appeal held it had been entitled to do so.

31. In this reference APW has taken a different tack. Rather than suggesting that it is likely to be prejudiced by unrestricted upgrading, it suggests instead that the rights are not required and that in practice any upgrading which is likely to take place will be so modest as not to infringe the limitations which it seeks to add to EE/H3G's standard clause. Mr Clarke submitted that the sort of modifications to the mast which were likely to be required in this location would fall within what was permitted by paragraph 17 and APW's proposed clause. The "no more than minimal adverse impact" restriction had to be considered in its proper context. The Site is relatively remote. Telecommunications equipment is rarely a thing of beauty and it would be difficult to suggest that the addition of equipment to an existing mast would have an adverse impact on the appearance of the mast, or the equipment, or the locality unless those additions were very substantial. If the appearance of the equipment was to be changed significantly then it was appropriate, he suggested, that that be prohibited.

32. I accept Mr Clarke's submission that the potential impact of upgrading on the visual appearance of the equipment must be assessed in its proper context. This reference does not concern equipment positioned in a residential neighbourhood or an area of any particular visual sensitivity. There is no evidence to support Mr Clarke's suggestion that the surrounding fields may one day be developed as a residential housing estate and I think that possibility so unlikely that it can be entirely discounted. In those circumstances it may be

academic whether the right to upgrade is qualified by the first paragraph 17 condition that no more than minimal adverse impact on the appearance of the equipment should result. The introduction of the proposed qualification would nevertheless create an issue between the parties which would require to be considered, and might cause dispute, on each occasion when upgrading was in prospect.

33. Whether any particular upgrading would impose an additional burden on APW depends on how the second paragraph 17 condition is interpreted. It could very well be said by APW that an additional burden is imposed on it every time the set down area within its demise is used by EE/H3G in connection with the addition of some new apparatus on the mast. It could be argued that more frequent notifications associated with additional work place an additional administrative burden on APW. If that view was taken the proposed qualification would restrict the scope of the upgrading right very substantially indeed. The view taken by the Tribunal, accepted by the Court of Appeal, in *On Tower* v *Green* was that such a restriction was inappropriate in an agreement for as long as 10 years because of the difficulty it would create for the operator in accommodating advances in technology.

34. The evidence in this case is that planning permission has been obtained for the addition of further equipment on the mast in connection with the enhancement of the existing 4G service and it is certainly possible that further modifications will take place over the lifetime of the new lease. The introduction of a significant qualification on upgrading such as is proposed by APW would, in my view, tend to obstruct the achievement of the objectives of the Code. Moreover, they would be liable to lead to disputes between the parties over whether a particular form of upgrading was or was not within the rights permitted. In view of the fact that APW's only other land in the area is immediately adjacent to the Site and not realistically capable of being used for any activity which would be interfered with by the upgrading of equipment on the mast, the possibility of loss and damage being caused to APW is theoretical only. As a result, paragraph 23(5) does not make it appropriate to impose any additional restriction.

35. For these reasons I conclude that the lease should include unrestricted equipment rights in the form sought by EE/H3G without the modification proposed by APW.

Repair and maintenance

36. The agreed terms include a covenant by EE/H3G to keep the Site and the boundary fencing in good tenantable repair and condition throughout the term and to keep the Site clean and tidy at all times (clause 6.2.1). A separate covenant obliges them to keep the electronic communications apparatus on the Site in good and safe repair and condition. EE/H3G proposes that the first of these obligations (but not the second) should be supplemented by a provision that:

> "If the Landlord gives the Tenant notice of any breach of paragraph 6.2.1, then the Tenant will begin any work needed to remedy that breach as soon as reasonably practicable following receipt of such notice and complete such works to the reasonable satisfaction of the Landlord".

APW suggests this obligation should be modified by replacing the words "as soon as reasonably practicable" with "within 14 days or such other reasonable period agreed between the parties acting reasonably depending on the nature of the breach" and requiring that any works be completed within 28 days of receipt of a notice or such additional reasonable period as may be agreed.

37. Neither party's position on this issue seemed to me to be coherent. Ordinarily one would expect a provision about repairing on notice to be included in a lease as the first step in a default procedure allowing the landlord, in the event of non-compliance, to enter and carry out the notified works itself before recovering the cost of doing so from the defaulting tenant as a debt (a *Jervis v Harris* clause). In that context the notice provision qualified a substantive right being conferred on the landlord. This clause does not serve that purpose, although perhaps it is the remnant of such a clause in an earlier draft. It is unclear how it relates to the unrestricted repairing obligation in clause 6.2.1. If the Site or the boundary fencing are in a state of disrepair the claimants will be in breach of covenant whether APW gives it notice of that disrepair or not. APW will have all the usual remedies for breach of covenant as soon as the breach occurs, without the need first to give notice requiring the claimants to do something about it (unless it wishes to forfeit, in which case a section 146 notice would be required). The proposed clause takes away none of those rights and confers no additional rights on EE/H3G. It therefore seems to me to be entirely pointless.

38. Although the parties are in agreement that some provision referring to repairing on notice should be included in the lease, they are unable to agree what form it should take, and in those circumstances it seems preferable simply to omit the disputed clause altogether.

Indemnity

39. The parties agree that the new lease should include an indemnity by EE/H3G protecting APW against claims or proceedings brought by third parties arising out of the exercise of its rights. EE/H3G want the indemnity to be available only in respect of claims "arising from any negligent act or omission …" on the part of the tenant. APW wants it to extend to claims "arising by reason of any act, negligence, breach or omission of the Tenant…".

40. The indemnity proposed by APW seems to me clearly to be preferable. The underlying principle is that the site provider, which is to receive none of the economic benefits of the use of the site for the exercise of the Code rights (because of the no-network assumption), should not be expected to share to any extent in the risks created by the exercise of those rights. If the exercise of the rights causes damage to a third party which results in a claim being brought against the site provider it is appropriate, in my judgment, that the site provider should be indemnified against that claim by the operator whether the operator has acted negligently or not. I therefore prefer the formulation of the indemnity proposed by APW.

Assignment and sharing

41. The parties agree that EE/H3G should have an unrestricted right to assign the lease to another Code Operator subject to entering into a guarantee agreement in a form first approved by the landlord (acting reasonably). They disagree about the extent of rights to share occupation

or use of the Site. EE/H3G propose a covenant that the tenant may, without the landlord's consent:

> "Share occupation or possession of the Communications Site and/or grant a licence of part of the Communications Site to share occupation or possession of the Communications Site and/or share the use of the Equipment and/or permit the exercise of Rights by or with any Code Operator".

APW wishes the right to share to be limited to the sharing of the tenant's equipment (and not to extend to the sharing of the Site); it also seeks once again to introduce the paragraph 17 conditions. It thus proposes that the tenant should be entitled, without the landlord's consent, to share the use of its equipment with any Code operator provided that such sharing has no adverse impact, or no more than minimal adverse impact, on the appearance of the equipment; and imposes no additional burden on the Landlord.

42. I take the same view of APW's suggested qualification of the right to share by reference to the paragraph 17 conditions as I did in relation to the qualification of the right to upgrade. It seems to me that it would impose a significant limitation on the opportunity to share with other operators and is, in general terms, inconsistent with the achievement of the objects of the Code and liable to bring the parties into conflict. It is not necessary to introduce the condition to ensure that the least possible loss and damage is caused by the exercise of the code rights, because it has not been suggested that sharing in itself is liable to cause any loss or damage.

43. The remaining issue, therefore, is whether the general prohibition on sharing possession or occupation of the Site in clause 8.1 should be qualified, as EE/H3G suggest, to permit sharing of occupation or possession of the Site itself, or, as APW proposes, by permitting only sharing of the equipment on the Site.

44. The Site is not currently shared, except by EE and H3G, and it is common ground that the claimants' business model does not involve offering their sites to other Code operators with a view to sharing. On the other hand, all operators are under obligations to make sites available to each other to facilitate improvements in telecommunications services for the public. The location of the mast is a matter of public record and if another operator wished to install apparatus in the area and approached EE/H3G with a request for sharing rights, they would be obliged to consider making them available.

45. If the right to share was limited to sharing the equipment alone the attraction of the Site to other operators would be reduced. It is likely that any new operator coming to the Site would wish to install their own apparatus, including a cabinet at ground level and antenna on the mast structure itself. No evidence was provided by APW about how the sharing of equipment alone would work in practice. Its real concern was that new Code rights could be obtained by third parties by agreement with EE/H3G which would then bind APW and prejudice its ability to obtain vacant possession of the Site at the end of the term. I do not think this is a realistic fear. Code rights granted by the claimants would not bind APW unless it agreed to be bound (paragraph 10(4)). Mr Clarke suggested that it was unclear whether entering into an agreement which permitted the tenant to share occupation with others would

amount to an agreement by the landlord to be bound by Code rights obtained by the sharer. That seems to me to be an improbable interpretation of paragraph 10(4) of the Code but it can easily be guarded against by including an explicit statement that the landlord does not agree to be bound by any Code rights acquired by sharers. Subject to that qualification the formulation proposed by EE/H3G, permitting them to share occupation of the Site itself, and not simply of the equipment, is to be preferred.

Landlord's redevelopment break clause

46. APW wishes to have a right to terminate the lease after five years if it intends to redevelop all or part of the Site or any neighbouring land acquired during the term or any other land under the ownership or control of Mr Stephenson. EE/H3G resist the introduction of such a clause on the grounds that it would prejudice their ability to recover their investment in the site if their occupation could be brought to an end after only five years.

47. It is not suggested that APW has any proposals for redeveloping the Site or the set down area. Mr Ward's evidence was simply that APW has an associated company whose business is building new telecommunications masts and acting as a wholesale infrastructure provider (although he was aware of only one example of this having taken place). His evidence also touched on the possibility of the Site being used for a wind turbine. Whether either of these suggestions is a realistic possibility in the second half of the 10-year term is rather doubtful but that does not seem to me to be a particularly strong reason for refusing to include a redevelopment break. As EE/H3G themselves point out, in the context of upgrading and sharing, the telecommunications sector is fast moving both technologically and commercially and, seen in that light, the proposed term is relatively long. If in principle the Site were to be capable of being developed for a more profitable use by APW, then it is not the policy of the Code to stand in the way of such a redevelopment. That is apparent from the fact that a prospective site provider may rely on an intention to redevelop all or part of the land over which an operator seeks Code rights as a ground of opposition to an application under paragraph 20 (see paragraph 20(4)). An existing site provider may also rely on an intention to redevelop as a ground of opposition to the renewal of Code rights (paragraph 31(4)(c)). In circumstances where the site provider is not entitled to share in the economic benefits realised by the use of its land for telecommunications purposes, it would be unfair and inappropriate for it to be prevented from making an alternative use of its land by the imposition of long-term Code rights which cannot be terminated. The fact that the inclusion of a redevelopment break clause may introduce a degree of uncertainty in the investment decisions made by an operator does not seem to me to be a reason for refusing such a clause.

48. As Mr Clarke also pointed out, the inclusion of a redevelopment break clause will not prevent the operator from applying to the Tribunal for a new lease, putting the site provider to proof of its intention to redevelop the Site if it wished to resist such an application. In *Adams v Green* [1978] 2 EGLR 46, a case under the Landlord and Tenant Act 1954, the Court of Appeal noted that the need to prove the statutory ground of opposition in order to remove the tenant from the site ameliorated the impact of a redevelopment break clause because it "protected the tenant from the effect of any notice not given *bona fide* for the purpose for which it is intended."

49. The new lease will therefore include a landlord's redevelopment break clause exercisable on or after the fifth year of the term.

Vacant possession

50. The parties disagreed whether, at the end of the term, EE/H3G should be required to hand the Site back to APW with vacant possession. It appeared likely, in the course of submissions, that their disagreement would be capable of being resolved by the introduction of words making it clear that the obligation did not apply for so long as the lease was continued after the end of the term by paragraph 30 of the Code. The inclusion of an obligation to give vacant possession (thereby requiring that third parties sharers of the site should remove themselves and their apparatus) and the proposed qualification of that obligation where the agreement is subject to statutory continuation are both clearly appropriate.

Rent

51. The agreement to be imposed in this case is to be a lease, and the "consideration" provided for by paragraph 24 of the Code will therefore be a rent.

52. On behalf of EE/H3G, Mr Stott considered that the rent for the lease which a willing landlord would agree with a willing tenant, on the assumptions required by paragraph 24, would be £625 a year. That figure assumed that there was no electricity or fibre supply to the Site, and that these would be provided by the incoming tenant. Mr Stott did not think that any of the disputed terms, including the redevelopment break clause, would make any difference to rental value. He made use of two different valuation approaches. He first valued the Site by the comparative method, using recent Code transactions as evidence. He then adopted the structured approach first identified in *Vodafone Ltd v Hanover Capital Ltd* [2020] EW Misc 18 (CC) which arrives at a valuation by attributing a value to each of the factors which would be likely to influence parties negotiating a letting on the paragraph 24 assumptions (a negotiation which never occurs in reality).

53. In explaining his comparative valuation Mr Stott identified two lettings under the Code as being of particular relevance. He was cross-examined at some length on the details of those transactions, his knowledge of the background to them, and the extent to which they were comparable to the Site. In his report, Mr Stott nevertheless acknowledged that there was some doubt as to the utility of the comparative approach when undertaking a valuation under paragraph 24. In their joint statement the experts repeated their concern over the usefulness of comparables in the exercise they were undertaking.

54. Unnecessary time and expense has been incurred in this reference in attempting to value the Site by reference to real-world telecommunications transactions. All the transactions to which reference was made were lettings of land for the sole purpose of its use in connection with the provision of a telecommunications network. But the object of paragraph 24 of the Code is to ensure that value attributable to the use of the subject land for that purpose is excluded from consideration.

55. The Tribunal has on at least three previous occasions commented on the difficulties which the no-network assumption creates for a valuer wishing to make use of the comparative method. The first case to consider the paragraph 24 valuation hypothesis was *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd* [2019] UKUT 107 (LC), although in the event it was not necessary for the Tribunal to undertake a valuation of its own. At [114], the Tribunal suggested that market evidence of rents agreed for the grant of Code rights might be of value if it could be shown that the parties had had regard to the statutory assumptions when negotiating those rents or if a coherent basis for adjustment could be suggested to enable so much of the value as was referable to the intended use of the land for network purposes to be disregarded.

56. In *Cornerstone Telecommunications Infrastructure Ltd v London and Quadrant Housing Trust* [2020] UKUT 282 (LC) the Tribunal adopted the three-stage structured approach to valuation which had been utilised by the County Court in *Vodafone v Hanover Capital* and did not value by reference to the comparable method, although it did refer to a number of comparable transactions which had been provided in evidence.

57. More recently, in *EE Ltd and Hutchison 3G UK Ltd* v *Affinity Water Ltd* [2022] UKUT 08 (LC), at [35], the Tribunal contrasted the structured approach and the use of market transactions:

> "The adoption by the Tribunal of the rather cumbersome and artificial three-stage approach to valuation under paragraph 24 of the Code, rather than the more familiar comparative method based on market evidence, is driven by the requirement to make the "no-network" assumption. It would be attractive to be able to by-pass the artificiality of this approach and to refer directly to market transactions, but there are obvious dangers in doing so. Lettings on Code terms in which the rights being conferred on the tenant do not relate to the provision or use of an electronic communications network are unknown in reality. Consensual Code agreements are invariably entered into so that a site can be used in connection with an operator's network; there are routinely accompanied by capital payments which are often concealed from view, protected by confidentiality agreements and, when they are disclosed, are difficult to analyse; they do not carry statutory compensation rights and rarely include a comprehensive contractual alternative. It therefore remains to be seen whether credible adjustments are possible to account for the many differences between consensual and imposed transactions to enable the total sums agreed as rents to be used as direct comparables when the Tribunal determines consideration under paragraph 24. Where a three-stage assessment has been undertaken and both parties have attributed a specific value to a particular type of burden or benefit, their agreement on that component may nevertheless provide a useful reference point."

58. I take this opportunity to reiterate what was said in *Affinity Water*. Evidence of real-world transactions for telecommunications sites is not promising material on which to base a valuation under paragraph 24. The real market is not the same as, or even similar to, the hypothetical open market which paragraph 24 requires us to assume. The unwillingness of site providers to enter into transactions is an important feature of the real world but is not a

feature of the market which paragraph 24 assumes. The commercial purpose which underlies real-world transactions is specifically to be ignored in identifying the factors which will influence the hypothetical transaction.

59. Mr Stott suggested that where it could be seen that parties with professional representation had agreed a rent with the statutory assumptions in mind that should enable the transaction to be relied on as useful evidence. The Tribunal itself floated that possibility in *London and Quadrant*. But as the Tribunal sees more and more of these valuations, it is increasingly apparent that reliance on evidence of negotiated Code transactions cannot be justified. Whatever method parties have adopted in negotiating the rent for use of land in connection with a telecommunications network, they are negotiating with that purpose in mind and the value they arrive at is referable to some degree to use for that purpose. Yet the essence of paragraph 24 is that that same purpose must be disregarded. Often the rents for such transactions represent only part of the financial terms agreed between the parties, and Mr Stott himself argued that the additional "commercial payments" were heavily influenced by the commercial pressures experienced by operators. But those commercial pressures are all associated with the provision of a network and it is unrealistic to suggest that the same pressures have no influence on the annual rent. Mr Stott did not suggest any way in which the influence of the true network purpose of real-world transactions could be identified and excluded, nor has any other valuer. The *Hanover Capital* structured approach addresses that problem by placing very little reliance on real-world transactions (the only exception so far allowed has been where parties to a comparable letting attributed a specific value to the security arrangements at a site). Mr Stott suggested that it was therefore safe to rely on rents negotiated within that structured framework, but there is no need to do so since a site specific assessment can be made instead. If negotiating parties have adopted the *Hanover Capital* approach in respect of a different site, it is hard to see why referring to their agreement will improve on a three-stage assessment focussing on characteristics of the subject site.

60. Mr Stott also drew some comfort from the fact that the County Court had made use of the comparative method in *EE v Morris* [2022] EW Misc 1 (CC). But *Morris* was a case under the Landlord and Tenant Act 1954, not under the Code. Section 34 of the 1954 Act does not require that the commercial purpose of the transaction be ignored and there is therefore no difficulty in using real world transactional evidence as raw material for the valuation exercise. Paragraph 24 of the Code, on the other hand, prohibits consideration of the use for which the site will actually be put and requires the valuer to imagine a transaction which would never take place in reality, for a purpose which is unspecified other than that it is not in connection with a telecommunications network.

61. In future, therefore, parties should avoid the expense of preparing evidence of real-world telecommunications transactions and analysis on the comparative method where the relevant assessment is being undertaken under paragraph 24 of the Code. Where it is said that a particular site has an alternative use value which is more than nominal then a comparable assessment based on transactions for that alternative use will of course be valuable. Thus, for example, where a Code agreement is sought in respect of land which is currently used as a commercial carpark, comparative evidence about the value of parking spaces will be highly relevant but evidence of what other parties have agreed for sites with no alternative use value for lettings on Code terms are of no assistance.

62. Mr Peat did not rely on a comparative valuation but preferred to base his assessment on the structured approach. Before the rent could be determined he considered that it was necessary to reach a conclusion on the weight which should be given to the covenant in APW's intermediate lease restricting the use of the land demised (including the Site) to "any communications use". If, as a matter of law, that restriction had to be disregarded for the purpose of a valuation under paragraph 24 Mr Peat considered that the rent should be £1,750 a year. This figure took account of value attributable to alternative uses of the Site. If, on the other hand, the restriction was to be taken into account and meant that the Site could be used only for a communications use, Mr Peat considered that a rent of £1,000 a year would be agreed. That was because the combined effect of the contractual restriction on use and the statutory no-network assumption that the Site would be used for a purpose that did not relate to the provision or use of an electronic communications network would be to eliminate any value attributable to alternative uses.

63. Mr Peat was also of the view that an additional annual sum should be paid as compensation under paragraph 25 of the Code to reflect the loss to APW of the ability to use its land to erect a mast of its own and to operate as a wholesale infrastructure provider. The precise amount of that compensation depended on the amount of the rent payable under paragraph 24, but the end result in each case was to produce an aggregate rent and compensation sum totalling £7,500 a year.

64. Mr Stott considered that the Site had no alterative letting value other than as agricultural land and he attributed a nominal £50 at stage one of his *Hanover Capital* valuation, to which he added £600 at stage 2 (taken directly from the Tribunal's decision in *On Tower v Green*). He considered that the use of the Site would not impose any significant burdens on the site provider (which he assumed owned no other land than was demised to APW by its intermediate lease) and so added nothing at stage 3.

65. Mr Peat referred to a variety of circumstances in which small parcels of land in rural locations were let at rents which he felt were indicative of the sort of return a landowner would expect to receive on a letting negotiated for a non-telecommunications use. These included the sites of allotments, pylons, Met masts, glamping sites, open storage, wind turbines, or advertising sites. He acknowledged that most of these uses were not appropriate to the Site, although he thought use for signage was viable in view of the road scheme which would place the Site immediately adjacent to the route of the A30. In his experience informal advertising sites (for example for a pub or storage facility) would be likely to yield an annual return to the site provider of £1,500 and he adopted that figure as his alternative use value for the Site. He reduced that figure to nil if the site could be used only for communications purposes.

66. It was common ground that the *Tulk v Moxhay* principle meant that the covenant in the intermediate lease restricting the use of the land demised to APW to communications uses would bind EE/H3G and any other sublessee of APW. Mr Clarke submitted that the "communications uses" which were the only uses permitted by the intermediate lease overlapped with use for the purpose of a telecommunications network, the value of which was required to be ignored by the statutory no-network assumption. He suggested that it would be impossible to give effect to the statutory valuation hypothesis without disregarding the contractual restriction on use and referred to *Harbinger Capital Partners v Caldwell*

[2013] EWCA Civ 942, where Lewison LJ had explained (in relation to a different statutory valuation assumption) that:

> "Giving effect to the hypothesis may require a legal impediment to the implementation of the hypothesis to be ignored or treated as overridden; but only to the extent necessary to enable the hypothesis to be effective."

67. I do not think it is necessary to ignore the effect of the contractual restriction on use which exists in reality. That is for two reasons.

68. First, as Mr Radley-Gardner submitted, a communications use is potentially a wider use than use solely for the purpose of providing an electronic communications network; he referred to communications sites used by police forces or the coast guard as examples of permissible uses which were not related to the provision of a network regulated by the Code. The application of the no-network assumption will not necessarily exclude the whole of the value of the Site for a communications use. Secondly, paragraph 24 requires the assumption of a letting of the Site and it is irrelevant that, in practice, there might be nobody prepared to take the site on the assumed terms (including a bar on network use). It does not follow that because a site has only a very limited use, a person who wants to take it for that use will be prepared to pay only a nominal sum for it. There is therefore no reason in principle why the Site cannot be valued having regard both to the contractual restriction on its use and to the no-network assumption. The position might be different if the intermediate lease limited the use of the Site to use in connection with the provision of an electronic communications network, but it does not, and it is not necessary to decide that issue.

69. Mr Peat's view of the sort of rent that would be available for the letting of an informal advertising site was not supported by any specific examples. There is currently no planning permission for such a use, nor has the road which it would depend on yet been constructed. It is questionable whether it would be permissible under the restriction on use in the intermediate lease. None of these considerations mean that the rent payable for such a use would not feature in negotiations, as I agree with Mr Peat that a site provider would look at examples of different uses to gauge what might realistically be charged for a one-off letting of a small parcel of land such as this Site, but I do not think great weight would be given to it.

70. As often happens in these cases although both expert witnesses have conscientiously complied with their duties to the Tribunal, the positions they have taken are at the limits of what is credible and more closely reflect what might be expected to be the starting position in a friendly negotiation rather than the consensus point. The values they suggested for the various *Hanover Capital* stages were not based on their experience of comparable transactions (because there are none) or on an analysis of evidence, but largely used the Tribunal's decision in *On Tower v Green* as a reference point, adding or subtracting as they considered justifiable. That case was also concerned with a rural mast site and, at [142], the Tribunal suggested that in the absence of special features a rural site which was not in close proximity to housing might expect to let on paragraph 24 assumptions at a rent of £750. In *Cornerstone v Fotheringham* LTS/ECC/2019/06 the Lands Tribunal for Scotland assessed a rent of £600 a year for a comparable rural site but added an additional £1,500 in the year

of installation to reflect short term additional inconvenience to the site provider. In this case the parties have agreed that the rent should be the same in the year of installation and in subsequent years (subject to RPI indexation after five years) and any temporary inconvenience associated with establishing the Site (which, on Mr Stott's case would include the installation of an electricity supply to the Site) has to be accounted for in the rent.

71. There is nothing particularly unusual about this example of a rural mast site. Looked at in the round, there is no reason to depart from the figure which the Tribunal identified in *On Tower v Green* as the letting value, on the paragraph 24 assumptions, of an unexceptional rural site remote from any housing. I therefore determine that the rent under the new lease will be £750 a year.

Compensation

72. The final issue is whether any assessment should be made at this stage of compensation payable to APW under paragraph 25(1) of the Code. Compensation is payable where a site provider or other relevant person has sustained or will sustain loss or damage as a result of the exercise of the Code rights imposed by the Tribunal. Where the Tribunal is satisfied that loss or damage will be sustained it has a discretion whether to quantify that loss at the time it makes its order imposing the Code rights, or to wait until a later date (paragraph 25(2)). One head of loss which is potentially recoverable where an agreement has been imposed under paragraph 20, or an order has been made for the removal of apparatus under paragraph 44(5), is compensation under paragraph 84(2)(b) for "diminution in the value of the land".

73. In this case Mr Peat suggested that compensation should be awarded at this stage for a diminution in the value of the land demised to APW by reason of its inability to make profitable use of that land following the imposition of the agreement. The use which he suggested APW could otherwise have made of its land was for the provision of its own telecommunications mast, through a subsidiary or group company which traded as an infrastructure provider. He estimated that the annual value foregone by APW as a result of being unable to erect and let its own mast was £7,500.

74. As far as such a claim for compensation relates to the Site itself, it is clearly unsustainable. In *EE v Islington LBC* [2019] UKUT 53 (LC), at [124] to [135], the Tribunal considered a claim for compensation to reflect what was said to be a diminution in the value of a local authority's residential tower block as a result of the imposition of a Code agreement. The Tribunal rejected that claim, explaining at [132]-[133]:

> "132. … Consideration is a one-off or periodic payment representing the value of the right to use the land for the term, on the terms which have been agreed or imposed; it is, as the Law Commission put it, the price for the grant of the right (albeit a price determined on assumptions which disregard the purpose which gives the right most of its value). Compensation, on the other hand, is recompense for loss or damage suffered by the site provider as a consequence of the agreement reached or imposed; it is the monetary equivalent of the loss or damage sustained. A site provider which allows its land to be occupied and which receives in return the market value of that occupation on a periodic basis

> does not suffer loss or damage from being kept out of the use of the land or from being deprived of the opportunity to let it to someone else.
>
> 133. We acknowledge that, in practice, the valuation assumptions required to be made when assessing the amount of consideration payable prevent the site provider from realising the true value of its land. In reality, the site provider is prevented from realising that portion of the value of its land which is attributable to its suitability for use in connection with the provision of a telecommunications network. But that does not give rise to a loss for which compensation is payable under paragraph 84. For the purpose of the Code, including for the purpose of determining whether a compensatable loss has been sustained, consideration determined in accordance with paragraph 23 must be taken to be the market value of the rights conferred."

75. The same reasoning applies in this case to any alternative use which APW might wish to make of the Site. It will receive consideration at the level prescribed by Parliament as representing the market value of the land, and cannot additionally claim to have suffered a loss in being unable to exploit the Site for some alternative use.

76. The compensation claim in this case goes a little further than the claim rejected in EE v Islington, in that the Site in respect of which Code rights are to be granted is not the whole of the land on which it might in theory be possible for APW to build a mast of its own. In response to my invitation to counsel to consider whether this made any difference, both parties took the opportunity to make further written submissions after the hearing.

77. Both counsel focussed their submissions on paragraph 85 of the Code, which allows compensation to be claimed for injurious affection to neighbouring land. It provides by sub-paragraphs (1) and (2) that where an operator exercises a right conferred by or in accordance with any provision of Parts 2 to 9 of the Code, compensation is payable by the operator under section 10 of the Compulsory Purchase Act 1965 (compensation for injurious affection to neighbouring land) as if that section applied in relation to injury caused by the exercise of such a right as it applies in relation to injury caused by the execution of works on land that has been compulsorily acquired. No such claim was considered in *EE v Islington* (see [115]).

78. Nor was such a claim articulated in the statements of case or properly explored in the evidence presented to the Tribunal in this reference. Mr Peat did not distinguish between the Site and the rest of APW's land (comprising the set-down area) and he did not have in mind the conditions which have to be satisfied for a claim under section 10 of the 1965 Act to succeed. He also acknowledged in cross-examination that he had made a number of assumptions based on limited evidence available to him concerning the costs of development and profitability of a mast in the hands of an infrastructure provider. Mr Radley-Gardner's first submission was therefore based on a procedural objection to the suggested claim being advanced at all.

79. The parties' written submissions disclosed some significant issues of fact and law which would have to be resolved before a claim under paragraph 85 could succeed, and it is clear to me that it would be neither fair nor feasible to resolve them all on the evidence which has

been provided. Nor is there any immediate need to do so. There is no evidence that APW has been prevented from implementing any intention to develop a mast of its own on the land, and the fact that an associated company has done so on other sites does not begin to prove a recoverable loss. Had APW intended to develop its own mast on the land it would have been in a position to object to the imposition of new rights in favour of EE/H3G, but it has not done so. Because the new lease is to include a redevelopment break clause, APW will also have the right to bring it to an end and oppose any request for renewal if it has serious plans of its own to make use of the land which would be incapable of being implemented. If, despite the redevelopment break clause, the Code rights now to be conferred on EE/H3G do have the effect of preventing APW from implementing a genuine scheme of development of its own, then it will be in a position in future to make a properly formulated claim for compensation. To determine the suggestion of a claim at this stage could only result in its dismissal. The better course is to make no determination and to leave APW to make such further compensation claim as may be advised at a time of its choosing.

80. The final issue for consideration concerns compensation for reasonable legal and valuation expenses incurred by APW which are claimed under paragraph 84(2) of the Code. These were not quantified in evidence and were to be the subject of further discussion between the parties. The parties will no doubt inform the Tribunal of the outcome of those discussions.

Martin Rodger QC,

Deputy Chamber President

13 July 2022

Right of appeal

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