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Case No: LC-2020-55

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Royal Courts of Justice,
London WC2A

29 July 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE – NEW AGREEMENT – renewal of lease of existing site – landlord's break clause – indemnity – consideration for code rights over green field site – paras 23, 24, 34, Sch.3A, Communications Act 2003

BETWEEN:

EE LIMITED (1)
HUTCHISON 3G UK LIMITED (2)

Claimants

-and-

AP WIRELESS II (UK) LIMITED

Respondent

Telecommunications site at Vache Farm,
Amersham Road,
Chalfont St Giles,
Buckinghamshire

Martin Rodger KC, Deputy Chamber President and
Mrs Diane Martin MRICS FAAV

11-12 June 2024

Oliver Radley-Gardner KC, instructed by Winckworth Sherwood LLP, for the claimants
Toby Watkin KC and *Wayne Clark*, instructed by Eversheds Sutherland (International) LLP, for the respondent

The following cases are referred to in this decision:

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

Cornerstone Telecommunications Infrastructure Ltd v Fothringham LTS/ECC/2020/007

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

EE Ltd and another v The Mayor and Burgesses of the London Borough of Islington [2019] UKUT 53 (LC)

EE Ltd and Hutchison 3G UK Ltd v Affinity Water Ltd [2022] UKUT 8 (LC)

EE Ltd and Hutchinson 3G UK Ltd v Stephenson and another [2022] UKUT 180 (LC)

Fisher v Taylors Furnishing Stores Ltd [1965] 2 QB 78

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

On Tower UK Ltd v JH and FW Green Ltd [2020] UKUT 348 (LC)

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

Introduction

1. This reference concerns the renewal under Part 5 of the Electronic Communications Code of the lease of a greenfield telecommunications site at Vache Farm near Chalfont St Giles in Buckinghamshire ("the Site"). It provides the Tribunal with its first opportunity since *EE Ltd and Hutchison 3G UK Ltd v Affinity Water Ltd* [2022] UKUT 8 (LC) ("*Affinity*") and *EE Ltd and Hutchinson 3G UK Ltd v Stephenson and another* [2022] UKUT 180 (LC) ("*Stephenson")* to determine the appropriate rent or consideration for such a site under paragraph 24 of the Code.

2. The previous lease of the Site was granted by the owners of Vache Farm in 2005 for a term of 15 years and was assigned to the claimants ("EE/H3G") in 2015. In 2018 the respondent, AP Wireless II (UK) Ltd ("APW"), acquired an overriding lease of the Site for a term of 50 years and became EE/H3G's immediate landlord. The rights conferred by the previous occupational lease continued under the provisions of the Code after the expiry of the contractual term in May 2020.

3. EE/H3G's reference to the Tribunal seeking new code rights was made in December 2020 but was stayed pending appeals in other cases which have now been resolved. The principle that a new lease should be granted is no longer in dispute and most terms have been agreed between the parties. It is agreed that the new lease will be for ten years with a break exercisable by the operator after five years. There will be a rent review by reference to RPI also after five years. The only significant terms remaining in dispute are the amount of the rent and whether the site provider, APW, should have the right to terminate the lease for redevelopment.

4. At the hearing of the reference EE/H3G were represented by Mr Oliver Radley-Gardner KC and APW by Mr Toby Watkin KC and Mr Wayne Clark. Evidence concerning operational matters was given by Mr Noel Lester MRICS, a regional property manager at MBNL (a joint venture company between EE and H3G), Mr David Powell, a regional asset manager for APW, and Mr Nicholas Ward, a regional director of asset management at APW. Valuation evidence for EE/H3G was given by Mr Colin Cottage MRICS, Managing Director of Valuation and Compensation at Ardent Management Limited and for APW by Mr Paul Williams MRICS, Head of Telecoms at Carter Jonas LLP.

The Site

5. The Site is in a rural location, approximately 450m north of Chalfont St Giles, within an area designated as green belt and an Area of Outstanding Natural Beauty. It comprises a fenced compound of 96 m sq (16m x 6m), located at the northern boundary of a grass field, adjacent to an area of woodland.

6. The original lease plans show the access to the site at the northern boundary of the field, taken from a hard surface private road which leads on to several residential properties. That access point is over 300m from the public highway. In practice that access is no longer in general use as the installation of an electronic gate across the private road, closer to the highway, has created difficulties for contractors seeking entry to the Site. In October 2021, the freeholder arranged for an alternative access route, from a point on the private road which is only 123m from the highway; this *de facto* route involves passing through a padlocked gate into a stable yard and then onwards across the length of the field, in which horses graze, to the Site. Access is usually taken on foot or with a four-wheel-drive vehicle. APW's records show that in 2023 access requests were made 33 times.

7. The Site has three phase power and two separate fibre connections. The equipment on site is a 20 m high lattice steel mast, standing on concrete, to which are fixed a number of antennae and microwave dishes. At ground level several cabins house electricity and telecommunications apparatus. The Site is used for electronic communications networks operated by EE/H3G and Vodafone; Virgin Media O2 also have a presence.

The disputed terms

8. 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. 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)).

9. The parties agree that APW or any successor as landlord should have the right to terminate the new lease on giving 18 months' notice. They disagree on the circumstances in which that right should be exercisable.

10. APW proposes that the right of termination should be available whenever:

    (a) the Landlord desires to redevelop all or part of the Communications Site or any neighbouring land or any land under the ownership or control of the Superior Landlord;
    or
    (b) the test under paragraph 21 of the Code for the imposition of the agreement on the Landlord is no longer met.

11. EE/H3G object to APW's formulation and propose a redevelopment break clause exercisable in the following more limited circumstances:

    > If the Landlord can show a settled intention to Develop the Landlord's Property or any neighbouring land acquired during the Term by the Landlord (or any group company of the Landlord) or any land under the ownership or control of the Superior Landlord and could not reasonably Develop the Landlord's Property without obtaining possession of the Communications Site and the other parts of the Landlord's Property on which the Equipment is situated the Landlord may determine this Lease on or after the fifth anniversary of the Term Commencement Date.

12. In both of these formulations capitalised words are defined terms. Most are self-evident but, for the time being, the "Communications Site" (meaning the Site demised by the lease) and the "Landlord's Property" refer to the same land, since APW owns no other land at Vache Farm. The word "Develop" is given a restrictive meaning in EE/H3G's proposed lease and excludes development for the purpose of providing or operating an electronic communications network, or electronic communications services, or the provision of an infrastructure system.

13. The differences between the parties on redevelopment are therefore: (a) whether the opportunity to terminate the lease should be available to APW where it intends to redevelop the Site in connection with an electronic communications use; (b) whether the right should be exercisable at any time or only after five years; (c) whether APW should be required merely to "desire" to redevelop, or whether it should demonstrate a "settled

intention"; (d) whether it should be required to demonstrate that it could not reasonably develop without obtaining possession of the Communications Site; and (e) whether, additionally, APW should have the right to terminate the lease because the test under paragraph 21 of the Code for the imposition of an agreement is no longer met.

14. The background to this dispute is that APW is the UK subsidiary of Radius Global Infrastructure Inc, an international investor in mobile mast site leases. APW is not a Code operator, but a separate Radius subsidiary, Icon Tower Infrastructure Ltd, is registered with Ofcom as an operator. Icon's business model includes constructing telecommunications infrastructure of its own (masts or towers) to replace and upgrade the infrastructure of other operators on existing sites at which Icon or APW will have acquired intermediate leases. Operators at the existing sites will then be invited to relocate their equipment to Icon's new mast or tower.

15. The key to this aspect of Icon's business model is that the rights which Icon intends to grant to operators to mount their equipment on its masts or towers will not be code rights, and the charges it will collect for those rights will be determined by the market and not by the Code. That is because code rights are rights in relation to land (paragraph 3 of the Code) but "land" is defined in the Code as not including electronic communications apparatus (paragraph 108). Masts and towers are electronic communications apparatus so the right to install equipment on one is not a code right and the price which may be charged for it is not regulated by the Code.

16. In his submissions Mr Radley-Gardner KC explained that EE/H3G did not wish the break to be available to allow APW, Icon or another group company to develop a duplicate mast on the Site. He gave two reasons, namely, that the operators required a minimum term to justify the expenditure on the site after renewal to maintain service, and that they did not wish to change from being the occupiers of land under the Code to becoming the occupiers of a mast which would put them outside the Code (which they presume is APW's intention in seeking the opportunity to redevelop). He also suggested that it was not the policy of the Code to create the opportunity for "blue on blue" disputes (by which he meant disputes between participants in the telecoms sector); instead, the policy of the Code was to facilitate the roll out of telecommunications networks, which required stability.

17. Mr Watkin KC pointed out (as Mr Lester had confirmed in his evidence) that EE/H3G make use of masts and towers belonging to other mast companies on whose infrastructure they do not enjoy Code rights. Other operators (Vodafone and Virgin Media O2) have apparatus on EE/H3G's tower at the Site and will be present on terms which are unprotected by the Code. The model which APW and Icon operate is not novel and is not inconsistent with the Code. Nor was there any justification for prohibiting redevelopment where the site provider intended to replace the operator's mast with one of its own. Mr Watkin KC referred to *Fisher v. Taylors Furnishings Stores Ltd* [1965] 2 QB 78, in which, at page 91, Parker LJ had said that a landlord which intended to occupy business premises itself, but which could not satisfy section 30(1)(g), Landlord and Tenant Act 1954 because it had not owned the premises for the required period of five years, could nevertheless rely on section 30(1)(f) if it also intended to carry out redevelopment. There was no reason for treating site providers under the Code any less favourably.

18. The parties have been over this ground before, including in *Stephenson.* The relevant dispute in that case was whether, on a lease renewal under the Code, it was appropriate in principle to include a landlord's redevelopment break clause (as APW proposed and

EE/H3G resisted). Although it was concerned with the issue of principle, the Tribunal's response provides guidance on the points of detail which are now in issue. At paragraph [47], the Tribunal said this:

> "[T]he telecommunications sector is fast moving both technologically and commercially and, seen in that light, the proposed [10 year] 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."

19. At paragraph [48] the Tribunal also referred to the fact that after notice had been given terminating the lease, the operator would be entitled to apply to the Tribunal for the grant of a new lease and the site provider would then be required to prove its intention to redevelop to the satisfaction of the Tribunal if it wished to resist such an application.

20. Although the security of tenure provided by the Code is modelled to some extent on the Landlord and Tenant Act 1954, it is important not to take that analogy too far. The grounds on which a landlord may object to the renewal of a business tenancy under section 30(1) of the 1954 Act are broader than those allowed by paragraph 31(4) of the Code. In particular, a site provider cannot rely on an intention to carry on its own business from the site as a ground of opposition. Under the Code, in the absence of some default on the part of the operator, the operator's right of renewal will in practice be limited only by an owner's intention to redevelop the site. Mr Watkin KC relied on observations by Vos J in *Humber Oil Terminals Trustee Limited v Associated British Ports* [2011] L&TR 27, Ch at paragraph [143] but those observations were made in the context of the 1954 Act and are not directly applicable.

21. Nevertheless, as *Stephenson* shows, it is not the policy of the Code to stand in the way of the redevelopment of sites. Provided the intention is genuine, we can see no reason why a different approach should be taken where the intended redevelopment is for a telecommunications use, even if the net result is that a particular operator may in future enjoy less favourable terms at that site than if its previous lease of the land had continued. That is consistent with the approach taken in the 1954 Act cases to which we were referred. If, at the end of the full ten year term of the new lease, APW opposed a renewal because it intended to redevelop the Site with a new mast, EE/H3G would not be entitled to complain that the new mast would be owned and managed by APW or an associated company. All that would matter would be whether APW could prove the necessary intention.

22. The real issue is therefore whether APW should have the right to terminate the new lease for redevelopment sooner than at the end of the term in ten years' time. The answer

involves balancing the need of the operator for a reasonable period of security, with the entitlement of the site provider to have the opportunity to redevelop the site if it can obtain the necessary consents and can persuade the Tribunal at the appropriate time that its intention to do so is genuine. In answering the question we must also have regard to the direction in paragraph 23(5) of the Code that the terms of the new lease should ensure the least possible loss and damage is caused by the exercise of the Code rights conferred by the new lease to those who own interests in the Site.

23. As to the need for a period of secure occupation, the Site has been in operation for well over 15 years and we assume the initial investment in establishing it has long since been recouped. Although a general ambition to upgrade to 5G was referred to by Mr Lester, we were not presented with evidence of any particular intention to invest in the Site in the short term and the only costs which he referred to were those of EE/H3G decommissioning their own apparatus and relocating to an APW mast if the break became exercisable. Mr Radley-Gardner KC referred in his written argument to maintaining the service rather than extending or improving it (although no doubt occasional upgrading will occur). Whether the unquantified costs of decommissioning the current site are incurred in five years rather than ten years does not seem to us to be a matter of particular significance.

24. We also infer from EE/H3G's own proposal for a five year break clause that a minimum term of that duration would satisfy its own business requirements.

25. Taking these matters into account we can see no good reason to limit the break clause agreed in principle so that it is exercisable only if the intended redevelopment is for some purpose other than for a telecommunications use. On the other hand, perpetual dispute should not be encouraged, and a reasonable period should be allowed before any redevelopment opportunity can be exploited. There was no evidence that APW, or Icon, will be in a position to implement a redevelopment scheme at this Site in the short term. Termination should therefore not be permitted earlier than the fifth anniversary of the term and to provide a degree of certainty for both parties it should be exercisable by not less than 18 months' notice expiring on that date or on any subsequent anniversary (rather than at any time, as proposed by APW).

26. The debate over whether APW should be required merely to "desire" to redevelop, or whether it should demonstrate a "settled intention" is a hangover from a previous version of EE/H3G's proposal which would have required proof of the relevant intention when notice was given to terminate the lease, as well as at the time any dispute was heard by the Tribunal. There is no reason why a site provider should be required to demonstrate the appropriate resolve by reference to more than one date and, as the relevant date for the purpose of a determination under paragraph 31(4)(c)) will be the date of hearing of the application, that is the date which should be selected. Given that choice, there is no reason why the contractual language should not mirror the language of the Code by referring to intention rather than desire, which would be required to be proved at the date of the hearing to satisfy both the statutory and the contractual requirement; the only other qualification which we consider appropriate is that the intended redevelopment must be one which could not reasonably be undertaken while the new lease continues.

27. We are very much less attracted to the second limb of APW's suggested break clause, which would give it the right to terminate the new lease if "the test under paragraph 21 of the Code for the imposition of the agreement on the Landlord is no longer met". That test (so far as it is applicable to the imposition or renewal of agreements) requires two

conditions to be met: first, the prejudice caused to the relevant person (the site provider) by the order must be capable of being adequately compensated by money, and, secondly, the public benefit likely to result from the making of the order must outweigh the prejudice to the relevant person. We appreciate that a site provider has the right to bring an expired code agreement to an end on that ground under paragraph 31(4), but no evidence or explanation was offered of the circumstances in which, at this or any other site, APW might satisfy this condition during the contractual term of the lease. Opportunities for dispute should not be made available without good reason. The better course in our judgment is to limit the right of early termination to the familiar redevelopment ground.

28. The break clause will therefore provide that the Landlord may terminate the new lease on giving 18 months' notice expiring on the fifth or any subsequent anniversary of the term commencement date if it intends to redevelop all or part of the Site and could not reasonably do so while the new lease continues.

29. By the end of the hearing the only other term which had not been agreed (clause 7.7.5) concerned a pretty obscure indemnity in favour of the site provider requiring the operator to reimburse sums which the landlord might have to pay to the superior landlord under a specific clause of the superior lease. The relevant term of the superior lease is not well drafted and the circumstances in which sums might have to be paid under it are unclear. Reference is made in it to paragraph 20 of the old Code, which is no longer in force, and to the exercise of a right under that paragraph which it does not appear to confer. As we do not understand the proposed clause, and neither Mr Radley-Gardner KC nor Mr Watkin KC succeeded in explaining it to us, and as the agreed terms already include a wide indemnity which would appear to cover the ground which we were told the additional clause was aimed at, the better course is to omit it.

Rent

30. Having settled the terms of the new lease we can now consider the rent payable under it.

31. The rent or consideration payable under the new lease is to be assessed under paragraph 24 of the Code, adopting the "no-network" assumption which was explained in *EE Ltd and another v The Mayor and Burgesses of the London Borough of Islington* [2019] UKUT 53 (LC) at paragraphs [66] to [68]. The policy to which the assumption gives effect is that the fair return to the site provider "should not, as a matter of principle, include a share of the economic value created by very high public demand for services that the operator provides".

32. The no-network assumption has given rise to difficulties because parties have been unable to produce much relevant evidence from which the value of a site suitable for telecommunications use can safely be determined when the fact that the intended use is for telecommunications must be disregarded. In the absence of reliable evidence the Tribunal has had to do its best with a more theoretical valuation model. In this reference we have been asked to revisit on the basis of transactional evidence what has become a relatively settled value for unexceptional rural sites. Before considering the evidence, we remind ourselves how that settled state came about.

33. The early paragraph 24 cases such as *Islington* focussed on the impact of the no-network assumption and how it could be allowed for in a valuation. Typically, expert witnesses called by site providers deployed a mass of evidence of recent and historic

telecommunications transactions which they subjected to elaborate analysis in the hope of persuading the Tribunal that little had changed and that rents should remain at or not significantly below the levels seen in the open market before paragraph 24 came into force. The Tribunal made it clear that these propositions were simply unrealistic and that the very substantial costs being incurred in trying to prove them were being incurred in vain.

34. In *Cornerstone Telecommunications Infrastructure Ltd v London and Quadrant Housing Trust* [2020] UKUT 282 (LC) the Tribunal adopted a three stage approach to the assessment of consideration under paragraph 24, following the example of the County Court in *Vodafone Ltd v Hanover Capital Ltd* [2020] EW Misc 18 (CC). That approach involved determining the existing use value of the site (or any alternative use value, if higher), to which were then added a sum to reflect any additional benefit which would be conferred on the tenant by the letting (such as the benefit of occupying an already secure site), and a sum to reflect any additional adverse effect (or burden) which the activities on the site would impose on the site provider when compared to the existing, or alternative, use value. It is intended to arrive at a value which takes account of the factors which would be uppermost in the minds of negotiating parties if they were required to leave out of account the value to the operator of the right to use the site for the purpose of a telecommunications network.

35. The three stage approach was also employed by the Tribunal in *On Tower UK Limited v JH and FW Green Limited* [2020] UKUT 348 (LC) ("*Dale Park*") to arrive at consideration of £1,200 per annum for a rural site with dwellings in close proximity. That figure comprised an agreed site value (stage 1) of £100, to which was added the Tribunal's assessment of the value of benefits to the operator (stage 2) at £600 and of burdens on the site provider (stage 3) at £500. At [139] the Tribunal said regarding those burdens:

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

36. At [142] the Tribunal continued:

> "…We have explained the special circumstances of this site, being a rural site but with dwellings in close proximity…Without those special circumstances the value of burdens might well be no more than a nominal £100, and a figure of £750 reflecting a nominal site value, general additional benefits and nominal burdens would be appropriate."

37. In the cases that followed, experts generally agreed to adopt the three-stage approach in their assessment of consideration, but this led them to focus excessively on the detail of potential benefits and burdens in a way which would not reflect normal market behaviour between parties negotiating a rent. The Tribunal remained concerned at the disproportionate expense being incurred in disputes over consideration and sought at an early stage to impress on parties the very modest sums which they could expect to receive. In *Affinity* having determined consideration of £3,300 for a site on a water tower the

Tribunal included a table summarising the figures determined in its own earlier decisions and those of the Lands Tribunal for Scotland for residential, commercial and rural property referring to them as "guidance on the levels of consideration which parties can expect the Tribunal to determine in other cases". The Tribunal observed at [83]:

> "…A headline figure of £3,000 a year (£3,300 with the additional benefit of the break clause) fits appropriately into the pattern of previous Tribunal decisions. We would suggest that the pattern, or tone, is now becoming clear enough that it should rarely be necessary when presenting evidence to the Tribunal in future for parties to adopt the much more detailed *Hanover Capital* approach to valuation."

38. Subsequently, in *Stephenson,* the Tribunal said at [70}:

> "…The values they [the experts] suggested for the various *Hanover Capital* stages …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…"

39. And at [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."

40. These attempts at expectation management have largely been successful, and we have seen many fewer references in which consideration has seriously been contested. The effect, as Mr Williams explained, has been that operators have adopted £750 as their invariable offer for rural sites based on the Tribunal's figure in *Stephenson*. We do not see the introduction of predictability into negotiations over relatively modest sums as something undesirable provided, of course, that if a challenge to it is mounted, the Tribunal's mind is not closed. Evidence in support of higher levels of consideration must be taken seriously, including evidence of the opinion of experts who have an understanding of the limitations paragraph 24 imposes and experience of letting the sort of property which has to be valued. That brings us to the expert evidence in this reference.

Expert valuation evidence

41. By the conclusion of their evidence Mr Cottage considered that the annual rent payable under the new lease should be £1,000, while Mr Williams thought that the appropriate figure was £2,850.

42. The experts agreed that the Site had no alternative use value and disregarded APW's previous suggestion that "glamping" was a viable alternative, on planning and other grounds. They also agreed that their valuations would be unaffected by planning permission for the installation of electronic communications apparatus ("ECA"). There was some uncertainty over the condition in which the Site was to be valued as both experts said that it was a matter for legal submissions whether electricity and fibre supplies at the site could be assumed under the no-network assumption. As to that uncertainty, the no-network assumption is irrelevant to the physical condition of the Site

and the locality at the date of the assumed letting. On normal valuation principles the Site must be assumed to be vacant, the operator having removed its apparatus (*Affinity*, [17]-[28]), but, consistently with the reality principle, electricity and fibre must be assumed still to be available at the boundary of the Site (in the absence of any term in the existing agreement requiring their removal at the expiry of the lease).

43. Mr Cottage, on behalf of EE/H3G, initially considered that the rent should be £750 per annum, in line with the figure awarded in *Stephenson* for an unexceptional rural site. He found nothing in the Site or the new lease terms which required any adjustment to that figure. Nor was any adjustment required for size because the figure of £750 had first been mooted in *Dale Park*, which was a 67 sq m site, and the Tribunal then used the same figure for a site of 18 sq m in *Stephenson*. The benefits and burdens would not depend on the size of the site but would relate to the number of times access would be taken. This would not relate directly to the number of operators sharing the ECA and the Tribunal had not differentiated between rents for *Dale Park* where there was sharing and *Stephenson*, where there was not. In summary, Mr Cottage stuck firmly to the figure of £750 adopted by the Tribunal in *Stephenson* and considered that there was nothing new in Mr Williams' evidence or arguments that had not already been considered by the Tribunal.

44. Mr Cottage nevertheless accepted that it would be appropriate to update the figure of £750 to account for inflation using the Retail Prices Index ("RPI") since the date of the *Dale Park* decision. Indexation from December 2020 to the latest available figure in April 2024 produced an uplift from £750 to £977, which he rounded to £1,000.

45. On behalf of APW, Mr Williams assessed the rent at £2,850 using a base rent of £1,500, derived from the tone of rents agreed for a variety of non-telecommunication lettings of small compounds in rural locations, with an uplift of £1,350 for burdens arising from this particular lease. His rationale for these figures, which he set out at length in his reports, is explained below.

46. The starting point of Mr Williams' assessment was his opinion that the Tribunal's figure of £750 for an unexceptional rural site was too low. He had yet to encounter in his practice with Carter Jonas (since 2018) any letting of a small compound for non-telecommunications use, whether passive or more intensive, at a rent below £1,000. He suggested that this figure should be a minimum value in the stage 1 assessment, before assessing benefits and burdens under stages 2 and 3. In particular the determination of a rent of £750 in Stephenson, for a small site of 18 sq m with poor access, suggested that the rent for a more convenient site of 96 sq m at Vache Farm, with scope for higher burdens of activity arising from that, should be higher.

47. Mr Williams next proposed that the Tribunal had taken a wrong turn in *Dale Park*, when it first applied the three stage approach to a rural site. Before moving to Carter Jonas Mr Williams had worked for Arqiva, now On Tower UK Limited ("On Tower") and he was therefore very familiar with the evidence of On Tower lease renewals reviewed in *Dale Park*. The Tribunal found at [124] that the evidence suggested a figure of £1,500 per annum was sufficient to induce site owners to agree lease renewals, when supplemented by transitional payments to step the rents down from their more generous pre-Code levels. The Tribunal disregarded those transitional payments and said at [129]:

> "…We take the view that the maximum inducement might be a doubling of the no-network rent. If that is how the figure of £1,500 was arrived at, then that would suggest a no-network consideration of £750 in those cases."

48. Mr Williams then noted that incentives had been taken into account by the County Court when it determined rents for new tenancies under the Landlord and Tenant Act 1954 and suggested that, in *Dale Park*, the Tribunal had been wrong to exclude them from consideration when it analysed the evidence of consensual transactions. Although he accepted that the basis of assessment of rent under s.34 of the Landlord and Tenant Act 1954 was different from that under paragraph 24 of the Code, he maintained that the Tribunal in *Dale Park* had been in error in excluding incentives from its analysis of renewal evidence, which reflected the market at the time.

49. Mr Williams therefore re-analysed the evidence in *Dale Park*, taking into account one-off incentives and transition payments to produce an average rent of £2,099 per annum. If the Tribunal had assumed that a discount of 50% of this average rent of £2,099 was sufficient to satisfy the no-network assumption, it would have resulted in a figure of £1,050 per annum for an unexceptional site. Adjustment for RPI would result in a current figure of £1,368 per annum.

50. Separately from his analysis of Code transactions Mr Williams had also undertaken an extensive analysis of rental transactions for small rural sites required for non-telecommunications uses. He began by referring to 38 transactions in 2023 where Network Rail had rented small sites from owners of land adjoining their lines in order to carry out works. These were all short term licences which he acknowledged were of limited value as direct comparable evidence but said that overall they are indicative of the level at which landowners are willing to transact for an infrastructure related compound.

51. Mr Williams then considered 16 rental transactions for small sites identified by the Central Association of Agricultural Valuers ("CAAV") in a letter dated 5 October 2018 to inform the Department for Digital, Culture, Media and Sport ("DDCMS") of typical annual payments agreed for non-telecommunications sites in rural areas. Limited details were available of the individual transactions, but he selected four of them as potentially helpful: a meteorological station in Wales at a rent of £2,500, a Cuadrilla borehole compound (3m x 3m) in Lancashire at a rent of £2,000, a noise monitoring compound near East Midlands Airport at a rent of £1,250 and an airport noise monitoring compound near Gatwick Airport in Sussex (10m x 10m) at a rent of £4,500.

52. Mr Williams acknowledged that these rents for small compound transactions would need to be adjusted to remove any "special value" to the tenant arising from location and business need. The more alternative options that were available to the prospective tenant, the lower the effect of any factor which might generate special value. Using his experience and judgment he therefore made downward adjustments of up to 50% to account for special value. Mr Williams then adjusted rents for the very small compounds upward by 50% for size, by comparison with the Site, and adjusted all rents for inflation since October 2018. This produced a range of rents from £1,674 - £3,348 per annum.

53. Mr Williams subsequently obtained details of three more lettings of small sites at significantly higher rents but as he drew no further conclusions from these, we need not refer to them.

54. More recent evidence was also available of the letting of an airport noise monitoring site at Station Road, Melbourne near East Midlands Airport, in which £1,500 per annum was agreed for a 3m x 2m site immediately adjoining a public highway, for a period of 10 years from April 2023. RPI rent reviews were provided for every three years. The lease was contracted out of the security of tenure provisions under the 1954 Act and included a

break after five years for either landlord or tenant. The rights included installation of a 4m mast or column on a concrete footing, installation of cables for connection to electricity and telecommunications supplies, and unlimited access rights to and from the public highway by any reasonable route designated by the landlord. The agent who negotiated the lease on behalf of the tenant had told Mr Williams that a more usual level of rent would be £1,000 per annum for such a small compound site, but a higher figure was agreed because the landlord understood that there were limited alternative options for the tenant.

55. In his analysis Mr Williams drew the inference that, when special value was excluded, a rent of £1,000 per annum would be a minimum for a very small compound with a limited set of rights, let for a passive use. He defined a passive use as one which exerts only a nominal burden on the landlord and where rights of access are exercised infrequently. He adjusted this figure upwards for size by 50%, in line with adjustments he made to rents for very small compounds in the CAAV transactions, to reach a figure of £1,500.

56. The final piece of evidence relied on by Mr Williams was a one year letting in June 2021 of a 128 sq m former telecommunications mast site at Berwick Lodge Farm, Bristol to a business requiring storage for tree surgery equipment, carpentry and furniture restoration. The rent was £3,000 per annum, payable monthly at £250. The rights included connection to existing electricity and water supplies, rights of access during defined working hours and the right to use toilet facilities in an adjacent yard. The lease was contracted out of security of tenure provisions of the 1954 Act and either party could exercise a break on three months' notice. The landlord was responsible for insurance, without reimbursement. Mr Williams adjusted the rent up to £3,760 for inflation since the rent commencement date.

57. Reviewing the adjusted rents derived from these market transactions, Mr Williams commented that the upper end of the range for compounds in passive use was £3,350 and the higher figure at Berwick Lodge was not surprising given the more intensive use and access.

58. Mr Williams concluded that the "floor" value of £1,000 per annum for a very small site, adjusted upwards by 50% for size, represented the rental value of the Site assuming a passive use requiring limited access. He then suggested that this figure required further adjustment for the greater burdens which would be imposed at the Site, by the exercise of the rights under the new lease compared to a compound let for a passive use. Using his experience over many years of representing landowners of different types with ECA on their property, Mr Williams identified four issues arising from use under a Code agreement that would be of concern to a landlord entering into a transaction on a green field site.

59. The first issue was security of tenure. The difficulty of achieving vacant possession of a site occupied for ECA is well known and would be particularly relevant for a landlord who might wish to regain occupation for development, as at Vache Farm (which is subject to an option agreement in favour of a developer, exercisable for a period of 10 years from 10 March 2023). The second issue concerned the regular access for maintenance and also the intensive access which would be required at unknown intervals during the term by each separate operator for works to upgrade their apparatus to 5G. The third was rights over adjacent land, especially to install cables, to have temporary set down areas and to carry out tree lopping. The final issue was loss of control and management.

60. Mr Williams attributed broad figures to each category: £500 for security of tenure, £400 for access and works, £250 for rights over adjacent land, and £200 for loss of control and management, to arrive at a total adjustment of £1,350 for the more intensive burdens which would be imposed by the new lease at the Site, when compared to the consequences of a low level passive use. Adding this to his base figure of £1,500 produced an annual rent for the Site of £2,850.

61. Mr Williams felt that the adjustment of £1,350 sat well with the adjustments for benefits and burdens of £1,250 - £1,300 that he had agreed with Mr Cottage for three sites in *On Tower UK Limited v AP Wireless II (UK) Limited* [2022] UKUT 152 (LC) *("Audley House*"). He felt that it also sat well with the total of £1,100 awarded by the Tribunal in *Dale Park* for benefits and burdens.

62. Mr Williams reiterated his view that a rent of £750 per annum for an unexceptional rural site does not allow for differences between sites and the burdens imposed on their site owners. Although the Site was an unexceptional rural site, it was very different from the site in *Stephenson* which was 18 sq m, and housed a simple 17 m high monopole, had no sharing operators, and no realistic prospect of development, so that the outlook of its landlord would be very different. He nevertheless acknowledged that a site of 96 sq m was not uncommonly large for a telecommunications site and that there was no evidence that size affected the level of rent agreed. Nor was there a discernible relationship between size and rent in the evidence of lettings for uses associated with airports.

63. Mr Williams agreed that his proposed base rent of £1,000 - £1,500 may already reflect benefits to the tenant and some burdens imposed on the landlord. The letting of the Station Road noise monitoring site, which underpinned his baseline rent, resulted in a loss of control for the landlord, unlimited access, and rights to lay cables over adjacent land. But Mr Williams maintained that the extent of regular access required at the Site by multiple operators, and the intensive access they will each require for upgrade of ECA, would be more onerous than at the Station Road site. That site is also located close to the highway, so the impact of access issues is low compared with the Site.

Submissions

64. Mr Radley-Gardner KC invited the Tribunal to update what has become the standard consideration for an unexceptional rural site for inflation but otherwise to leave its previous approach undisturbed. He submitted that the guidance in *Dale Park* arose from the Tribunal's analysis of consideration using the three stage approach, and the cross check by reference to consensual transaction evidence was no more than that. The Tribunal has already said that Code rents are a poor analogue for a paragraph 24 valuation and Mr Williams was wrong to rely on them. The *Dale Park* figure of £750, updated in line with RPI to £1,000, is consistent with the base rent of £1,000 at Station Road. He described this as a respectable valuation position.

65. Mr Watkin KC submitted that the low figure of £750 referred to in *Dale Park* had been influenced by the very earliest decisions, in *Fothringham* and in *Islington*, which were later superseded by a much higher figure in *London and Quadrant*. In *Stephenson* the Tribunal simply applied the *Dale Park* figure, so the "pattern" for rural sites consists now of a single figure. In this case, for the first time, the Tribunal had been provided with useful evidence of small rural lettings for non-telecommunications uses and its previous decisions on unexceptional rural sites should be revisited in the light of it.

66. He criticised Mr Cottage's approach in applying the Tribunal's figure of £750 without expressing any valuation judgment.

67. Mr Watkin KC submitted that the evidence of open market lettings of small sites was relevant, because the principle of substitution would apply (i.e. that a prudent buyer will not pay more than the cost of acquiring an equivalent substitute). He suggested that where there is no shortage of sites, a prospective tenant will not pay more than they need to and will look elsewhere if a landlord asks too much. Landlords would be bidding against each other, until the rent reached a point below which no landlord would consider it worthwhile letting. The Site may have only nominal alternative use value, but the minimum acceptable rent is still required to overcome the landlord's reluctance to take on the burdens of a letting. This had been demonstrated by Mr Williams' evidence to be a figure of not lower than £1,000 for a very small site with a very low intensity use.

68. The real burdens imposed by the new lease must then be taken into account, including the security of tenure slowing down development, and the frequency of access required through the yard and across a field with horses in it - 33 requests for access had been recorded in 2023.

Discussion

69. Given the high rate of inflation over the last three years the experts were right to acknowledge the importance of keeping the levels of consideration paid for sites, in all situations, abreast of it. The leases that we see generally provide for rents to be reviewed in line with RPI, but we have heard from Mr Williams that the guideline figures set out in *Affinity* are still adopted by operators in their negotiations, so we assume that we need to spell out here the relevance of inflation to those operating in the market.

70. Mr Radley-Gardner KC suggested that the original *Dale Park* figure adjusted for inflation to £1,000 per annum was now a respectable valuation position for consideration on unremarkable green field sites, consistent with the base rent evidenced by the Station Road letting. But a figure of £1,000 per annum sits well below the bottom of the range of Mr Williams' adjusted tonal evidence.

71. We are open to Mr Watkin KC's invitation to revisit the rent of £750 for an unexceptional rural site first referred to in *Dale Park* and determined in *Stephenson* if an analysis of the evidence justifies it.

72. Starting with the Network Rail transactions relied on by Mr Williams, given the very short periods for which the rents were being paid, we do not consider these, even when adjusted, to be of assistance in assessing a tonal rent for a site to be let for a period of 10 years. For similar reasons, we do not find the evidence of a former mast compound letting at Berwick Lodge Farm helpful because, with rent paid monthly and a three month break for both parties, it has the appearance of a short term agreement.

73. We have also considered Mr William's critique of the way in which evidence of lease renewals was discounted in *Dale Park* and his alternative analysis in which he rentalised the transition payments which the Tribunal ignored. We do not accept that critique, because it is inconsistent with the no-network assumption. Additionally, as he acknowledged, the Tribunal did not derive its figure in *Dale Park* from the renewal evidence and its reference to On Tower transactions was as a sense check.

74. This is not the first occasion on which the Tribunal has seen the non-telecommunications transactions on which Mr Williams mainly relied; in particular, we have been shown the CAAV's schedule of open market agreements for small sites before. They were relied on in *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Limited* [2019] UKUT 107 (LC), but that claim failed (at this level) on jurisdictional grounds and no valuation was required. They did not reappear in *Dale Park*, and in *Stephenson* although reliance was placed on small rural lettings, and their relevance was noted, the evidence was limited and lacking in detail. This is therefore the first time that transactions such as these have been analysed in any detail or with a view, if possible, to establishing a tonal value for small rural sites in non-telecommunications use which may then be used to arrive at a no-network value.

75. The Tribunal has previously expressed interest in considering evidence of this type. In *Compton Beauchamp* at [115], we said that:

> "This sort of evidence has the advantage that it does not require adjustment to reflect the no-network assumption. It might therefore also be useful. Its value is likely to increase if it can be shown that the reference land may realistically be of interest to those types of user. The prospect of planning permission being forthcoming may also be a relevant consideration."

76. It was not suggested on behalf of APW that the Site was realistically of interest to any other type of user, and the alternative use value was agreed to be minimal. Of course, the fact that the Site may have no alternative use value, and only a nominal value for its former agricultural use (because of its small size), does not mean that in the arm's length transaction which paragraph 24 requires us to assume, the willing landlord, acting prudently and with full knowledge, would be prepared to let the Site for a nominal rent. In *Stephenson*, at [69], the Tribunal agreed with the site provider's valuer, Mr Peat, that even where planning permission for an alternative use was not available, "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" although it added that it did "not think great weight would be given to it". Additionally, and quite irrespective of planning or other restrictions, the negotiation must be taken to be conducted on the basis that the rights which are granted to the willing tenant will be exercised, and that they will have consequences for the landlord. As the Tribunal explained in *London & Quadrant* at [97] and [145] the no-network assumption is concerned with the purpose for which the rights are to be exercised, and not with the nature of the rights themselves, and the burdens, or adverse consequences, which will fall on the hypothetical landlord as a result of the assumed letting must be taken to be the same as those which will be experienced in reality by the site provider.

77. The adverse consequences of letting a small parcel of land for a modest return will often be sufficient to dissuade a landowner from letting at all. As the CAAV explained, in its letter of 5 October 2018 to DDCMS:

> "…If asked, many landowners would prefer to have no third parties on their land at all; it inevitably disrupts their own use and quiet enjoyment of the property for their own purposes, whether that is business, recreation or residential use. If a third party is to be given access, the terms agreed need to be sufficient to make it worth the hassle of dealing with them."

Paragraph 24 requires that the landlord must be assumed to be willing, but that does not mean that they will be immune to the practical concerns which cause others to be unwilling, and their willingness is to let the land at its market value. In negotiating to arrive at that market value both parties would be aware of the lettings of other small rural sites for a whole range of different uses and, we consider, would take them into account. In *Stephenson* it was suggested that such transactions would not be given "great weight", but they would be relevant, and the weight to be given to them would depend on how closely they resembled the subject transaction (in *Stephenson* reliance was being placed on a letting for use as an advertising hoarding).

78. Each of the lettings of which we have received evidence was of course entered into for a specific purpose. In every case the land was wanted in connection with railway works, meteorology, noise monitoring or whatever, and the rent which the tenant was prepared to offer will have been influenced by the value of the proposed use to it. When determining the rent under the new lease the no-network assumption requires that the real purpose of the transaction must be ignored; thus, rights which are to be conferred on the tenant must be taken not to relate to the provision or use of an electronic communications network. In making the no-network assumption care must be taken not to fill the gap which has been left in the assumed purpose of the hypothetical transaction by assuming an alternative use which has no basis in reality. There is no justification for having regard to the economic value capable of being created by some alternative use of the Site unless that use is one for which the Site could in fact be used.

79. The challenge posed by the evidence of small sites let for non-telecommunications purposes (where it is not suggested that the site to be valued is suitable for any of those uses) is therefore to adjust the agreed rents to remove so much as is attributable to the financial benefit accruing to the tenant from the intended use of the land. If that can be done, then what is left, because it is based on real transactions, is likely to provide a better measure for a paragraph 24 valuation than a figure built up solely by attributing values to benefits and burdens in the abstract. Of course, that is necessarily a theoretical exercise since, in reality, someone with no reason for entering into a transaction would not do so. It therefore depends on valuation judgment. But the three stage *Hanover* approach is no less abstract or theoretical and depends largely on the valuer's judgment in assigning a value to factors which cannot be observed or measured in isolation from a transaction with a specific purpose.

80. It is agreed that the Site has no alternative valuable use, so if, as Mr Williams acknowledged, the transactional evidence reflects not only the need to compensate the landlord for loss of the land and the adverse consequences of the letting but also the value to the tenant of the activity which it intends to carry out on that land, some adjustment of the transactional rents is required. But where the figures involved are modest, and the same activity could be carried on in a number of different locations and does not generate an income stream related to the site itself, it is credible, as Mr Watkin KC argued, that at least at the lower end the rents agreed for the non-telecommunications transactions are getting close to the level below which no letting would take place. Mr Williams attempted to use his experience and judgment to make adjustments of up to 50% for "special value" within the CAAV transaction evidence. He also adjusted the Station Road evidence down from £1,500 to £1,000 in order to exclude the special value to the airport. This exercise provides material, rooted in real transactions, but adjusted to discount the value to the tenant of the particular activity being conducted from the land, which we are satisfied is a useful corrective to the Tribunal's figure of £750 in *Stephenson* and *Dale Park*.

81. The CAAV transactions, after adjustment by Mr Williams for special value, size and inflation, ranged from £1,674 to £3,348 per annum. The lowest figure was derived from £1,250 per annum agreed in 2018 for a small noise monitoring compound at East Midlands Airport. The 2023 letting of the small Station Road site for noise monitoring at the same airport is a useful piece of recent evidence because the lease terms are available to us and are similar to those agreed or determined for the new lease of the Site.

82. We are satisfied that, after Mr Williams' subjective but significant adjustments for special value, applied to modest starting figures, nothing of what is left is attributable to any sharing of the economic value created by the demand for the services that the tenant provides in each case. But we are not satisfied that his upward adjustment of the rents for very small sites is justified when it was common ground that there is no direct correlation between size and rent. However, Mr Williams' view that the burdens likely to arise under the new lease at the Site will exceed those arising on a 6 sq m noise monitoring site, and even those arising on the 18 sq m site in *Stephenson*, is a reasonable one. The greater frequency and intensity of use of the Site is partly a reflection of its size, when compared to the passive use of a small site from which Mr Williams derived his valuation, and it is the additional burdens, such as the extent of access required to maintain and upgrade a greater amount of equipment, which would feature in the mind of a landowner entering into a letting. When we reconsider the CAAV transaction evidence for small sites, adjusted by Mr Williams for inflation and special value but not for size, the figures cluster above £3,000 and around £1,000.

83. The more onerous burdens accepted by a landlord entering into a lease of the Site on the new terms, by comparison with an agreement for a noise monitoring or similar low intensity or passive site, are: the potential difficulty of regaining possession for redevelopment at a site which enjoys statutory security of tenure; greater regular access by multiple operators and the anticipation of significant additional access and activity involved with future upgrade work; the rights to use adjacent land for set-down and to undertake tree lopping. We agree with Mr Williams that a landlord would take a high level view of them, rather than make a detailed assessment. However, we consider that he has been over generous in his assessment of a high level adjustment of £1,350, on top of £500 for size, especially having accepted that his base level of rent would already account for some benefits and burdens.

84. We nevertheless give weight to Mr Williams' opinion because of his extensive and relevant experience in the rural market, and we use our own experience of that market in making this determination. We are persuaded that the Tribunal's earlier figure of £750 was too low and should be reconsidered, not only because of inflation but in the light of the evidence of non-telecommunications transactions for unexceptional rural sites. That material, heavily adjusted though it necessarily is having regard to the artificial paragraph 24 hypothesis under which the valuation must be carried out, enables us to conclude that the appropriate annual consideration for a rural mast site is £1,750.

85. We do not consider it necessary to update the table of figures in *Affinity* in January 2022, nor to identify any particular relativity between consideration for rural sites and those in other situations, other than to reiterate the impact of inflation on figures determined in previous years.

Mrs Diane Martin MRICS FAAV

Martin Rodger KC,
Deputy Chamber President

29 July 2024

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.