UPPER TRIBUNAL (LANDS CHAMBER)

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Location: Royal Courts of Justice

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE – INTERIM CODE RIGHTS – multi-skilled visit – non-intrusive inspection – site provider requiring the right to reject the operator's risk assessment and method statements – potential criminal liability under the Health and Safety at Work Act 1974 – requirements for terms under paragraph 23 of the Code - transaction costs

A NOTICE OF REFERENCE UNDER PARAGRAPH 26 OF SCHEDULE 3A TO THE COMMUNICATIONS ACT 2003

BETWEEN:

CORNERSTONE TELECOMMUNICATIONS INFRASTRUCTURE LIMITED

Claimant

-and-

THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF HACKNEY

Respondent

Re: Tradescant House,
Frampton Park Road,
London, E9 7NS

Judge Elizabeth Cooke
Heard on: 25 July 2022
Judgment Date:

Harriet Holmes for the claimant, instructed by Osborne Clarke LLP
David Holland QC and Harry Vann for the respondent, instructed by Freeths LLP

The following cases are referred to in this decision:

On Tower Limited v AP Wireless II (UK) Limited [2022] UKUT 152 (LC)

Introduction

1. Tradescant House is an 11-storey residential block in the ownership of the respondent, the London Borough of Hackney. The claimant, Cornerstone Telecommunications Infrastructure Limited, seeks interim rights under Schedule 3A to the Communications Act 2003 (known as the Electronic Communications Code) to inspect the rooftop in order to find out whether it is suitable for the installation of electronic communications equipment. The inspection visit will take place on a single day and is primarily a visual inspection that will not intrude upon the fabric of the building.

2. The respondent does not object to the claimant having those interim rights but it resists some of the terms that the claimant seeks to have the Tribunal impose upon it. The reference is therefore a sequel to the Tribunal's recent decision in *On Tower Limited v AP Wireless II (UK) Limited* [2022] UKUT 152 (LC) ("*Audley House*") because the principal bone of contention is responsibility for the safety of the site – but in very different circumstances from those that pertained to *Audley House*. Readers of this decision will find it helpful first to peruse *Audley House.*

3. The claimant was represented at the hearing by Miss Harriet Holmes of counsel, and the respondent by David Holland QC and Mr Harry Vann of counsel, and I am grateful to them all.

4. In the paragraphs that follow I summarise the legal background, which is not in dispute, and then the factual situation, before considering in turn the various terms in dispute.

The legal background: telecommunications

5. The legal background is, for those familiar with the Electronic Communications Code, straightforward. The Code regulates the legal relationship between mobile telephone operators (whether providing a phone signal or physical infrastructure) and the landowners on whose land telecommunications equipment has to be placed. The Code provides protection for landowners while seeking to protect "the public interest in access to a choice of high quality electronic communications services", as paragraph 21 puts it.

6. Code rights are conferred upon operators by agreement with the occupier of land (paragraph 9), and an agreement may be imposed by an order of the Upper Tribunal (paragraph 20); in either case the operator has considerable security of tenure. However, paragraph 26 makes provision for interim Code rights, which can only be created by the Upper Tribunal imposing an agreement upon the parties and do not carry that security. The test that an operator must satisfy in order for the Tribunal to impose an agreement conferring Code rights under paragraph 20 is set out in paragraph 21 of the Code; for interim rights the operator need only show that it has a "good arguable case" that that test is satisfied. In the present case it is conceded that the operator has such a case and the respondent does not oppose the imposition of an interim Code agreement.

7. Interim Code rights were designed to enable an operator to get on to land quickly pending the resolution of all the terms of the Code agreement, but they can also be conferred in the absence of an application under paragraph 20. Therefore they are often sought, as here, as the basis for the operator to carry out the investigation that is needed before deciding whether or not to seek the right to place equipment on the site.

8. Such an investigation is known as a "multi-skilled visit" or MSV. It may be a simple visual inspection, or it may involve intrusive works that penetrate the fabric of a building.

9. Whether Code rights are sought under paragraph 20 or paragraph 26, the terms on which they are conferred are determined by the Tribunal in light of the provisions of the Code. Paragraph 23 refers to an order under paragraph 20 but is equally applicable to an agreement for interim rights (paragraph 26(4)(3)), and it provides so far as relevant:

> "(1) An order under paragraph 20 may impose an agreement which gives effect to the code right sought by the operator with such modifications as the court thinks appropriate.
>
> (2) An order under paragraph 20 must require the agreement to contain such terms as the court thinks appropriate, subject to sub-paragraphs (3) to (8).
>
> (3) The terms of the agreement must include terms as to the payment of consideration by the operator to the relevant person for the relevant person's agreement to confer or be bound by the code right (as the case may be).
>
> …
>
> (5) The terms of the agreement must include the terms the court thinks appropriate for ensuring that the least possible loss and damage is caused by the exercise of the code right to persons who—
>
> (a) occupy the land in question,
>
> (b) own interests in that land, or
>
> (c) are from time to time on that land."

The legal background: health and safety

10. Sections 3 and 4 of the Health and Safety at Work Act 1974 create duties, the breach of which can give rise to criminal liability. Section 3 provides:

> "(1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.
> (2) It shall be the duty of every self-employed person who conducts an undertaking of a prescribed description to conduct the undertaking in such a way

> as to ensure, so far as is reasonably practicable, that he and other persons (not being his employees) who may be affected thereby are not thereby exposed to risks to their health or safety."

11. Manifestly the respondent's undertaking includes the management of Tradescant House and it is under a duty to ensure that its employees, its tenants and its visitors are not exposed to risks to their health and safety; equally the claimant is under a duty to the same range of people in the conduct of the MSV.

12. Section 4(2), however is relevant to the respondent, which is in control of the rooftop and of access to it:

> "(2) It shall be the duty of each person who has, to any extent, control of premises to which this section applies or of the means of access thereto or egress therefrom or of any plant or substance in such premises to take such measures as it is reasonable for a person in his position to take to ensure, so far as is reasonably practicable, that the premises, all means of access thereto or egress therefrom available for use by persons using the premises, and any plant or substance in the premises or, as the case may be, provided for use there, is or are safe and without risks to health."

13. Criminal liability under both sections arises from failure to take reasonably practicable steps to eliminate or reduce risks; there is no need for injury to have occurred.

14. The respondent is also responsible for fire safety in the building, under the Regulatory Reform (Fire Safety) Order 2005, and is the "dutyholder" under the Control of Asbestos Regulations 2012; I say more about asbestos precautions later.

The factual background

15. There are currently 14 telecommunications sites on the respondent's buildings in the London Borough of Hackney. The respondent uses Hub Telecoms Consultancy Limited ("Hub Telecoms") to co-ordinate its dealings with the various operators involved.

16. The claimant is an infrastructure provider, co-owned by Vantage Towers (formerly Vodafone) and by VM O2 (formerly Telefonica) which companies use its infrastructure as well as third parties such as EE Limited, Hutchison 3G Limited and Airwave Solutions Limited. It needs to consider whether it can use the roof of Tradescant House as a site for antennae to replace a site nearby which is likely to have to be decommissioned.

17. Tradescant House is, as I said, a multi-storey block. The flats within it are let to residential tenants; it is not in dispute that the London Borough of Hackney has significant problems in terms of poverty, drug-abuse and anti-social behaviour and the respondent is keenly aware of its responsibilities as a social landlord and of the vulnerability of its tenants (and of the difficult behaviour of some of them). So Tradescant House can be a difficult place to work. Access to the roof is through the common parts of the block and then through the water tank room and the lift motor room and then by ladder to the roof itself. Hazards include smashed

ceiling lights with jagged glass and the risk of head injury because of a low ceiling, rubbish in the water tank room, trip hazards, unprotected raised skylights on the roof, and litter on the roof.

18. In October 2020 the claimant undertook an MSV on the site. More accurately, it arranged for one to be undertaken. Telecommunications operators use a great many contractors for their day-to-day operations, and in this case the visit was undertaken by a consultant, Mono. The visit was carried out pursuant to an agreement made with the respondent which was not imposed by the Tribunal and therefore did not confer Code rights. I have been provided with an undated copy of that agreement; I refer to it as the "2020 MSV agreement".

19. Some months later Mono went into liquidation. In place of Mono the claimant appointed Waldon to assess the suitability of Tradescant House. Waldon wanted to conduct its own MSV rather than assume liability on the basis of an inspection carried out by others, and the claimant therefore asked the respondent if the 2020 MSV agreement could be extended to allow another visit. The respondent asked the claimant to use a form of agreement that it had drafted on the basis of terms agreed with MBNL, another infrastructure provider with which it had had dealings. The claimant was not willing to use that form of agreement and was unhappy with some of the terms, and therefore in July 2021 it served notices under paragraph 26 of the Code and subsequently issued the present reference on 7 February 2022.

20. As is usual in Code references, the Tribunal listed a case management hearing on 8 April 2022 with a direction that the application for interim rights would be determined on that occasion if that proved to be possible.

21. It did not prove to be possible to do that, because there were too many terms in dispute for the Tribunal to hear the parties' arguments in the half day listed for the hearing and there was a conflict of factual evidence. Instead, I heard argument on some of the terms and gave directions for the matter to be re-listed and for further evidence to be served. With the parties' agreement I gave an indication as to how I was minded to decide the issues relating to the terms about which I heard argument; I stressed that this was an indication and not a judgment and that I would hear argument about all the terms at the eventual hearing if it did not prove possible to settle the matter before then.

22. Central to the terms of the guidance I gave on 8 April 2022 was the fact that the draft agreement annexed to the notices, on the basis of which the reference was brought, made provision both for a non-intrusive survey and an "intrusive survey", but did not say what sort of intrusive works the claimant wanted to do, nor how long it would take. Counsel (not Miss Holmes on that occasion) when pressed by me about this point was without instructions. I said that insofar as the claimant was unhappy with the guidance I had given it might reflect that the reason for that was its having applied for the right to carry out entirely unspecified intrusive works.

23. On 19 April 2022 the claimant told the respondent that it no longer wanted to carry out intrusive works at this stage and sought only a non-intrusive MSV. As a result of that the draft agreement before me now is very different from what I was looking at in April. I therefore make a fresh start on the terms that are now in dispute, without regard to anything

I said about them (in particular about the approval of risk assessments and method statements for the visit) at the hearing in April.

24. It is now clear what the claimant wants to do. Two visits are planned. One will be a visual inspection, attended by a Network Radio Planner, an Acquisition Surveyor, a design engineer, a panoramic photographer, a transmission surveyor and possibly a fibre supplier; I take that list from the witness statement of Mr Richard Haughey, the claimant's Health and Safety Environment Supplier Manager. None of them will be employees of the claimant.

25. Prior to that visit, and on the same day, there will be a separate visit to carry out an asbestos survey. This is a requirement of Waldon's before it will conduct an MSV; it comprises a visual survey and also a taking of samples by wetting surfaces and scratching them. The respondent queried whether such a survey could be described as "non-intrusive", and certainly it goes further than simply a visual inspection, but the important thing is that what the claimant wants to do is clear. Risk assessments and method statements for the visual inspection and for the asbestos survey were exhibited to Mr Haughey's statement.

The terms in dispute

26. Many of the terms of the draft agreement are not in dispute. The agreement makes the usual provision for the claimant to have access to the site for the purposes of the MSV, on 5 working days' notice and in working hours; it contains covenants by the claimant to cause as little disturbance or inconvenience to the respondent and its tenants as is reasonably practicable, not to install anything on the site, to make good physical damage, not to permit legal nuisances or injury to the respondent or others in the vicinity, to carry out the MSV with professional skill, care and diligence and to ensure that those attending hold the requisite certificates.

27. By the time of the hearing only six terms of the interim Code agreement remained in dispute. The hearing and the cross-examination of witnesses was largely concerned with what I will call the "approval condition", namely that the visit shall not take place until the claimant's risk assessment and method statement for the visit are approved by the respondent, with approval not to be unreasonably withheld. So I begin with that term and then move on to the less fundamental issues.

28. One point that I do not have to decide is the fact that the MSV will be accompanied by the respondent's electrical clerk of works. That has been agreed by the parties following my remarks in April.

Health and safety: the approval condition

The terms required by each party

29. Prior to the visit the claimant will complete a risk assessment and a method statement, referred to collectively as the "RAMS" for the visit. It is willing to submit it to the respondent for comment, and for the agreement to contain an obligation for it to pay due regard to the

respondent's comments, but once such comments are made it seeks to be entitled (after giving due consideration to them) to go ahead and carry out the MSV, whether or not the RAMS is amended in response to the respondent's comments and whether or not the respondent is then content with the RAMS.

30. The respondent seeks a term that provides for it to see each iteration of the RAMS and to refuse access until it has approved the RAMS.

31. The issue can be summarised as the question: who has the last word about the adequacy of the RAMS and, therefore, about whether the visit can go ahead?

32. In practical terms, the issue is very unlikely to matter. Prior to the 2020 MSV an employee of Mono sent the RAMS to Mr Goodacre (the director of Hub Telecoms), and once his comments and queries had been dealt with in a few email exchanges, and an updated RAMS had been supplied, access was given (the correspondence was exhibited to the witness statement made by Miss Helen Main, the claimant's Code and Acquisition Lead). No-one had a problem with the process. The respondent has an agreement with MBNL which includes the approval condition. Mr Goodacre told the Tribunal that in many years of practice he has never had an instance of an operator objecting to the site provider's requirements.

33. Nevertheless both parties regard it as important to have the last word on the RAMS.

34. For the claimant, the central issue is control of its own operations. Miss Main explained that the claimant and its contractors have the relevant expertise to prepare suitable RAMS for an MSV. Site providers do not. In this case the site provider employs a telecommunications agent, who – in the claimant's view - may not understand the operator's requirements or the best way to safely manage the visit. Furthermore, since the draft agreement requires the claimant to pay a fee for the respondent's agent to consider the RAMS, the claimant is concerned about the cost of paying a third-party agent to duplicate work already competently carried out by the claimant and its contractors. And the claimant is concerned about the delay involved in waiting for the approval of the RAMS.

35. As to delay, Miss Main gave extensive – but second-hand – evidence of the difficulties that MBNL is said to have had in getting access to another site where it had agreed that the respondent would have the right to refuse access until its RAMS were approved. I make no finding about that evidence; it is of very little relevance since it is about a different property with its own problems, and involves different parties. Even if MBNL has experienced delay, that does not mean that the claimant will do so. Nevertheless the concern about potential delay is understandable.

36. Mr Richard Haughey, the claimant's Health and Safety Quality and Environment Supplier Manager, gave evidence about the condition of the site – which he regards as not unusually hazardous – and about the safety of the claimant's practices. He expressed concern about the claimant's ability to carry out its work if the site provider has to approve the RAMS, although he could provide no examples of unreasonable refusal of approval by the respondent.

37. Furthermore, the claimant is concerned that the RAMS will be rejected for trivial reasons. We saw an example of this at the hearing. It was pointed out to Mr Haughey in cross-examination that the RAMS for the asbestos survey indicates that just one contractor will attend to carry it out, whereas there should be two; but email correspondence indicates that in fact there will be two people present even though only one is mentioned on the RAMS. The procedure is therefore safe. But Mr Holland QC was quick to point out that nevertheless the RAMS is incorrect. So it is, but that does not mean that the procedure proposed is unsafe in this instance. That concern then creates another: the respondent proposes that the claimant pay a fee of £160 every time it submits a RAMS for approval, and the claimant is understandably concerned that it will not only have to respond to trivial complaints but will also have to pay for doing so.

38. The respondent's concerns, on the other hand, are twofold. It is concerned about the safety of the site for its residents, visitors and employees; and it is also very anxious about the potential for criminal liability under the Health and Safety at Work Act 1974 ("the 1974 Act").

39. Mr Goodacre has over 20 years' experience in the telecommunications industry. He does not have a qualification in health and safety, but has many years' experience of examining RAMS. Part of his role is the approval or rejection of RAMS for visits to telecommunications sites by the various operators with whom the respondent has agreements; when he does so he works together with the respondent's health and safety team. Mr Jankowski is Head of Resident Safety for the respondent and gave evidence at the hearing; Ms Donna Bryce, former Head of Resident Safety, made a witness statement but was not able to attend the hearing. Ms Bryce's evidence was in any event of limited usefulness since her statement was made on 1 April 2022 when the claimant still proposed unspecified intrusive works, and Ms Bryce's concerns include the need to compensate the residents if their parking spaces are blocked, and the need for extra precautions if a crane is used. None of that is now relevant.

40. Both Mr Goodacre and Mr Jankowski were anxious to make it clear that the respondent is concerned about health and safety. It has no wish to oppose the MSV or telecommunications operators, and is keen for its residents to have access to mobile phone technology. I accept that evidence and I reject the suggestion made by counsel at the first case management hearing that the respondent is raising objections to the claimant's terms in bad faith as a way of extracting a ransom payment. I have no doubt that the respondent's concerns for its residents, as well as for its own employees and for visiting contractors, is genuine. It also has a great fear of being found criminally liable under the health and safety legislation, and I have no doubt that that fear is genuine.

41. Mr Goodacre was asked in cross-examination why he was not confident in the claimant's own health and safety systems and in the claimant's judgment about the RAMS. Mr Goodacre drew attention to occasions when the claimant's contractors have made mistakes or have been careless about health and safety. I do not need to go through those instances in detail; conspicuous among them was the time when the claimant's contractors installed equipment on the wrong roof (or, rather, above the wrong building when the two buildings shared a roof), and the occasion when Mr Goodacre paid a surprise visit to check on two contractors who were found to be working on the roof without safety precautions such as

attachment to the building. Mr Goodacre readily agreed that the approval of RAMS would not have prevented the occurrence of these and other errors, because contractors do not always read the RAMS for the visit – although when he accompanied the first MSV on this site in October 2020 he went through the RAMS with them.

42. What the evidence of Mr Goodacre and Mr Jankowski demonstrates is not – and I think was not intended to be - that the claimant or any other operator is, in general, not competent in terms of health and safety, but that errors are made on sites and cannot be wholly eliminated. That being the case, the respondent regards it as important to do all it reasonably can both to prevent risk (even though the behaviour of individual contractors on particular occasions is outside its control) and also to protect itself from liability.

The relevance of negotiated agreements

43. Both parties have referred me to previous negotiated agreements in support of their present position, and I need to dispose of those arguments briefly before turning to relevant material.

44. The respondent says that the claimant was content to submit its RAMS for approval before the 2020 MSV, in accordance with the terms of the 2020 MSV agreement; it is said that there is no reason why the claimant should have changed its position. The respondent also refers to its agreement with MBNL, where the operator has agreed to an approval condition; it asks why the claimant's requirements are different so that it cannot make the same agreement.

45. The claimant, on the other hand, says that the 2020 MSV agreement did not require the respondent's approval of the RAMS before the visit, and Miss Main in cross-examination insisted that the correspondence exhibited to her statement was a process of clarification and did not amount to the respondent approving the RAMS before access was granted.

46. The copy of the 2020 MSV agreement that was provided to the Tribunal is unsigned and undated but I assume that the copy is identical to the actual agreement. It required the claimant to comply with the respondent's access procedure, which was set out in a Schedule to the agreement. The procedure states that any request for access must include "Site and task specific Risk Assessments and Method Statements", and states that the respondent's agent will respond to the request stating whether access has been confirmed or denied. What the correspondence shows is an exchange of emails over a few days, with Mono sending a copy of the RAMS to Hub Telecoms, updating the RAMS in light of the further information supplied, passing on copies of contractors' training and safety certificates, and finally once there were no outstanding queries access being granted. It is obvious, although not stated in so many words, that the purpose of the email exchange was to get access for the MSV, and that access was granted once the RAMS and other information was satisfactory. The MSV agreement did not state in so many words that the RAMS had to be approved, but the requirement to follow the access procedure made it inevitable that that was what had to happen. Neither party appears to have had any problem with that, and the process took only a few days.

47. But that makes no difference to the Tribunal's decision. Terms in consensual agreements are included or rejected for all sorts of reasons; concessions may be made for speed, terms may be horse-traded, experience between particular parties may mean that one or the other insists on particular terms that it would not otherwise seek. None of that is relevant to the Tribunal's decision about the terms that are appropriate, and that are required to minimise loss and damage to the respondent.

48. That means that operators and site providers can reach agreements on whatever basis is convenient to them, without fear that they have then compromised their position when terms are in dispute before the Tribunal.

49. That is also the case where terms are imposed by the Tribunal by way of a consent order. The fact that the Tribunal has on a previous occasion by consent imposed an agreement that contained, or did not contain, an approval condition does not mean that its hands are tied, still less that the Tribunal's hands are tied, on a future occasion when that term is in dispute. Where the term is in dispute the decision will be taken on the basis of what the Code provides, without regard to what these parties or other parties have agreed on previous occasions.

Health and safety legislation: is the approval condition necessary to protect the respondent from criminal liability?

50. The respondent's duties under sections 3 and 4 of the 1974 Act are to take all reasonably practicable steps to eliminate or minimise risk to its employees and visitors. I begin by asking whether the imposition of the approval condition will in itself cause the respondent to be criminally liable for breach of its duty under the 1974 Act by virtue of its allowing the claimant's contractors on to the site without having had the last word about the RAMS.

51. This takes us back to the subject matter of *Audley House*. It will be recalled that that reference concerned the renewal of a telecommunications lease for a number of ground level mast sites, one in a car park, two others in storage and haulage yards. What they had in common was that the site provider was a long leaseholder of the site alone, and not of surrounding land, and had no involvement in the sites. The site provider was also an infrastructure provider on other sites, but on these sites it had no role and no more than an occasional presence by way of inspection. Its concern was that because it was a telecommunications operator, the activities carried out by the claimant at Audley House and the other sites concerned in the *Audley House* decision would be regarded by the Health and Safety Executive as part of its undertaking, so that inevitably it had to protect itself from liability under section 3 of the 1974 Act by duplicating every aspect of the claimant's health and safety processes. Furthermore it regarded itself as being in control of the access to the sites so that, again, it had to protect itself from liability under section 3.

52. At paragraph 2 of *Audley House* the Tribunal (Judge Cooke and Mr Mark Higgin FRICS) said:

> "Landowners are obliged to suffer the presence of equipment and conduits on their land for the benefit of us all, but the safety of that equipment and the management

> of any risk that it poses for the public remains the responsibility of those who operate it."

53. In *Audley House* it was agreed that the site provider would grant exclusive possession of the three sites to the claimant. The sites were held not to be part of its undertaking, so that no liability for what went on there could arise under section 4 of the 1974 Act. Furthermore, the agreement imposed by the Tribunal gave the site provider no control over what the operator did on the access to the sites and therefore it could not be liable for risks created there by the operator.

54. The situation in the present reference is very different. What goes on on the roof of Tradescant House is very much part of the respondent's undertaking as a landlord, and it retains full control of the access to the roof. It is of course liable for unsafe practice that it could prevent.

55. I come to actual unsafe practice shortly. But I start with the question whether the approval condition is required on the basis that the respondent will be in breach of its duty under the 1974 Act if the agreement does not contain the approval condition, so that it has to allow the claimant's contractors on to the site without having approved the RAMS. That would happen where it had commented on the first draft and the claimant had considered its comments, because without the approval condition the terms of the agreement would give the respondent no right to approve or reject the second version of the RAMS.

56. Mr Goodacre and Mr Jankowski thought, if I have understood them correctly, that it would in that case be in breach of its duty. Mr Goodacre said in cross-examination:

> "My client has a responsibility for anyone passing through the common parts and those other contractors and tenants, so my client would not be discharging its duty if they simply allowed operators to walk on without having given approval for those works to carry on."

57. I asked Mr Vann how the respondent could be civilly or criminally liable for allowing contractors on to the site without having given final approval to the RAMS in a case where the terms imposed by the Tribunal prevented it from doing so, and he agreed that it could not. If the Tribunal refuses to impose the approval condition, so that the respondent has the right to comment on the first version of the RAMS but the claimant then has the last word, that will not in itself make the respondent criminally liable under the 1974 Act.

Practical reasons for imposing the approval condition

58. Nevertheless I am going to impose the approval condition for two practical reasons.

59. The first is that it is appropriate to do so (see paragraph 23(1) of the Code, paragraph 9 above) in circumstances where – in sharp contrast to the position in *Audley House* – the respondent is in a much better position to assess the risks on the site than is the claimant.

60. This is an MSV. Waldon has not been on this site before. In writing the RAMS it is dependent upon the site provider to make it aware of site specific risks, and the site provider is better placed than the operator or its agent to assess whether the RAMS takes appropriate steps to meet those risks. The position would be very different if this were an established site being operated by the claimant so that the claimant was familiar with the building and the site-specific hazards. It would be also be very different if the claimant was visiting in order to install or maintain its apparatus; it is clearly important that telecommunications operators be in control of their own undertaking, and the operator is better placed than the site provider to assess the risks arising from work that involves electronic communications apparatus. But here the operator is simply walking onto the site to look and take photographs, and carrying out an asbestos survey. No risks specific to the claimant's undertaking are going to be created. If one party has to have the last word about the RAMS then that should be the one that knows more about the risks, which in these circumstances is the site provider.

61. The second reason is that, in the unlikely event that there is a real disagreement about safety, an MSV agreement with the approval condition is less likely to cause less loss and damage to the respondent than the same agreement without that condition.

62. We can test the situation as follows, using the extreme hypothetical examples that featured in argument at the hearing.

63. First imagine, unlikely though it is, that the respondent required a safety measure that the claimant regarded as positively unsafe. In that event the claimant would simply not carry out the MSV. This is not a case where the claimant has to visit in order to maintain or repair equipment; there will be a cost and there will be delay and inconvenience, but no risk of injury will arise from this disagreement.

64. Second, imagine a situation where – again, unlikely though it is – the claimant's RAMS indicated a plan that the respondent thought was positively unsafe and created a real danger to life, the respondent pointed this out, and the claimant regarded the respondent's concerns as unfounded and refused to amend the RAMS. I stress that this is unlikely and no-one had any evidence of anything like this having happened. But of course the possibility of this happening is at the heart of the respondent's concerns. In that situation the respondent cannot walk away. If it does nothing there is a risk of an accident actually happening.

65. Would the respondent be at risk of criminal liability if it did nothing? Would the Health and Safety Executive ("HSE") expect the respondent to breach the terms of the agreement so and refuse access in such a case? Mr Vann could not point to any instance where HSE had prosecuted a person for failing to commit a civil wrong, but in his view it could not be ruled out. I regard that as highly unlikely. But the concern here is a real one about danger to life, and if the respondent has such a concern then the fact that someone else is going to be liable is not going to be a comfort. Its options would be to refuse access, in breach of the agreement; or to seek an injunction to prevent access; or to ask the Tribunal to change the terms of the agreement; or perhaps to ask a member of HSE to attend the MSV. These are difficult choices.

66. So in the event of a real disagreement about the safety of the claimant's RAMS, if the claimant is faced with a demand that it regards as creating a risk it can simply not carry out the visit (pending resolution of the disagreement). No-one will then be put at risk. But if the respondent is unable to refuse access in a situation that it thinks creates a danger to life – unlikely as that is - then the outcome is far worse. Either people will be put at risk or the respondent will have to incur the expense and stress of litigation.

67. Therefore paragraph 23(5) of the Code requires that I impose the approval condition upon the parties. The respondent's drafting of clause 7 of the draft agreement will prevail (save that in clause 7.1 the claimant is to be required to provide "RAMS for the relevant MSV"; the words "reasonable and appropriate" are to be deleted because they are unnecessary). The claimant's concerns about delay are met by the timing provisions in the respondent's draft, which sets out deadlines for the respondent to provide comments. The definitions section of the agreement will include the respondent's definition of "Approved RAMS".

68. As I said above (paragraph 37), the claimant is understandably concerned about the rejection of a RAMS for trivial reasons. The approval condition is qualified by the requirement that approval is not to be unreasonably withheld; and my impression was that Mr Goodacre was not in business of box-ticking or of finding fault for the sake of it and was likely to focus on real risk rather than on formalistic defects. Some of the claimant's concerns can be met by rejection of the respondent's demand that a fresh fee is paid for every iteration of the RAMS, as I explain below. And if the respondent were to use the approval condition as a way of preventing the MSV from taking place for reasons other than safety then the claimant will be able to enforce the terms of the agreement on the basis that approval is being unreasonably withheld.

The claimant's asbestos survey

69. That last point prompts me to add a comment about the asbestos survey, which is to take place just before the visual survey visit in order to meet Waldon's requirements. It will be recalled that there is a separate RAMS for the asbestos survey.

70. In his skeleton argument Mr Vann pointed out, and I accept, that the respondent is the dutyholder under the Control of Asbestos Regulations 2012. Regulation 4(3) states:

> "In order to manage the risk from asbestos in non-domestic premises, the dutyholder must ensure that a suitable and sufficient assessment is carried out as to whether asbestos is or is liable to be present in the premises."

71. The respondent's duties are further described in the Approved Code of Practice ("ACOP"), an HSE document; breach of ACOP is presumed, pursuant to section 17 of the 1974 Act, to be a breach of the law. The respondent's duty is non-delegable. ACOP identifies two types of asbestos survey, a management survey, which is non-intrusive and suitable for day-to-day occupation of the building (and which is therefore the type of survey that the respondent regularly carries out) and a refurbishment and demolition survey which is required if demolition or refurbishment is planned. The survey proposed here is neither; it goes a little

further than a management survey in that it is proposed to scratch surfaces, but it is not a full refurbishment survey.

72. It is not usual to do an asbestos survey before an MSV; nevertheless the claimant requires it in this instance. In his skeleton argument Mr Vann expressed concern that the survey that is planned is not adequate, because it is not a full refurbishment survey, and that the respondent will be liable if electronic communications equipment is installed on the basis of an inadequate survey; at the hearing he also expressed the view that the RAMS could be rejected on the basis that the survey is unnecessary for the MSV.

73. It seems to me that Mr Vann was mingling two separate points here. On the one hand, the claimant is not proposing to carry out, on the basis of this very basic survey, any works that require a full refurbishment asbestos survey. If in due course it proposes to do so then the respondent will have cause for concern but that is not what is proposed. The survey that is proposed is purely for the MSV. Accordingly there is no reason for concern on the part of the respondent that it may be liable on the basis that works are being done after an inadequate survey.

74. If on the other hand the respondent proposes to reject the RAMS for the asbestos survey on the basis that the survey is not needed for the MSV, then I would regard that as an unreasonable withholding of consent. Mr Goodacre and Mr Jankowski in their evidence gave no indication that they proposed to reject the RAMS for the asbestos survey on that basis, but Mr Vann's submissions made it seem to be a possibility. If it is, then the respondent is now on notice that such a rejection would be problematic. The approval condition is about the assessment of risk; it is not for the respondent to question the purpose of a survey, so long as the survey is safe.

75. I now turn to the other five terms in dispute.

The provision of documents by the respondent to the claimant

76. As I observed above, the claimant is unfamiliar with the site and is dependent upon the respondent for the provision of the information it needs before the MSV. Paragraph 3.2 of the draft agreement provides for the respondent to supply documents in the following categories:

- "health and safety documentation relating to the MSV Site;
- all roof guarantees, including all applicable terms and conditions and plans showing the parts of the Grantor's Property covered by such guarantees, relating to the MSV Site;
- Risk assessment and/or details of known risks at the Grantor's Property;
- Structural designs, reports, drawings and/or structural calculations relating to any buildings on the Grantor's Property;

- Fire Risks Assessments;

- Asbestos Reports or Surveys and any method statement for managing any known asbestos; and

- a copy of the Electrical Installation Certificate or, if one has been undertaken, the most recent Electrical Installation Condition Report for the Grantor's Property (to include the Report(s) for each main circuit within the Grantor's Property, but excluding the Reports for any individual residential unit or dwelling within the Grantor's Property)."

77. Some of those documents are needed for the MSV itself because they will form the basis of the risk assessment. Some of them may, if they contain the information the claimant needs, save the parties the trouble of there having to be an intrusive MSV later. Some of them may be more relevant to the claimant's longer-term plans, if in due course it makes any.

78. The claimant wants the respondent to provide all these documents within 21 days of the completion of the agreement, save for any that do not exist or that are not in the respondent's possession nor such that the respondent can reasonably obtain them.

79. The respondent wants instead to be obliged to provide such of them as the claimant reasonably requires, within 28 days of the request. Concern was expressed as to whether the respondent would otherwise have an unlimited obligation to provide all possible documents including for example expired insurance policies.

80. Since the claimant does not know what the respondent has, it would be difficult for it to be sure of what it reasonably required. Since the parties' interests here are identical, namely that the claimant should be able to carry out a safe MSV and should have as much information as possible now rather than having to trouble the respondent later, it is very difficult to see why the respondent requires the claimant to make a specific request. The respondent is best placed to know what the claimant needs. Since these are documents that relate to a single building they should not be too difficult to find, and it seems to me to be best for both parties if the respondent sorts them out straight away rather than waiting for a request.

81. The agreement shall require the respondent to provide to the claimant, within 21 days of the date of the MSV agreement, such of the documents listed above as the respondent thinks the claimant needs in order to carry out the MSV and to assess the suitability of the site for its future use, provided the documents are in its possession or it can reasonably obtain them.

82. No doubt if there are documents that the respondent does not provide, that the claimant wants, it will ask, and no doubt the respondent will be as helpful as it reasonably can. I am not going to add any further provisions to that effect because there should be no need to do so where, as here, it is in both parties' interests that the claimant has what it needs.

Fees payable by the claimant to the respondent

83. Paragraph 1.5 of the draft agreement provides for the claimant to pay for the provision of documents, and for the consideration of its RAMS, by the respondent.

84. The claimant is willing to pay £50 for each class of documents (that is, each of the bullet-pointed items in paragraph 76 above), capped at £350. The respondent wants the claimant to pay £50 for each document.

85. The point of the payment is to cover the respondent's costs of retrieving the document and copying it. The Tribunal has pointed out in previous cases the importance of trying to quantify the likely costs of the MSV to the respondent rather than leaving an argument for later. £50 per document seems to me excessive, given the time it takes to scan a document, and a charge per document is going to lead to arguments about what is a single document.

86. The agreement will provide for a payment of £500 by the claimant to cover its costs of procuring and providing the documents described in paragraph 3.2.

87. The claimant is willing to pay £100 in respect of the respondent's costs of reviewing each set of RAMS (it will be recalled that there are separate RAMS for the asbestos survey and the MSV itself). The respondent seeks a payment of £160 for each version of the RAMS that it gets to comment on. I have decided that the respondent shall be entitled to refuse access until it has approved the RAMS and so it may have to see more than one version, although I expect that it will be rare for there to be more than two in view of the undoubted competence both of the claimant's contractors' health and safety teams in producing RAMS and of the respondent and Mr Goodacre in making their requirements clear. The idea that the claimant has to pay each time it resubmits a RAMS is obviously conducive to bad feeling; and it is disproportionate for the claimant to have to pay the full fee again every time it makes a minor amendment.

88. The agreement shall provide for the claimant to make a single payment of £250 to the respondent to cover the respondent's costs of reviewing the RAMS both for the asbestos survey and for the MSV.

The costs of enforcement

89. The respondent wants the agreement to include the following provision at paragraph 1.7.1:

> "The Operator shall pay to the Grantor on demand the further reasonable costs and disbursements of the Grantor including any solicitors' or other professionals' costs and disbursements properly incurred in connection with the enforcement of the obligations on the part of the Operator."

90. The claimant says that the costs of litigation should be dealt with in the usual way in litigation, and I agree; the difficulty with this clause is that it overrides the usual process of the assessment of the reasonableness of costs. The clause will not be included.

The provision of warranties and guarantees

91. The agreement requires the claimant not to vitiate any insurance policy of the respondent or any warranties relevant to the site provided that copies of the warranties and guarantees are provided to the claimant before it has access to the property. The claimant wants the respondent to be obliged to provide those copies at least 72 hours in advance of access. The respondent wants to be obliged to provide them in advance of access and where reasonably practicable 72 hours beforehand. It does not want to lose the protection of the clause if it has trouble getting a document to the claimant in time.

92. Whether that clause is in any event necessary is not clear to me. The claimant is obliged in any case to compensate the respondent for loss and damage caused to it by the claimant, including for example the loss of a guarantee or the vitiation of an insurance policy.

93. But since the parties have agreed that the clause is to be included in one form or the other, the respondent's wording should prevail. I have no doubt that it will do its best to provide the relevant warranties and guarantees because, again, the parties' interests are identical; neither party wants a guarantee to be rendered void by the claimant's visit, because if that happens the claimant will have to compensate the respondent and the respondent will have to go to the trouble of requiring it to do so. The respondent should not be deprived of the protection of the clause in the event that it has trouble finding a document.

Transaction costs

94. Finally we come to transaction costs. The MSV, and the process of negotiation leading up to it, should not leave the respondent out of pocket; it is well-established that it can expect the claimant to reimburse the legal and professional fees that it has occurred in the negotiation of the agreement.

95. Where there has been litigation it is necessary for the respondent to strip out its transaction costs from its litigation costs (which may or may not be the subject of an order for costs in the litigation), and there are obvious difficulties in doing this. The respondent claims £29,580. The bill of costs records the fee-earners concerned, three of whom are litigation fee-earners. The charges for their work should be subtracted from the total – and I note that that will reduce the bill considerably, since litigation fee-earners are said to have spent nearly 50 hours working on the MSV, as well as letters and telephone calls. The remaining figure will be paid by the claimant to the respondent as transaction costs. Those costs are going to be higher than is normally seen for an MSV, because this has been an unusually fraught and indeed hostile negotiation. The respondent has also filed its bill for litigation costs; in the event that it makes an application for costs it may wish to re-draw its bill for litigation costs to include the charges removed from the transaction costs.

Conclusion

96. The present proceedings have presented a sharp contrast to the sensible arrangements made for the MSV in October 2020. Points of principle have been insisted upon in the context of this brief and straightforward MSV, with the result that the two RAMS for the visit have been litigated over, at eye-watering cost, instead of being agreed in a few email exchanges.

97. I understand that a further and intrusive MSV may not be needed if the drawings that the respondent may provide (see paragraph 76 above) give the claimant the information it needs. If, however, an intrusive MSV is required I express the hope that the parties will be able to agree terms with the assistance of this decision.

Judge Elizabeth Cooke

5 August 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.