UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE – NEW AGREEMENT OR MODIFICATION – water tower – consideration and compensation – assumption of vacant possession – relative merits of market transactions and Tribunal decisions as comparables – recovery of professional fees incurred before order conferring Code right – paras 24, 34, Schedule 3A, Communications Act 2003

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN:

EE LIMITED AND HUTCHISON 3G UK LIMITED

Claimants

-and-

AFFINITY WATER LIMITED

Respondent

Re: Allenby Road Reservoir

Southall

UB1 UHF

Martin Rodger QC, Deputy Chamber President and P D McCrea FRICS FCIA rb

24-25 November 2021

By remote video platform

Stephanie Tozer QC, instructed by Winckworth Sherwood LLP, for the claimants

Tim Calland, instructed by Birketts LLP, for the respondent

The following cases are referred to in this decision:

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

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

Cornerstone Telecommunications Infrastructure Ltd v Marks & Spencer plc LTS/ECC/2019/0034

EE & H3G v Morriss [2022] EW Misc 1 (CC)

F.R Evans (Leeds) Ltd v English Electric Co Ltd (1978) 36 P & CR 185

Harbinger Capital Partners v Caldwell [2013] EWCA Civ 492

New Zealand Government Property Corp. v H.M. & S. [1982] QB 1145

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

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

Introduction

1.
This decision is about the financial terms of a new agreement conferring rights under the Electronic Communications Code (Schedule 3A to the Communications Act 2003). The parties agree that under paragraph 34 of the Code they should be directed by the Tribunal to enter into an agreement in respect of a site belonging to the respondent which is already occupied by the claimants following the expiry of a previous lease. They have also agreed the terms of a new lease except for the consideration and compensation payable which the Tribunal is now asked to determine.

2.
The respondent, Affinity Water Ltd, is a statutory water undertaker and the site in question is part of its Allenby Road Reservoir in Southall, Middlesex. In 1998 its predecessor, North Surrey Water Ltd, granted Mercury Personal Communications Ltd a lease for a term of twenty years of an area of land at the Reservoir together with the right to install electronic communications apparatus on the land and on top of its adjoining water tower. The lease was contracted out of the security of tenure provisions of the Landlord and Tenant Act 1954. As it expired after the commencement of the Code on 28 November 2017 it is therefore classified as a “subsisting agreement” for the purpose of the transitional provisions which accompanied the Code. By the time the lease expired the interest of the landlord was vested in the respondent, while the interest of the tenant had been assigned to the claimants, EE Limited and Hutchison 3G UK Ltd, who are operators entitled to the benefits of the Code.

3.
At the hearing of the reference the claimants were represented by Stephanie Tozer QC and the respondent by Tim Calland. Factual evidence was given by Mr John Merrill, a senior manager in the respondent’s estates department, and by Mr Noel Lester, a regional property surveyor at MBNL, which manages more than 20,000 telecommunications sites on behalf of the claimants. A witness statement was submitted by Mr Graham Deans, Head of Estates and Facilities for the respondent. Expert evidence was given on behalf of the claimants by Jonathan Stott MRICS and on behalf of the respondent by Allison Mullen MRICS. We are grateful to them all for their assistance.

The site

4.
The respondent’s reservoir is situated on the west side of Allenby Road in a residential area about a mile north of Southall. Together with its grounds it extends to about 3.3 acres and is surrounded by houses on all sides.

5.
The reservoir is a covered concrete structure occupying about a third of the site. Adjoining that structure stands a concrete water tower which was built in the 1930s. The reservoir and the water tower are both part of the respondent’s operational infrastructure.

6.
A 1.8m perimeter fence secures the grounds from trespass. Access from Allenby Road is through a pair of secure gates and along a surfaced track. Most of the enclosure is an open grassed area with a few trees and bushes around the perimeter. Apart from the reservoir and the tower only a few small structures are visible above ground, but there are pipes and other installations below ground level.

7.
The original 1998 lease demised an area of land between the reservoir and the water tower and permitted the tenant to erect a telecommunications equipment room on it; that area is now a fenced compound of about 8 metres by 5 metres which will be referred to in the new lease as the "Communications Site". The claimants have two equipment cabinets on the Communications Site which are connected by cables to antennae on top of the water tower.

8.
Under the terms of the lease the claimants have unrestricted access to the Communications Site at ground level (subject only to a requirement to notify the respondent when their staff arrive and leave). For safety reasons access to the water tower has to be supervised. The new lease will contain similar provisions requiring the claimants to comply with the respondents' general access conditions.

9.
The water tower hosts communications apparatus belonging to a number of operators. As well as its agreement with the claimants, Affinity has similar arrangements with Arqiva, Airwave and Cornerstone.

The proceedings

10.
Paragraph 30(2) of the Code provides that an operator may continue to exercise Code rights which have ceased to be exercisable under the terms of an agreement. For that reason, the claimants have been entitled to exercise their Code rights under the 1998 lease despite the expiry of the term in 2018.

11.
By paragraph 33 either party to a Code agreement may give notice to the other party requiring that the agreement should be modified or terminated, and that a new agreement should have effect between them. Such a notice may not be given earlier than the last six months of the agreement. If the operator and the site provider have not reached agreement on the proposal by the expiry of the notice, either may apply to the Tribunal under paragraph 33(5) for an order under paragraph 34 of the Code.

12.
Under paragraph 34 the Tribunal has wide powers to direct the continuation, modification or termination of an existing Code agreement or to order the parties to enter into a new agreement. The existing agreement continues until the new agreement takes effect and the Code applies to the new agreement as if it were an agreement under Part 2 of the Code (i.e. a consensual agreement conferring Code rights between an occupier of land and an operator).

13.
In this case the claimants first invited the respondent to enter into a new agreement on 18 October 2018 but a formal notice under paragraph 33 was not served until 17 December 2019. The

negotiations which followed failed to achieve a consensus and on 15 April 2021 the claimants commenced this reference.

14.
By the time the matter came on for hearing the parties had agreed all of the terms of the new agreement except the financial terms. The agreement is in the claimants' standard form with minor variations to take account of the respondent's requirements in relation to this particular site. There is to be a new demise of the Communications Site for a term of ten years. The claimants are to have the right to install electronic communications apparatus on the water tower, subject to the respondent approving its location. The claimants are also to have the right to use a set down area for parking or to position a crane to add or remove apparatus, together with rights of access over the track leading from Allenby Road.

15.
The agreement obliges the respondents to keep the access route, the set down area, and those parts of the property over which the claimants have rights in a reasonable condition. The respondent is not to be responsible for improving or upgrading the water tower or any other part of the property or for ensuring that the tower can withstand the weight of the claimants' equipment. Nor is the respondent to be under an obligation to re-instate any part of the site in the event of damage or destruction outside its control but it must not knowingly obstruct or interfere with the claimants' use of the access route or the set down area.

16.
The parties have been unable to agree what is referred to in the agreement as the "Site Payment" and which they intend should comprise both consideration for entering into the agreement and any initial compensation to which the respondents are entitled under the Code. The draft agreement envisages that the Site Payment will be an annual sum but the parties agree that if part of the compensation can be ascertained at this stage (for example, for professional expenses in negotiating the terms of the agreement) it would be appropriate for that sum to be payable on the grant of the new lease rather than being incorporated into the Site Payment as an annual equivalent payable over the 10 years of the term.

The assumption of vacant possession

17.
There was some debate about the assumptions which the Tribunal is required to make about the site and the notional transaction when determining the amount of consideration payable by an operator to a site provider under an agreement which the parties are ordered to enter into by the Tribunal under paragraph 34(6) of the Code. In particular, both parties approached the valuation on the basis that the site which is the subject of the notional transaction must be assumed already to be an equipped telecommunications site with the consequence that the incoming operator will take over the apparatus present on the site in reality on the valuation date (taken to be the date of the hearing). The Tribunal questioned that consensus, but the parties stood firm.

18.
The point did not play a significant part in the evidence and it arose only in the context of the expectations of parties negotiating for a new agreement about the degree of disruption which was to be expected when the new tenant wished to exercise the right to install new apparatus on the water tower. As we will come to in the evidence, a significant 5G upgrade of the existing apparatus is in prospect within a few months. The Tribunal asked whether it was to be assumed that a project on a

similar scale (though not for a network purpose) was in the minds of the parties negotiating the terms of the new lease. If so, was that project to be assumed to be in addition to the installation of equipment on the water tower at the start of the lease or was the prospective upgrade to be taken to be part of the initial fit out of the site. The answer we were given was that the site was to be assumed to be equipped at the commencement of the new lease. Ms Tozer QC submitted that this answer was dictated by the reality principle in circumstances where the statutory valuation hypothesis did not include an assumption that the letting was with vacant possession. Mr Calland agreed.

19.
Although the point is not one of particular significance in this case, it may be more important in other cases. It concerns the identification of the subject matter of the assumed transaction and is therefore a point going to the first principles of Code valuation. We are aware of it having arisen in only one other case, where the same consensus existed between the parties. Whether that consensus is sound merits consideration.

20.
Unlike an agreement which is imposed on the parties by the Tribunal under Part 4 of the Code, which can only relate to a site occupied by the site provider, an order under Part 5 and paragraph 34 can only relate to a site over which the operator already has Code rights.. The question under Part 5 is whether and on what terms the operator may continue to exercise those rights. The reality in a Part 5 case is therefore almost always that the new lease is of an equipped site (exceptions can be imagined where the Code rights being conferred are rights of access or other ancillary rights). The question is whether the statutory valuation hypothesis requires that that reality be modified and that the circumstances of the notional transaction be taken to be different from those on the ground on the valuation date.

21.
Where parties are unable to agree the terms of a new agreement under Part 5 of the Code, those terms are required to be specified by the Tribunal in an order under paragraph 34(10). By paragraph 34(11)(b), paragraphs 23(2) to (8) (terms), paragraph 24 (consideration) and paragraph 25 (compensation) “apply … to an order under sub-paragraph (10) as they apply to an order under paragraph 20”. In other words, a valuation for the purpose of an order under Part 5 requiring the parties to enter into a new agreement in respect of an existing site is to be conducted under paragraph 24, which applies when the Tribunal imposes an agreement in relation to a new site under Part 4 of the Code. There is no indication in paragraph 34 that paragraph 24 is to be modified when it is utilised for the purpose of Part 5.

22.
Paragraph 24(1) of the Code provides that the consideration payable by an operator to a site provider (the “relevant person”) under an agreement imposed under paragraph 20 is to be an amount representing “the market value of the relevant person’s agreement to confer … the code right.” Paragraph 24(2) explains what that amount is:

“… the amount that, at the date the market value is assessed, a willing buyer would pay a willing seller for the agreement –

(a)
in a transaction at arm’s length,

(b)

on the basis that the buyer and seller were acting prudently and with full knowledge of the transaction, and

(c)
on the basis that the transaction was subject to the other provisions of the agreement imposed under paragraph 20."

23.
Paragraph 24(3) introduces further assumptions, including the no-network assumption, the disapplication of paragraphs 16 and 17, and the assumption that "the right in all other respects corresponds to the code right" i.e. to the Code right conferred by the agreement to be imposed.

24.
As Ms Tozer QC submitted, paragraph 24 does not include an express assumption that the Code rights to be valued are being conferred in respect of a site which is vacant. Such an assumption could not be applied meaningfully to some Code rights, or to certain forms of agreement (an agreement conferring the right to enter land, to connect to a power supply, to obstruct a right of access or to lop trees, all of which are Code rights to which paragraph 24 may be applied). But the reality principle is not that all of the circumstances be taken to be as they are in reality on the valuation date unless the valuation hypothesis expressly requires a different assumption. As Lewison LJ explained in Harbinger Capital Partners v Caldwell [2013] EWCA Civ 492, at [26]:

"A departure from reality must either be expressly required or must be an inevitable consequence of what has been expressly required."

25.
A Code valuation requires the assumption of a transaction at arm's length between a willing buyer and a willing seller. It is axiomatic that both the willing buyer and the willing seller are hypothetical persons (F.R Evans (Leeds) Ltd v English Electric Co Ltd (1978) 36 P & CR 185).

26.
Both the requirement that the transaction be at arm's length and the implicit assumption that the parties are abstractions, and not the real parties, inevitably require the further assumption that the actual occupier (if there is one) has vacated the site by the valuation date. A negotiation between a site provider and an operator who is already in occupation following the expiry of a previous agreement cannot be described as a negotiation at arm's length. A pre-existing relationship between buyer and seller is the antithesis of an arm's length transaction and introduces into the assumed negotiation advantages and disadvantages which would not operate on the market as a whole. The terms on which a sitting tenant or any other special purchaser would be willing to transact are not arm's length terms and therefore have no part in the ascertainment of a market value.

27.
The assumption that the actual occupier is not present on the site usually carries with it the further assumption that the items which the occupier would be required or entitled to remove when leaving the site have been removed (New Zealand Government Property Corp. v H.M. & S. [1982] QB 1145, CA). The same assumption seems to us to be necessary in a Code valuation to respect the express direction that the consideration is arrived at by a negotiation in the market conducted at arm's length. Were that assumption not to be made the result would appear to be that the assessment of consideration would take account of the effect on market value of the operator's apparatus on site at the date of valuation. Ms Tozer QC submitted that the letting was to be assumed to be of the equipped

site but on the basis that the incoming tenant would pay nothing for the apparatus, but it is difficult to find that assumption in paragraph 24. It is conceivable that the market might value the presence of a mast which could be used for non-network purposes. The presence of the apparatus might also have the opposite effect, depressing the price which would be paid for the agreement: the transaction is assumed not to relate to the provision or use of an electronic communications network and the presence of the apparatus on the site might make it impossible to use the site for any other purpose without first removing it.

28.
We were referred to what the Tribunal said in On Tower UK Ltd v JH & FW Green Ltd [2020] UKUT 348 (LC) ("On Tower v Green") at [82]-[83] where, after inviting submissions on this issue and receiving none, the Tribunal did not dissent from the consensus that paragraph 24 does not require an assumption of vacant possession. Despite that, our current view, again without the benefit of full argument, is that for the purpose of a paragraph 24 valuation required by paragraph 34, the subject site must be assumed to be vacant.

Valuation

29.
The experts for both parties agreed on the general approach which they should take to the valuation, basing themselves on the decision of the Tribunal in Cornerstone Telecommunications Infrastructure Ltd v London and Quadrant Housing Trust [2020] UKUT 282 (LC) ("London & Quadrant") which adopted the three-stage valuation approach considered by the County Court in Vodafone v Hanover Capital [2020] EW Misc 18 (CC) ("Hanover Capital"). The same approach has been employed by the Tribunal in On Tower Green and by the Lands Tribunal for Scotland in Cornerstone Telecommunications Infrastructure Ltd v Marks & Spencer plc LTS/ECC/2019/34 (6 July 2021) ("Marks and Spencer").

30.
It was also common ground that it would be sensible to assess the outcome of the three-stage Hanover Capital approach in the light of information about other comparable transactions or relevant Tribunal decisions.

31.
Before turning to the detail of the evidence it is therefore worth summarising the position which has been reached in other cases in which the Tribunal, and its Scottish counterpart, have determined consideration under paragraph 24.

Decision	Type of property	Annual consideration
CTIL v Fothringham (Lands Tribunal for Scotland)	Rural, estate location	£600 (£1,500 in year of installation)
On Tower v Green	Rural, adjacent to housing	£1,200
Marks & Spencer	City, department store/offices	£3,850
London & Quadrant	City, residential rooftop	£5,000

32.

It can also be noted that, although consideration of £1,200 was determined for a rural mast site near residential dwellings in On Tower v Green, it was suggested that £750 was likely to be appropriate for a standard greenfield site.

33.
In London & Quadrant the Tribunal suggested that, on the evidence before it (which was of broadly consistent rent levels around the country), there was no reasons to think that consideration of much more, or much less, than the £5,000 it determined in that case would be appropriate for other residential rooftop sites. That figure included an allowance anticipating costs which might be expected to arise from future upgrades. In Marks and Spencer, when determining an annual consideration of £3,850 payable for a rooftop site on the main shopping street in Edinburgh, the Lands Tribunal for Scotland preferred on the evidence before it to leave “facilities management” issues arising from future upgrades to be dealt with as compensation when they arose.

34.
These decisions provide guidance not only on an approach to valuing sites on the artificial assumptions required by paragraph 24, but more broadly on the levels of consideration which parties can expect the Tribunal to determine in other cases. Without taking account of any special features or particular sensitivities which a particular location may exhibit, we would be surprised if the value of Code rights fell significantly outside the ranges indicated by previous decisions concerning sites with similar characteristics.

35.
To what extent evidence of market transactions provides as reliable a guide is a separate question. The adoption by the Tribunal of the rather cumbersome and artificial three-stage approach to valuation under paragraph 24 of the Code, rather than the more familiar comparative method based on market evidence, is driven by the requirement to make the “no-network” assumption. It would be attractive to be able to by-pass the artificiality of this approach and to refer directly to market transactions, but there are obvious dangers in doing so. Lettings on Code terms in which the rights being conferred on the tenant do not relate to the provision or use of an electronic communications network are unknown in reality. Consensual Code agreements are invariably entered into so that a site can be used in connection with an operator’s network; they are routinely accompanied by capital payments which are often concealed from view, protected by confidentiality agreements and, when they are disclosed, difficult to analyse; they do not carry statutory compensation rights and rarely include a comprehensive contractual alternative. It therefore remains to be seen whether credible adjustments are possible to account for the many differences between consensual and imposed transactions to enable the total sums agreed as rents to be used as direct comparables when the Tribunal determines consideration under paragraph 24. Where a three-stage assessment has been undertaken and both parties have attributed a specific value to a particular type of burden or benefit, their agreement on that component may nevertheless provide a useful reference point.

36.
No reliance was placed in this case on consensual lettings of other water tower sites (although passing reference was made to two agreements entered into by Severn Trent plc). Instead both Mr Stott and Ms Mullen considered that evidence of transactions relating to rural and rooftop sites could be informative in identifying a tone of the market. They considered that these might also indicate whether a Hanover Capital three-stage assessment resulted in a rent which seemed improbably high or improbably low.

The parties' valuations

37.
In their statement of agreed facts, Mr Stott stated that his view was that the appropriate level of annual consideration was £1,453, while Ms Mullen's opinion was £7,706.63. The parties' positions on consideration narrowed as the evidence progressed. By the end of the hearing, both experts having made some concessions, the claimants contended for consideration of £2,787 per annum, the respondent, £6,560.84 per annum. The sum directly at stake in this reference is therefore less than £4,000 per annum, but for both parties the ramifications across their respective estates are likely to be considerable. Mr Stott and Ms Mullen are both experienced experts in this field. Ms Tozer called into question Ms Mullen's impartiality, but we found her to be a credible and helpful witness and, like Mr Stott, quite prepared to make concessions where these seemed sensible. As has been commented on elsewhere, in this highly polarised sector there are few if any experts who act for both site providers and operators (EE & H3G v Morriss [2022] EW Misc 1 (CC) at [72]); the Tribunal is well aware of the risks to an expert's independence and objectivity which such situations present, and there is rarely any advantage to be had in labouring them.

38.
The current or highest alternative use value of the site, which is stage one of a Hanover Capital assessment, was agreed at a nominal value of £50 per annum for use of the roof of the water tower and the ground level Communications Site; an additional £12.50 per annum was also agreed for the right to use the set down area when required.

39.
The heart of the dispute lay in stages 2 and 3 of the assessment which are intended to reflect the additional benefits over and above the right of occupation, which will be conferred on the tenant by the agreement and which it would otherwise have to provide for itself, and any adverse effect on the site provider, over and above any effects which would be a consequence of the use of the site for the purpose reflected at stage one. The theory underlying these stages is that they reflect all of the matters which would be in the minds of parties negotiating a rent which did not take account of the economic value to the tenant of the activity it intended to conduct on the site. They attempt to measure what paragraph 24(1) of the Code calls "the market value of the relevant person's agreement to confer … the Code right" while respecting the statutory no-network assumption in paragraph 24(3)(a).

40.
Both experts approached the assessment of benefits under stage two in three steps. They first identified those elements of the respondent's annual expenditure on the whole 3.3 acre site which were of some value to the claimants and to others with the right to occupy parts of the site; these included, for example, expenditure on the security of the site or on the maintenance of the water tower. They next sought to identify how much of that expenditure related to the areas which were used exclusively by the respondent (for example, the reservoir itself) and how much related to areas in which it was said that the claimants, and other operators, had an interest and to apportion each element accordingly. The final step, which was agreed between the experts, was to divide the apportioned expenditure arrived at in the previous steps by five. This was on the basis that the claimants, the respondent and the other three operators who make use of the site should all be assumed to benefit equally from the expenditure required to maintain and run the parts of the site which they all occupied.

41.
We have some difficulty with the exhaustive approach taken by the experts, which seems to us to be entirely detached from any exercise which parties negotiating on the assumed basis might undertake. On any view the level of rent being negotiated is modest, and we are sceptical that the notional parties seeking to agree it would descend to the level of granularity with which the experts have analysed the evidence in this reference. The hypothetical tenant is hardly likely to ask the landlord, when presented with its suggested rent, for sight of the last few years' invoices in order to subject them to line by line scrutiny. The parties, who are both assumed to be willing to enter into the transaction, would simply come to a figure after fairly broad-brush negotiations which might involve some discussion of the total cost of running the site but would be most unlikely to go beyond headline figures. In the paragraphs that follow we will refer to the evidence presented to us and make some observations and findings upon it, but that should not be taken as encouragement to others to follow the same course. Once the individual elements have been calculated, we will return to the need to stand back and consider the outcome of negotiations in the hypothetical market.

42.
The value of the benefit conferred on the claimants by some heads of the respondent's expenditure was agreed: locks; maintenance of the water tower's lightning conductor; team labour costs; the cost of five-yearly tower inspections; and insurance. These totalled £2,451, which divided by 5 equated to a stage two figure of £490.20.

43.
The elements remaining in issue were grounds maintenance, security, building and site maintenance, tree works, pest control, an allowance for future anticipated repairs, and what was referred to as "extra benefits".

Grounds maintenance

44.
The annual cost to the respondent for grass cutting and other landscape maintenance was £1,731.83. Mr Stott considered that the operator would only benefit to a very limited extent from this work; most of any grass cutting would be on land adjoining the reservoir, in which it had no interest. He accepted that some weed spraying and the maintenance of the access road would be of some benefit to occupiers of the area around the water tower, to which he attributed 10% of the cost; divided by 5, that equated to £34.60 per annum. Ms Mullen thought that the claimants would benefit to a greater extent, and attributed 50% of the cost to shared areas, equating to £173 per annum for each occupier.

45.
Mr Stott's figure equates to 2% of the respondent's annual expenditure on grass cutting and landscaping, Ms Mullen's 10%. In our view, the parties to the hypothetical negotiations are unlikely to agree a figure as low as that suggested by Mr Stott. We have taken 5% of the respondent's expenditure of £1,731.83; on the agreed assumption that all occupiers should contribute equally to expenditure from which they all benefit, that produces a figure of £86.59.

Security

46.
Mr Merrill gave evidence of the cost of security at the site and explained that because the water supply network is part of the national strategic infrastructure the respondent is required by DEFRA to maintain a high level of security. Mr Lester accepted that a site which was already secure would

provide some benefit, but he thought not to any great extent, as the claimants still rely on their own security measures including compound fencing, smart water, and liaison with the local police.

47.
Allenby Road was classed as a large reservoir system (having ten or more hatches) under the respondent's contract with its security company. Annual planned preventative maintenance ("PPM") was charged at £659, and further charges are made of £165 per call out on a 12-hour response basis, or £185 on a "4 2" (sic) hour basis. In the last version of the experts' agreed statement, the respondent's position was that a contribution should be based on an average of £175 each for ten call outs plus PPM at £659, totalling £2,409 (in fact, the evidence suggested charges were incurred for 15 call outs between October 2020 and August 2021).

48.
After some thought, Ms Mullen excluded the PPM, and apportioned 60% of the call out charges to common problems, thus leaving a total security figure of £1,050 to be divided five ways. Mr Stott accepted that the claimants benefited to an extent from security at the property. In his report, when the cost of security was believed to be £792.89, he was content to allow all that expenditure. In his oral evidence, he adopted a 50% apportionment, which produced a figure of £1,205, a little higher than Ms Mullen's figure of £1,050. After division between five occupiers the competing figures were Mr Stott's £241 per annum, and Ms Mullen's £210 per annum. In closing, Mr Calland asked us to prefer Mr Stott's view to that of his own witness.

49.
We think that two factors should be reflected in an allowance for security costs. First, the cost of security is influenced by the large reservoir on site, over which the claimants have no interest. Secondly, many of the call out charges appeared to be for replicated work, or where basic maintenance or corrosion-protection appears to have been ignored despite the expenditure on PPM.

50.
We consider that the benefit to the claimants of the respondent's enhanced security, over and above the claimants' own security measures, is likely to be marginal. We have allowed £210 per annum, being the lower of the two expert opinions.

Building/site maintenance

51.
The evidence on this head of expenditure evolved over time, but in the end the experts agreed that the starting point should be £792.50, which represented the average cost of building/site maintenance for the subject site over the last three years. Mr Stott apportioned 50% of this (£396, thus at 20% equates to £79.20), Ms Mullen 60% (£476, thus £95.10). We have taken a mid-point of 55%, which after applying the parties' agreed apportionment comes to £87.18 per annum.

Tree works

52.
The annual cost of routine inspections by the respondent's contractor was £140 plus VAT. The one-off cost of removing a tree which had fallen across the access road was charged at £375, so for that year the annual charge was £515. Mr Stott considered that any benefit which the claimant derived from annual tree work was nominal and made no allowance. Ms Mullen apportioned £375 to this item, resulting in a one-fifth contribution of £75 per annum.

53.
We think there is some, marginal, benefit to the claimants and have allowed 50% of Ms Mullen's figure - £37.50 per annum.

Pest Control

54.
Mr Lester accepted that pest control by the respondent was of some benefit but much of the claimants' equipment already incorporated protection by way of vermin-proof cabinets. Mr Stott agreed that it was of some benefit, but not to an extent that went to value. There was no evidence of a pest problem at the site, and the costs incurred in pest control measures at the site in the last 12 months was only £30. The respondent suggested that the average cost across all of its 162 sites was £344, and Ms Mullen took the whole of that amount into account.

55.
As with tree works, the benefit to the claimant of pest control is small. We have allowed a nominal contribution of £10 per annum.

Forthcoming repairs

56.
We were told that the budgeted cost of capital work to the water tower by the respondent's contractors over the ten-year term of the new lease amounted to £44,601. It transpired during the evidence that about half of this work was specific to the "wet" element of the water tower, as opposed to its structural integrity. Ms Mullen had originally contended for an annual allowance of £4,460.10 (to be divided five ways) but in closing Mr Calland did not rely on this figure. Instead he suggested an allowance of 10% of the aggregate cost of routine maintenance of the tower (£21,300). Mr Stott accepted that items that could be characterised as maintenance were allowable and should be spread over the ten-year term of the lease.

57.
Ms Tozer submitted that the figures were simply a budget and had not been scrutinised. However, we were told by Mr Merrill that the contractor, Stonbury, would have drawn up the schedule following an inspection, and that their rates for work were in line with rates agreed following an OJEU tendering exercise when Stonbury were first appointed as the respondent's contractor. The respondent's engineers would also have checked the figures proposed.

58.
Mr Merrill also told us that typical inspection and maintenance costs across the respondent's estate for water towers were in the region of £15,000 to £20,000; if more substantial work was found to be required, for instance concrete repairs, the cost would exceed £20,000. In Mr Deans' statement he said that in 2020-2021 Stonbury had completed remedial work to nine water towers at an average cost of £13,200 but Mr Merrill pointed out that this was merely an average for one year.

59.
In our view, this is the head of expenditure from which the claimants derive the most benefit, since it goes directly to maintaining the platform on which their antennae are mounted and without which it would be necessary for them to erect and maintain their own mast. In any negotiation for a lease of the Communications Site the parties would agree that the tenant should make a reasonable contribution towards these costs. We find it difficult to understand the assumption that the tenant

would agree to contribute 20% of the capital cost of maintaining the landlord's infrastructure, but that is what the parties have agreed. But even here a broad brush should be deployed. We take a figure of £17,500 as the cost of a single schedule of works to maintain the tower during the ten-year term, based on the mid-point of the range referred to by Mr Merrill. Spreading that sum over the term would equate to £1,750 per annum and, adopting the parties' agreed approach of equal apportionment amongst all five users it would produce an allowance of £350 per annum.

60.
Taking stock, the aggregate of the parties' agreed elements and our findings as above comes to £1,271.47.

Other Benefits

61.
Mr Stott's view was that the package of benefits conveyed on the claimants by the draft agreement were similar to those to which value was attributed by the Tribunal in On Tower v Green. He made no adjustment for the right to install, maintain, substitute, remove etc the claimants' apparatus, because of the no-network assumption. He considered that any tenant would expect would expect to install its own electricity supply and that the right to do so would not attract extra value; it was less valuable than the right to connect into the landlord's supply which On Tower had obtained. The right to trim or cut back trees was again, in Mr Stott's view, worthless in the context of the subject site. He valued the right to use other land for access (including the set down area) and to install a temporary generator each at £50 per annum (the same allowance was made for a generator in Marks and Spencer). We assume that the value he attributes to the land is over and above the £12.50 already agreed for the use of the set down area at stage one.

62.
In On Tower v Green the tenant's ability to break the lease after five years was wrapped up in the £600 which the Tribunal awarded at stage two. In this case Mr Stott attributed value to the tenant's right to break the lease after 12 months. He considered that the annual value of a five-year break clause would be the greater of £100 or 5% of the consideration (an approach which he understood was agreed between the valuation experts in On Tower). Mr Stott took this his starting point but added 1% per annum for the additional flexibility of being able to break four years earlier. He therefore made an allowance of the greater of £100 or 9% of the consideration.

63.
Ms Mullen adopted a much broader approach to the value of all the other benefits which would be provided by the new lease. She took the figure of £600 applied by the Tribunal in On Tower v Green and increased it to £750 to account for "additional items to reflect the nature of water authority sites", and the more valuable earlier break clause after one year.

64.
The difficulty we have with Ms Mullen's approach is that it is based on the Tribunal's figure in On Tower v Green, which concerned a different style of site. There is also force in Ms Tozer's submission that while that figure included a sum to reflect the right to erect and maintain a mast or other tall structure on the land, here the value to the claimants of the right to use the existing the water tower is already accounted for by other allowances in the stage two figure. To adopt the allowance made by the Tribunal in different circumstances risks at least an element of double counting.

65.

We found Mr Stott's evidence on this point more persuasive and have adopted his £50 for the use of the land including the set down area, over and above the £12.50 agreed at stage one, and £50 for the right to operate a generator.

66.
We therefore arrive at £1,371.47 at the end of stage two, but we are sure the parties negotiating a rent of this order would work in round figures, so we round up to £1,400.

67.
We agree that an annual break clause exercisable from the start of the term is more valuable to a tenant than one exercisable only after five years, and the principle of Mr Stott's method of adjustment, borrowed perhaps from the world of rent review, has some merit. But this adjustment is made to the aggregate of the final rent and we return to it below.

Stage three

68.
After some concessions by both experts, it was common ground that the stage three adjustment, which reflects the adverse effects of the agreement on the respondent, should include the burden on the respondent of having to manage the claimants' access to the site, and that a value of £1,500 per annum, should be attributed to this. It was also agreed that the cost to the respondent of drafting and maintaining its general conditions for the installation of equipment should be reflected in an allowance of £50 per annum.

69.
The remaining items in issue comprised a basket of various suggested adverse effects, and the burden of facilities management in future, which would be required because of the unrestricted rights given to the claimants to upgrade their apparatus on the site and to share it with others.

70.
Ms Mullen considered that account should be taken of the following obligations and burdens imposed on the respondent by the new lease: the requirement to enter into wayleaves with third parties within 28 days; the need to have regard to any interference with the claimants' equipment and that of others caused by its own activities; the fact that payment would be suspended if the claimants' equipment is switched off for more than 14 days; the burden of unrestricted upgrades; the obligation not knowingly to interfere or tamper with the claimants' apparatus on the site or with the supply of electricity to it; possible prejudice to the respondent's performance of its own statutory obligations as a result of the claimants' occupation; the cap of £10 million placed on the contractual indemnity to be given by the claimants against third party claims; the respondent's obligation to keep the access route and set down area in good repair; health and safety compliance; notifying the claimants of any rooftop or building works; and assisting the claimants in registering their lease.

71.
Ms Mullen accepted that her approach to these points, to which she had attributed an arbitrary sum of £200, was artificial. We agree, and derived little assistance from the level of detail with which they were discussed. Mr Stott considered the same items in the round. He said he might allow £50, as a one-off figure, to reflect the cost of registering the lease, but apart from that he attributed no further cost to this basket of burdens.

72.

In our view the suggested burdens on the respondent are either entirely theoretical, already taken into account at stage two, or where they have any substance, it is fairly minimal. We bear in mind that there are three other operators in place and that the consequences of sharing the site are not all negative even as far as the claimants' occupation is concerned. In return for the demise of areas which are agreed to have only nominal value to the respondent it will receive a modest, but not trivial, annual rent which should cover its administrative costs of dealing with the claimants and leave a small contribution towards its own expenses in managing and maintaining the site. It will also have the protection of the statutory right to compensation for any loss or damage it sustains as a result of the exercise of the Code rights conferred by the agreement. The miscellaneous minor irritations or interferences identified by Ms Mullen would not be separately accounted for by parties willingly negotiating a new agreement, and we will reflect them (if at all) in a final rounding up.

73.
Future facilities management is a different matter as the installation of new equipment on the water tower or elsewhere on the respondent's land is likely to absorb management time and cause it to incur real expenditure in administration and professional fees. Ms Mullen thought that as the owner of a water tower, the respondent had greater facilities management burdens than the owners of residential rooftop sites (a proposition which we doubt). As the telecoms market matured it was, she said, likely that there would be more rounds of network consolidation that would necessitate upgrades and major works. She considered it appropriate to base an allowance for future facilities management costs on the £2,429 per annum adopted in London & Quadrant, which she described as "good law".

74.
Mr Stott did not think it helpful to compare the future facilities management costs that might be assumed to be necessary at a residential rooftop site with those likely to be incurred at a water tower. The figure in London & Quadrant was based on a nearby comparable transaction concerning a residential rooftop at Brookstone Court. At Brookstone Court it was assumed that five upgrades would take place over the ten-year term. There was no reliable evidence about what costs might be incurred if or when a major upgrade occurs at the water tower, and Mr Stott proposed that any loss or damage incurred by the respondent should be claimed as compensation when the work occurs.

75.
The figure of £2,429 referred to by the Tribunal in London & Quadrant related to a large residential building and took account of evidence of an allowance of £22,000 paid as one-off compensation in respect of a similar site where comparable issues are likely to have been in mind. In a residential building those issues include the coming and going of numerous telecommunications contractors through the common parts for upgrades and alterations which are likely to generate management and tenant relations issues giving rise to expense and taking up staff time which would not easily lend itself to quantification in a compensation claim and which parties would instead be likely to take into account when agreeing the annual rent. The circumstances in which the respondent in this case is likely to incur additional costs arising out of sharing and upgrading are likely to be very different, and the costs more readily quantifiable. We do not think the London & Quadrant figure is of assistance.

76.
MBNL has planning approval to deploy 5G equipment at the Site and is currently carrying out an internal build cost tender exercise for the upgrade, with a view to starting in early 2022. The existing lease allows the 5G upgrade to take place and the parties' relevant professional advisers have been exchanging information for some time. Mr Lester had been advised that various professional costs had already been paid to the respondent in respect of the upgrade, totalling £3,600 and it had also been

agreed that £150 per day would be paid for the respondent's telecoms co-ordinator to be on site. Once the 5G upgrade had taken place, while there might be smaller scale deployments, Mr Lester did not expect a further significant upgrade in the next ten years.

77.
Mr Lester explained that there was also expected to be a "swap out" of the Huawei equipment currently on the tower. There was some confusion as to whether this work may already have happened.

78.
Mr Calland submitted that when the 5G upgrade and the possible Huawei swap out were considered, a figure of £22,000 over the term looked cheap. Mr Stott didn't agree; in his experience the swap outs could be carried out more swiftly than upgrade work, and he thought the proposed allowance was excessive. He said that the agreement in relation to Brookstone Court, where five upgrades each costing £4,400 were assumed, was at the stage when Cornerstone had no other rooftop agreements to rely upon, and were, he said, under shareholder pressure to complete the agreement.

79.
Ms Tozer suggested the claimants were content to pay professional fees of £3,600, plus a further £850 to sign off the works, plus supervision at £150 a day (it was not clear whether these figures included some of the fees which Mr Lester had said had already been paid). There was no evidence from the respondent what fees it had incurred or expected to incur, and Ms Tozer suggested that fees associated with the anticipated or any future upgrade or swap out should be dealt with as a separate compensation item in due course if they could not be agreed.

80.
In our judgment in a commercial setting such as an office building or a water tower, where future facilities management issues are likely to involve direct dealings between the parties to the lease, there is little reason to make a pre-emptive assessment of costs which might be incurred when alterations or upgrades take place. In London & Quadrant, the site provider was not only managing access to the roof of the building through the common parts, and assessing the impact of upgrades on its building, but it was also managing the concerns and inquiries of its residential tenants. In the comparable case relied on in evidence the parties had quantified all of those management costs as an addition to the rent, and the Tribunal was persuaded that a similar approach was justified. The same issues do not arise in this case. The parties have agreed an allowance for managing routine access and if future upgrades or the installation of additional equipment by sharers result in further professional or management costs those can be the subject of a claim for compensation. We therefore make no separate allowance under the heading of future facilities management.

81.
We therefore arrive at the following components:

Stage 1 - £ 62.50

Stage 2 - £1,400

Stage 3 - £1,550

£3,012.50 but say £3,000

82.

That figure assumes a ten-year term and a final allowance is required to reflect the benefit to the claimants of the flexible break clause. Mr Stott suggested an allowance of 9% but, in keeping with what we think would be the hypothetical parties' preference for round figures, we apply an uplift of 10%, to arrive at a rent of £3,300 a year.

83.
It is necessary at this point to stand back and consider whether this make sense in the light of other evidence, and in particular whether it is consistent with the pattern of value which is emerging from the other Tribunal decisions which we have tabulated in paragraph 31 above. We agree with Mr Stott that, in principle, the consideration likely to be agreed for a water tower under the statutory hypothesis should fall somewhere between that of a greenfield site, and an office or commercial building. We would expect it to be closer to the upper end of that range than the lower, because the tenant is being provided with a ready-made structure on which to install its apparatus (for whatever purpose it wishes to use it) and because the site provider has greater involvement in providing access and maintaining the site. 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.

84.
We are therefore satisfied that the sum of £3,300 a year represents the market value of the respondent's agreement to confer the Code rights agreed between the parties in this case for a ten-year term with the tenant having an annual right to break.

Compensation

85.
The only compensation issue concerns the professional costs incurred by the respondent in connection with the new lease. It was agreed that those should include the fees of the respondent's solicitors in preparing the lease and its surveyor's fees for advising on and negotiating the terms of the lease. The draft lease we were shown included a definition of compensation covering these elements but did not appear to us to contain any corresponding contractual obligation giving effect to what we were told the parties intended.

86.
Where the Tribunal makes an order under paragraph 20 of the Code imposing a new Code agreement, paragraph 25(1) provides that it may also order the operator to pay compensation to the site provider for any loss or damage that "has been sustained or will be sustained by that person as a result of the exercise of the code rights to which the order relates". By paragraph 84(2) such compensation may include payment for reasonable legal and valuation expenses. These provisions are applicable in this case by virtue of paragraph 34(11).

87.
Ms Tozer QC observed that paragraph 25(1) applies only to loss or damage sustained as a result of the exercise of the Code rights conferred by the Tribunal's order and she questioned whether that can include costs incurred before any Code rights had been acquired. We are satisfied that it does (as has previously always been assumed). We acknowledge that paragraph 25(1) is not drafted as clearly as it might have been, but the intention is obviously to allow compensation to be ordered at the time a Code agreement is imposed for losses sustained before that time. If the compensation clock cannot

begin to run until after rights have begun to be exercised the reference to “loss and damage that has been sustained” would be redundant. It is therefore necessary to understand the reference to loss “sustained as a result of the exercise of the code right” as including expenses incurred as a result of a claim for Code rights.

88.
We were provided with a schedule of the respondent’s transactional costs, verified by a certificate signed by its solicitor. These totalled £7,449 plus VAT for work carried out by two different solicitors, one a partner, the other an associate. We do not accept Ms Tozer’s submission that that figure is excessive. The claimants’ standard documents are themselves complex and deal with an extremely complicated subject matter. A site provider is entitled to seek advice on the lease and to recover the reasonable cost of doing so. Allowing for some duplication and ignoring VAT (which we assume can be recovered) we assess the legal expenses payable at £6,000.

89.
A claim was also made for £3,857.50 representing the fees of a valuer, Mr Mallard of Batchelor Monkhouse. We were given no explanation of Mr Mallard’s role and we therefore limit the sum payable in respect of his involvement to the figure of £1,500 proposed by Ms Tozer. It should be appreciated that a claim for compensation does not prove itself and where there is no evidence of why an expense has been incurred a claim is likely to be limited to the sum admitted by the paying party.

Disposal

90.
We will make an order under paragraph 34(6) of the Code terminating the subsisting Code agreement with effect from a date to be agreed between the parties and ordering that they enter into a new agreement on the terms previously agreed between them at an annual rent of £3,300. The claimants will additionally pay compensation totalling £7,500 in respect of professional fees.

Martin Rodger QC, Mr Peter D McCrea FRICS FCIArb

Deputy Chamber President

17 January 2022