UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2020] UKUT 248 (LC)
UTLC Case Number: TCR/38/2020

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE – CODE RIGHTS – paragraph 21 of the Code – whether prejudice to the site provider outweighs the public benefit of imposing an agreement – whether prejudice can be compensated in money – redevelopment by a third party – interim Code agreement, jurisdiction – terms of agreement – upgrading, sharing, access, compensation, equipment, electricity supplies, exclusion zones.

A REFERENCE UNDER SCHEDULE 3A TO THE COMMUNICATIONS ACT 2003

BETWEEN:

CORNERSTONE TELECOMMUNICATIONS INFRASTRUCTURE LIMITED

Claimant

AND

UNIVERSITY OF THE ARTS LONDON **Respondent**

Re: Roof-top site,
London College of Communications,
Elephant and Castle,
London,
SE1 6SB

Judge Elizabeth Cooke and A J Trott FRICS
6-7 August 2020
by Skype for Business

Mr Graham Read QC for the claimant, instructed by Osborne Clarke
Mr Jonathan Wills for the respondent, instructed by Eversheds Sutherland

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The following cases are referred to in this decision:

Agricullo Limited v Yorkshire Housing Limited [2010] EWCA Civ 229

Cornerstone Telecommunications Infrastructure Limited v (1) Ashloch Ltd (2) AP Wireless II (UK) Ltd [2019] UKUT 338 (LC)

Cornerstone Telecommunications Infrastructure Limited v Compton Beauchamp Estates Limited [2019] EWCA Civ 1755

Cornerstone Telecommunications Infrastructure Limited v Fothringham LTS/ECC/2019/06

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

Cornerstone Telecommunications Infrastructure Limited v University of London [2018] UKUT 356 (LC)

EE Limited and Hutchison 3G UK Limited v London Borough of Islington [2019] UKUT 53 (LC)

University of London v Cornerstone Telecommunications Infrastructure Limited [2019] EWCA Civ 2075

Introduction

1. This is the claimant's application under paragraph 20 of Schedule 3A to the Communications Act 2003 (known as the Electronic Communications Code, or "the Code"). It seeks rights under the Code to install and operate apparatus on the roof of the respondent's building at Elephant and Castle. On 18 May 2020 the Tribunal imposed on the parties to the reference an agreement conferring Code rights on the claimant on an interim basis pursuant to paragraph 26 of the Code.

2. Those interim rights were expressed to last until the determination of the claimant's application for rights under paragraph 20, or further order, and on 6 and 7 August 2020 we heard the application for paragraph 20 rights. The parties were in dispute both about whether a paragraph 20 agreement should be imposed and about the terms of that agreement. In addition the Tribunal was asked to determine an application to amend the plan annexed to the interim Code agreement and to the draft paragraph 20 agreement. The claimant was represented by Mr Graham Read QC and the respondent by Mr Jonathan Wills of counsel.

3. The reference is one to which regulation 3(2) of the Electronic Communications and Wireless Telegraphy Regulations 2011 applies and must be determined by 2 September 2020. The Tribunal was not assisted in meeting that deadline by the way that the case was conducted by both parties with a startling level of mistrust and animosity, which inevitably extended the material we had to consider. Further difficulty was caused by the fact that the time estimate for the hearing was far too short, so that a number of issues could not be dealt with at the hearing (as will be seen below). One reason why it was too short was the cross-examination of witnesses whose evidence was not in dispute (for example, those who gave evidence about the importance and suitability of the site to the claimant); another was the claimant's reliance upon five witnesses about the terms of the agreement when one witness, familiar with the claimant's operational requirements, would have been sufficient. The lack of time at the hearing led to the submission of extensive written closings which were of little assistance and extended the time taken to produce this decision.

4. In the paragraphs that follow we set out the legal and factual background, and then consider whether an agreement should be imposed, the terms of the agreement and the amendment application, further explaining the law where relevant.

The legal background

5. The Code regulates the legal relationship between operators who provide electronic communications networks or infrastructure, and the occupiers of land on which those operators need to place their equipment. Paragraph 3 of the Code lists the Code rights (to install and operate equipment on land and so on) that, according to paragraph 9 of the Code, can only be conferred on an operator by agreement between the operator and the occupier of the relevant land. Paragraph 20 enables the Tribunal to impose an agreement conferring Code rights upon an operator and an occupier of land, if the conditions set out

in paragraph 21 are met. We set out paragraph 21 later when we come to look at it in detail.

6. When an agreement conferring Code rights is made by, or imposed upon, an operator and an occupier, the Code gives security of tenure to the operator. Paragraph 30 of the Code says:

> "(1) Sub-paragraph (2) applies if—
>
> (a) a code right is conferred by, or is otherwise binding on, a person (the "site provider") as the result of a code agreement, and
>
> (b) under the terms of the agreement—
>
> > (i) the right ceases to be exercisable or the site provider ceases to be bound by it, or
> >
> > (ii) the site provider may bring the code agreement to an end so far as it relates to that right.
>
> (2) Where this sub-paragraph applies the code agreement continues so that—
>
> (a) the operator may continue to exercise that right, and
>
> (b) the site provider continues to be bound by the right.
>
> (3) Sub-paragraph (2) does not apply to a code right which is conferred by, or is otherwise binding on, a person by virtue of an order under paragraph 26 (interim code rights) or 27 (temporary code rights).
>
> (4) Sub-paragraph (2) is subject to the following provisions of this Part of this code."

7. The "following provisions" referred to in paragraph 30(4) are the provisions in Part 5 of the Code that enable a site provider to bring Code rights to an end, and an operator to seek different rights or a new agreement, when the agreement that conferred Code rights would – absent paragraph 30 – have ended or have been about to end. The site provider can only bring the agreement to an end, or resist the conferral of new rights, on one of the grounds set out in paragraph 31(4):

> "(a) that the code agreement ought to come to an end as a result of substantial breaches by the operator of its obligations under the agreement;
>
> (b) that the code agreement ought to come to an end because of persistent delays by the operator in making payments to the site provider under the agreement;

> (c) that the site provider intends to redevelop all or part of the land to which the code agreement relates, or any neighbouring land, and could not reasonably do so unless the code agreement comes to an end;
>
> (d) that the operator is not entitled to the code agreement because the test under paragraph 21 for the imposition of the agreement on the site provider is not met."

8. Paragraph 26 of the Code enables the Tribunal to impose an agreement conferring Code rights on an interim basis, which means that the agreement is expressed to end on a specified date or on the occurring of a specified event, and will do so because paragraph 30 does not apply. Interim rights can only be created by order of the Tribunal, because the parties may not themselves contract out of paragraph 30. Interim rights are often sought alongside rights under paragraph 20 so as to enable the operator to get access to a site while the terms of a paragraph 20 agreement remain in dispute, but interim rights may be granted on a standalone basis without an accompanying paragraph 20 application; *University of London v Cornerstone Telecommunications Infrastructure Limited* [2019] EWCA Civ 2075.

The factual background

9. We set out here the factual background, which is undisputed (although the parties have different views about the likelihood and timing of future events).

The parties and the redevelopment

10. The claimant is a Code operator[1] providing telecommunications infrastructure for its shareholders, Vodafone Limited and Telefonica UK Limited, both of which are Code operators providing telecommunications networks.

11. The respondent, the University of Arts London, is a collegiate university with sites in a number of different places in London. Its site at Elephant and Castle is the London College of Communications, SE1 6EB ("the LCC"). In normal circumstances (absent the current pandemic) on a typical day there will be around 3,500 people on site, many of them students, and some of the students aged under 18. On Open Days, held once a month, around 5,000 people are on the premises.

12. Until recently the claimant had equipment on two roof-top sites in the Elephant and Castle shopping centre, pursuant to agreements with Elephant and Castle Properties Limited ("ECPL"). It had to leave those sites on 31 July 2020 because of the impending redevelopment of the area. The redevelopment is being carried out by ECPL and its associated companies led, or managed, by Delancey Real Estate Asset Management Limited; we refer to ECPL and the other companies involved in the redevelopment collectively as "the developer" because the structure of the joint venture has not been explained to us and is not relevant to the reference. The redevelopment is a major

[1] A "Code operator" is an operator designated by Ofcom pursuant to section 106 of the Communications Act 2003; only operators that are Code operators can have Code rights conferred upon them.

programme that has already been a number of years in the planning and will take several years to complete. The development area, of approximately 3.56 ha, comprises two areas, the West Site and the East Site; the East Site is to be redeveloped first. The two buildings the claimant has just left are part of the East Site and are going to be demolished later this year.

13. Mr Ahmed Soleman, a radio planning engineer employed by Telefonica UK Limited, gave evidence that in 2018 the developer informed him that the claimant would have to leave its two sites, and suggested that the claimant might move its equipment to a temporary site on the roof of the LCC, which is within the West Site; then once the LCC building was demolished the claimant would move back to the East Site. Mr Soleman's assessment of the LCC rooftop, using a radio planning tool, was that it would be a good replacement site, and the claimant accepted the suggestion.

14. The demolition of the LCC building means, obviously, that the respondent too will have to move, and a new building is to be built for it on the East Site. This is an important and welcome move for the respondent because the LCC building is near the end of its useful life.

The respondent's contractual arrangements

15. The respondent has entered into a number of agreements with the developer. Heads of Terms, which set out the structure of the intended deal but were not contractually binding, were signed in 2015, and a further version was signed on 23 June 2020. On 10 January 2019 the respondent entered a Deed of Indemnity with ECPL which protected the respondent in return for its participation in the section 106 agreement required by the local planning authority, and in which the respondent covenanted "not to restrict or prohibit" the ability of the developer to carry out the development. Finally on 5 August 2020 the respondent entered into a contract with the developer for the sale and leaseback of the LCC building.

16. The structure of the deal is as follows. The developer is obliged to build a new LCC building on the East Site as part of the first stage of the redevelopment. Upon practical completion of that building the respondent will sell the old LCC building to the developer. But it will not hand over possession; it will stay in the building and take a three-year lease-back. For the first 18 months of that term the lease-back is rent free. The expectation is that during that rent-free period the respondent will fit out the new LCC building ready for the start of a new academic year. The lease contains a break clause which the respondent can exercise at any time. After 18 months the rent for the lease-back rises from nil to £3 million per annum; so there is a very strong incentive for the respondent to get the new building ready and exercise the break clause within 18 months. At present the intention of the parties is that that will happen by 29 June 2026, but there are no contractual dates for the sale and lease-back; all depends upon the date of practical completion of the new LCC building (which is as yet unknown) and then on the speed at which the respondent gets the new building ready.

17. The sale of the old LCC building to the developer is therefore not a sale with vacant possession. But the contract provides that the respondent will only be able to exercise the break clause in the lease if it delivers up vacant possession of the property, free from any third-party rights and free of telecommunications apparatus.

The timescale of the redevelopment

18. Ms Ailsa Turnbull gave evidence about the intended timescale of the redevelopment. She is a director at Gardiner & Theobald LLP, and describes the firm as “Project Managers for the Elephant and Castle Town Centre (East and West sites) development”. She is Client Project Manager and is responsible for everything needed to facilitate the development such as planning, procurement and third party agreements.

19. Ms Turnbull summarised the developer’s progress since 2013; planning permission was granted in January 2019. It was subject to judicial review, which was refused in October 2019; the High Court has refused permission to appeal to the Court of Appeal. The application for permission has been renewed to the Court of Appeal and a decision on that is awaited; legal advice to the developer is that permission is unlikely to be granted.

20. Ms Turnbull gave us a lot of information about the nature of the redevelopment, and the consultation process that the developer has carried out; we do not need to set out all the detail, but we note that there will be retail and residential development, including 330 affordable housing units.

21. Ms Turnbull referred to a large and complex spreadsheet setting out the projected timescale for the development. The East Site shopping centre is to close its doors on 24 September 2020 and building will start in October 2020. Crucial to these proceedings is the intended date of practical completion of the new LCC building. Currently the developer expects to be able to give the respondent early access to the building in May 2024 with a view to the building being ready for the new academic year in September 2026; but if early access can be brought forward to March 2024 then the new building could be ready for September 2025.

22. Mr Read QC in cross-examination suggested to Ms Turnbull that there are many reasons why the development may be delayed, making the September 2026 start date impossible. An appeal in the judicial review proceedings is one. Another is the pandemic, which may give rise to another lock-down or may restrict traffic into and out of London, and may in any event cause radical change in retail and other businesses. And excavation may uncover material that requires archaeological work which may require work to pause.

23. Ms Turnbull agreed, and was at pains to make clear that the timetable she has set out is provisional and may change. There have been some delays already. Ms Turnbull’s clients have continued construction work on other construction sites in London throughout the last few months and the pandemic was not known to have affected progress. She has been advised that the judicial review is unlikely to go further. She accepted the possibility of delay due to archaeological discoveries but explained that this is unlikely given the history of building in the area. Things may go wrong; but equally they may go well, and Ms

Turnbull was optimistic about the prospect of the new LCC building being ready sooner than is currently projected.

The paragraph 26 agreement with EE Limited and Hutchinson 3G UK Limited

24. When the developer offered the LCC roof-top as a temporary site to the claimant it also offered it to EE Limited and Hutchison 3G Limited ("EE and H3G"), through their agent MBNL.[2] On 31 July 2020 a reference was made to the Tribunal by EE and H3G seeking interim rights over the site under paragraph 26 of the Code for a term of five years. The respondent agreed to the imposition of the agreement and therefore a consent order was sought, which the Tribunal made on 7 August 2020. In seeking a consent order the parties explained the circumstances of the development and the need for the respondent to give vacant possession of the site when breaking the lease. In the recital to the order the Deputy President said:

> "**THE TRIBUNAL** is … satisfied that it has jurisdiction to make the order under paragraph 26 of the Code and that, in the circumstances recorded in the draft consent order and in a letter from the Claimants' solicitors to the Tribunal dated 31 July 2020, the imposition of the proposed agreement is a proper exercise of the Tribunal's discretion".

The paragraph 21 issue: should the Tribunal impose Code rights under paragraph 20?

The dispute about paragraph 21

25. It is the respondent's case that, because of its obligations to the developer and the consequences that would flow from the imposition of an agreement under paragraph 20 of the Code, the test for the imposition of Code rights is not met. Paragraph 21 sets out that test as follows:

> "(1) Subject to sub-paragraph (5), the court may make an order under paragraph 20 if (and only if) the court thinks that both of the following conditions are met.
>
> (2) The first condition is that the prejudice caused to the relevant person by the order is capable of being adequately compensated by money.
>
> (3) The second condition is that the public benefit likely to result from the making of the order outweighs the prejudice to the relevant person.
>
> (4) In deciding whether the second condition is met, the court must have regard to the public interest in access to a choice of high quality electronic communications services.

[2] MBNL, unlike the claimant, is not a Code operator and therefore cannot have Code rights conferred on it.

> (5) The court may not make an order under paragraph 20 if it thinks that the relevant person intends to redevelop all or part of the land to which the code right would relate, or any neighbouring land, and could not reasonably do so if the order were made."

26. All being well the old LCC building will be demolished as part of the redevelopment of the West Site, but the respondent cannot avail itself of paragraph 21(5) because it is not itself going to carry out the redevelopment. Instead, it is the respondent's case that the Tribunal should not make an order under paragraph 20 of the Code because neither of the conditions in paragraphs 21(2) and 21(3) is met.

27. We have to consider in detail the parties' arguments about those two conditions. We begin by saying that we accept what the claimant says about the public benefit of making the order sought. This is a busy urban area comprising retail, residential and university premises where electronic communications are in constant demand, and indeed the provision of such communications is an important element in the redevelopment plans. This is a suitable site to replace the buildings the claimant has had to leave. It is now well-established (see *Cornerstone Telecommunications Infrastructure Limited v University of London* [2018] UKUT 356 (LC), paragraphs 131 – 133) that it is no part of the Tribunal's task to consider whether alternative sites would do just as well. In any case it is not clear that any alternatives are available, save for the possibility that the claimant might share the rooftop site by agreement with MBNL on behalf of EE and H3G. Whether sharing would be on offer is not known, but in any event we regard such a sharing arrangement as in effect an alternative site which we do not have to consider. We have to weigh the public benefit arising from the imposition of a paragraph 20 agreement as if the alternative were that the claimant does not operate from the roof-top; that benefit is not diminished by the fact that the same benefit might be achieved by the use of an alternative site or of a sharing deal on the same rooftop.

The arguments for the respondent

28. The respondent argues that the imposition of an agreement under paragraph 20 will prejudice it in a number of ways.

29. The respondent says that once the paragraph 20 agreement has been imposed it will no longer be in control of its ability to meet its contractual obligations to the developer. It will not be able to give vacant possession of the LCC building, either on exercising the break or at the end of the term, unless the claimant leaves. The claimant's willingness to leave is unpredictable; it is entitled to take advantage of all the time available to it, and the respondent points out that it did not leave the old sites on request. A reference had to be made by ECPL to the Tribunal, and the claimant put the developer to proof of its intention to redevelop, although eventually (after a case management hearing) a consent order was made.

30. Accordingly there is a risk that litigation will be needed to get the claimant out, and if the agreement is imposed under paragraph 20 that will mean proceedings under Part 5 of the Code. The respondent is concerned about the time it will take to make the claimant leave.

31. The claimant is prepared to accept a five-year agreement under paragraph 20 (rather than the ten-year term it normally seeks), which would expire at the end of August 2025. Notice under paragraph 31 could therefore be given at the earliest on 28 February 2024, being eighteen months before the contractual term date. The claimant would then have three months in which to serve a counter-notice, and three months after that to make a reference to the Tribunal. It is, as the respondent says, entitled to take that time. The reference when made would not be subject to the six-month deadline imposed by regulation 3(2) of the Electronic Communications and Wireless Telegraphy Regulations 2011, and the respondent argues that it could take up to a year to be determined. A decision made in August 2025 bringing the Code rights to an end would not remove the claimant; if it did not then leave voluntarily Part 6 proceedings would be needed to obtain an order for the removal of the apparatus from the roof-top. The respondent observes that Part 6 proceedings are an unknown quantity and will not necessarily lead to an order for immediate removal. The respondent fears, therefore, that the claimant's apparatus could be on the roof beyond the summer of 2025 even if notice was given at the earliest possible opportunity.

32. The plan at present is for the new LCC building to be fitted out and operational (and therefore the break clause on the old building exercised) by September 2026, ideally in June 2026. But that may not help in terms of the time needed for litigation. A notice under paragraph 31 of the Code seeking to bring the Code rights to an end would not, realistically, be given until practical completion of the new LCC building; and at that point time starts to run on the new lease. The rent-free period lasts 18 months. Failure to get the claimant out in eighteen months would leave the respondent liable for the £3 million per annum rent that is due for the second half of the lease. And as just demonstrated, says the respondent, 18 months may not be long enough.

33. The scenarios just described assume a Tribunal decision bringing the Code rights to an end, but the respondent makes no such assumption. It argues that if it cannot persuade the Tribunal now that the tests in paragraphs 21(2) and (3) are not met, the Tribunal may not be persuaded in five years' time.

34. So the imposition of an agreement under paragraph 20 would mean that the respondent was no longer in control of its ability to give vacant possession of the LCC building to the developer within 18 months of the commencement of the lease-back and might well be unable to do so. The risk of litigation, and the time that litigation would take, put it at risk of having to pay rent beyond the first 18 months of the lease; and if the litigation is unsuccessful then at worst it will be unable to deliver vacant possession at the end of the three-year lease. That will leave it liable either to an unpredictable level of damages to the developer (which it would seek to recover from the claimant) or to an order for specific performance or an injunction. The consequences of litigation with the developer are unpredictable and unquantifiable in terms of reputational damage and damage to the working relationship with the developer. The respondent will also be prejudiced if entry into the new building is delayed, because students will have to continue working in an unsatisfactory environment.

35. Furthermore, the respondent argues that the mechanics of giving notice under the Code in the circumstances contemplated are unclear. A paragraph 31 notice can only be given by a

person who is bound by Code rights and is a party to the agreement conferring them. It is not in dispute that once the sale to the developer takes place, the effect of paragraph 10 of the Code is that the developer as freeholder will be bound by the Code agreement and will be deemed to be a party to it. The respondent takes the view that that means that the respondent, once it becomes a lessee instead of the freeholder, will no longer be a party to the Code agreement; the deeming provision is in paragraph 10(6):

> "A successor in title who is bound by a code right by virtue of sub-paragraph (5)(a) is to be treated as a party to the agreement by which P agreed to be bound by the right".

The respondent says that this means that the developer will be deemed to be a party in place of the respondent. Accordingly it is argued that once the lease-back takes effect the respondent will be unable to serve a paragraph 31 notice. Only the developer would be able to do so. It is not obliged to do so, and cannot be expected to welcome the prospect; the consequences of that situation are unknown.

36. In summary the respondent says, first, that a number of these prejudices are not capable of being quantified in money – in particular the risk to reputation, the risk to its relationship with its students, and the risk of a claim for an injunction. Accordingly the condition in paragraph 21(2) is not met. Nor, secondly, is the condition in paragraph 21(3) because the level of prejudice is so very high (as well as being unquantifiable at present) that it cannot be said that the public benefit likely to result from the making of the order outweighs the prejudice to it, even bearing in mind the public interest in a choice of high quality electronic communications networks.

37. The respondent also says that it is willing to agree to the imposition of an agreement conferring interim Code rights under paragraph 26 for five years. We will comment separately on that.

The arguments for the claimant

38. The claimant regards much of the respondent's argument as fanciful and exaggerated. First of all, it says that the development may well be delayed or may even not go ahead at all in the form currently intended. So the whole basis of the respondent's arguments about prejudice is, according to the claimant, open to doubt. If the development does go ahead, the claimant says that the respondent exaggerates the time that litigation would take; the Tribunal is well able to deal with a reference expeditiously even if the statutory six-month time limit does not apply. The claimant does not dispute that litigation may be necessary to remove it, but argues that the respondent would have a clear case at that stage.

39. The claimant does not accept the respondent's argument that the developer itself would have to give notice and make the reference; it says that on ordinary contractual principles the respondent remains party to the Code agreement and of course would still be the site provider. It would have far stronger grounds under paragraphs 21(2) and (3) at that stage, once practical completion of the new LCC building has taken place, than it has now, and the developer could join in the proceedings to make a case under paragraph 21(5). If the

Tribunal made an order against it, says the claimant, it would comply rather than waiting for Part 6 proceedings and an order for removal. Mr Read QC did not accept that there was any discretion under paragraph 40 and argued that an order for removal could be obtained very quickly.

40. Accordingly the claimant says that both conditions in paragraph 21(2) and (3) are met; the prejudice to the respondent is far less than the respondent supposes, and will be far outweighed by the public benefit in imposing a paragraph 20 agreement. In assessing that public benefit, says Mr Read QC, it is not open to the Tribunal to consider the public disbenefit caused by delay to the development if the claimant fails to leave; the Tribunal must consider only the public benefit that will flow from the conferral of secure Code rights.

The argument about paragraph 26

41. We noted above that the respondent expresses willingness to be bound by interim Code rights for five years.

42. The claimant does not want interim rights for five years. It points to the likelihood of delay to the development. If in five years' time the new LCC building is not nearing completion, and the claimant has only paragraph 26 rights, it will have no defence against an order to remove its apparatus. It does not trust the respondent to refrain from enforcing the removal of the claimant's apparatus before practical completion of the new LCC building, at a time when there was as yet no new site available to the claimant on the East Site. A paragraph 26 agreement would leave the claimant at risk of removal in circumstances where there would be no good reason for it to leave and considerable public disbenefit in its doing so.

43. At one of the case management hearings the Tribunal asked whether the claimant proposed to serve notice, and make a reference, claiming paragraph 26 rights for a term of five years in case it failed to persuade the Tribunal to impose an agreement under paragraph 20. Mr Read QC said that the claimant had chosen not to do so. Accordingly it is not in dispute that we cannot impose interim rights for five years upon these parties in this reference. Nevertheless the respondent argues that the imposition of such an agreement, albeit not in this reference, has to be in the Tribunal's contemplation when it considers the consequences of making an order under paragraph 20 and the level of public benefit that would confer, on the basis that if it did not make that order it would make an order in a fresh reference under paragraph 26. It is the claimant's case that the Tribunal does not have jurisdiction to make an order conferring interim rights for five years because to do so would circumvent the policy of the Code.

44. Mr Read points out that the Code says expressly, at paragraph 100, that it is not possible to contract out of the provisions of parts 3 to 6 of the Code, and it was central to the policy of the Law Commission, and of the government prior to the enactment of the Code, that it should not be possible to contract out of the security given to operators by the Code. Paragraph 6.96 of the Law Commission's report *The Electronic Communications Code* said:

> “the revised Code should provide that Code rights shall not come to an end unless terminated in accordance with the provisions of the revised Code”,

and the consultation published in February 2015 by the department for Culture, Media and Sport stated that:

> “the usefulness and legitimacy of the Code for all stakeholders is premised on ensuring that particular provisions of the Code cannot be ignored or circumvented.”

45. The claimant argues that whilst interim rights cannot be created by agreement, the Tribunal in imposing them for a term of five years would be sanctioning an agreement to circumvent Part 5 of the Code. To do so in the present case might lead to widespread contracting out, where an occupier offers paragraph 26 rights by consent, while threatening to contest a reference to the Tribunal under paragraph 20. Alternatively if there is jurisdiction the claimant says that the grant of interim rights for five years would be an improper exercise of the Tribunal’s discretion for the same reasons.

46. When this was discussed at the hearing the outcome of the application by consent for such an order in the reference made by EE and H3G was not known. It is known now (see paragraph 24 above).

47. We take the view that there is no substance in the claimant’s argument about jurisdiction. The Code does not provide any limit to the time for which interim rights can be imposed, and any argument that there is some sort of implicit time limit requires an impossible judgment as to where that limit lies. If five years is too long, how about three, two, or one, given that six months is uncontroversial? A jurisdictional limit is implausible. Clearly there is a discretion to be exercised, and the Tribunal will be alert to an attempt to frustrate the policy of the Code if parties agree paragraph 26 rights when there is no reason why paragraph 20 should not be engaged. By contrast, the respondent says that in the current reference the grant of interim rights for five years would make available for telecommunications equipment a site that would not otherwise meet the test for the imposition of Code rights.

48. In the light of what we have said about jurisdiction, should we consider the present application on the basis that if a paragraph 20 agreement is not imposed the public would nevertheless benefit from the making of a paragraph 26 agreement? The answer to that question will depend upon the circumstances in an individual reference. In the present case the claimant has chosen not to make a reference seeking a five year interim Code agreement. It is not known whether it will do so if it fails in this reference. Nor is it known what the respondent’s response would be. The public benefits of a paragraph 20 agreement are not diminished by the fact that the same benefits could, at least for five years, be achieved by a paragraph 26 agreement, and we do not know whether in fact a paragraph 26 agreement will be sought by the claimant.

49. Accordingly, we have no doubt, and the Tribunal has already held, that the Tribunal has jurisdiction to impose an agreement conferring interim Code rights for five years. But in

considering the present application for rights under paragraph 20 we compare the public benefits that will be conferred by the paragraph 20 agreement with the absence of such an agreement, and without assuming that a paragraph 26 agreement would be imposed instead.

Our conclusion on the paragraph 21 issue

50. With that in mind we turn back to the parties' arguments on the paragraph 21 issue.

51. It is clear that Parliament in enacting the Code intended private landowners to participate in the provision of telecommunications sites for the public good by suffering the use of their land for that purpose, being compensated for any damage caused but for consideration calculated on a basis that prevents them from making a profit out of the deal as they could under the Code's statutory predecessor. The test for the imposition of such rights is quite a stiff one; for the respondent to escape this public duty, unless it is itself going to redevelop the site, it must show either that it will suffer loss that cannot be compensated in money, or that the prejudice it will suffer is so great that it outweighs the public benefit derived from the use of the site. The level of prejudice must be very high indeed to outweigh the public benefit, in the light of the public demand for, and dependence upon, the availability of electronic communications. The benefit is perhaps even higher today than it was when the Code was enacted and certainly in the current circumstances we are all keenly aware of it.

52. But the very fact that Parliament provided, in paragraph 21(2), a way out for the landowner who will suffer prejudice that cannot be compensated, or in paragraph 21(3) contemplated a level of prejudice so great that it would outweigh the public benefit, points to the fact that Parliament did not intend a landowner to comply with this public duty at all costs. There comes a point when it is too much to ask.

53. There might be many reasons why that is the case. What stands out in this reference is risk, and specifically the risk of litigation.

54. We find that the development of Elephant and Castle is very likely to go ahead; we accept Ms Turnbull's evidence as realistic rather than optimistic, particularly in view of her evidence that the developer has continued work on its sites during the pandemic this year and is prepared for further lockdowns. We accept her evidence that the developer has been advised that further delay from judicial review is unlikely. We therefore also find that it is highly likely that the new LCC building will reach practical completion in time for the respondent to move in in the summer of 2026, and that there is a fair chance that it will be able to move in in the summer of 2025. We find as a fact that it is not possible to be confident that the claimant will leave the site without litigation; it was resistant to the request to leave its previous site, and it may have sound operational reasons for seizing every chance to prolong its stay on the temporary site. We acknowledge that the litigation relating to the previous sites ended in a consent order, but litigation was necessary in that case and will probably be necessary in this.

55. We do not agree with the respondent's interpretation of paragraph 10(6). When the respondent sells the old LCC building the developer will become a party to the Code agreement, but we see no reason (in the Code or in general principles) why the respondent would cease to be a party. It will remain a site provider, and so it will be able to give notice under paragraph 31 and so will remain to some extent in control of the process of removal. But there is a very high risk that it will take litigation to remove the claimant, so as to enable the respondent to give vacant possession of its building, and the outcome of that litigation, as of very nearly all litigation, cannot be predicted.

56. The consequence of risk is stress; the risk of litigation will cause stress and uncertainty to the respondent's employees, at a time when they are preparing for a move of the entire institution to a new building (itself a stressful process). If litigation becomes a reality there will be further stress, with its associated operational consequences. Whether or not the respondent is the successful party in any litigation there will be reputational damage in terms of how the respondent is regarded by the public, and difficulties in its relationship with the developer and with its students and prospective students. We regard all these as prejudices that cannot be compensated in money.

57. There is a further risk, albeit a lower risk, that the respondent will be unsuccessful in that litigation and will be unable to meet its obligations to the developer. Injunction proceedings might then be taken against it. Again this involves prejudice, in terms of stress, damage to the relationship with the developer, and reputational damage, that cannot be compensated in money.

58. Accordingly we find that the condition in paragraph 21(2) is not met.

59. Nor is the condition in paragraph 21(3). In considering this condition we reiterate that the public benefit we are considering is the benefit to the public of the claimant operating from the rooftop under the paragraph 20 agreement, whether or not that benefit could be achieved from another site or by sharing with EE and H3G. We reject the respondent's argument that we have to consider the net public benefit, being the benefit from the claimant's operations minus the disbenefit of delay to the development. The latter is too speculative to consider, but in any event we do not think that the Code requires a net assessment of the public benefit in this way. Even considering the benefit of the claimant's operation on the site, without netting off other disbenefits, we find that the prejudice to this respondent in these particular circumstances is too great to be outweighed by the public benefit likely to result from the making of the order.

60. We agree that the respondent may be pessimistic in its assessment of the time it would take to determine a reference to the Tribunal. If the Tribunal's workload and capacity continue to be as they stand at present it would be able to determine the reference under Part 5 well within a year of its commencement. But workload and capacity are notoriously unpredictable. A timely determination might not be possible. And litigation itself is unpredictable; therefore we cannot make findings of fact about either the time taken to determine such a reference or the outcome of it.

61. In view of that the imposition of a paragraph 20 agreement puts the respondent at risk both of having to pay rent at the rate of £3million per annum after the first 18 months of the lease-back, and of being liable in very substantial damages to the developer at the end of the three-year lease. Obviously it would seek to recover those losses from the claimant but the process of doing so is hardly likely to be easy.

62. The weighing of private prejudice against public benefit is difficult; the two are not obviously commensurable. Public benefit will generally outweigh inconvenience and annoyance and readily calculable losses, but there is far more than that here. We think that this crosses the boundary between prejudice that has to be suffered for the public good, and prejudice that is too much to ask. The condition in paragraph 21(3) is not met.

63. Accordingly we decline to impose an agreement under paragraph 20 and the claimant's application fails.

The terms of the agreement

64. In case we are wrong about that, we turn to the disputed terms in the draft agreement. The claimant was keen that we do so in order to resolve points that commonly arise and are of importance to operators generally; we observe that what we have to say about terms is *obiter* in the circumstances, and also that decisions about terms will depend upon the site, the factual background, and the parties' circumstances. For all those reasons we would caution against any attempt to derive general principles from what we say about the terms of the agreement.

65. However, the following is a matter of general concern in telecommunications disputes.

66. The level of hostility that we have observed between the parties to this reference has been unseemly and unnecessary, and has inflated costs on both sides. As the Tribunal observed at the first case management hearing, the parties have behaved as if they are enemies. We understand the caution of the respondent about matters of operational safety and convenience, and we understand the frustration of the claimant in the face of what it perceives as unnecessary caution. But the caution, and the frustration, have been taken too far, despite the fact that each party is providing a public service and endeavouring to do so safely and efficiently and neither is seeking to wrong the other or to do anything illegal.

67. An example of that is the disproportionate amount of time and energy spent on disputes about disclosure. The respondent was not prepared to disclose its contractual arrangements with the developer until ordered to do so by the Tribunal. The claimant has been unwilling to disclose to the respondent its own survey of the building. Disputes would be avoided if material can be shared, as a matter of courtesy and helpfulness even where there is no legal obligation to do so. The respondent applied at the case management hearing in April for an order that the claimant carry out and disclose a structural survey of the building, but did not tell the Tribunal or the claimant that it had itself commissioned a survey ("the Curtins report") in which concern was expressed about the capacity of the roof to support telecommunications equipment. That was an error of judgment on the part of the respondent, being a failure in its duty to co-operate with the Tribunal and to be frank in

giving evidence; but the claimant's attack on the credibility of the respondent's witness Mr Chandler (Associate Director of the respondent) was excessive. He was not a dishonest witness, but his evidence and his approach to the dispute exemplifies the lack of trust that has characterised the behaviour of both parties to this dispute.

68. The respondent accepts that the claimant is entitled to put equipment on the roof-top site, albeit on an interim basis not a secure one, and it is therefore in the interests of both parties to build a relationship that will work well in the coming years. The parties to a reference under the Code will be served well by lawyers who seek to build consensus and to help their clients see the other party's point of view; an approach that assumes the worst in all circumstances and requires provision in the agreement for duplicated safeguards and excessive bureaucracy will generate pointless costs, is likely to lead (as we shall see) to contradictory obligations, and will sour the atmosphere for the future. Sadly that is what has happened here.

69. In deciding the disputed terms we bear in mind the provisions of paragraph 23(5) of the Code which states:

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

70. Subject to that, we regard it as important not to duplicate safeguards; not to generate requirements for the transmission of information where that would be of little or no practical benefit to either party; and to give due respect to the professionalism of both parties. We accept the evidence of the claimant's witnesses that they make it a priority to consult site providers and to listen to what they say when seeking access to sites or tackling an emergency and so on. We accept that the respondent will act reasonably in protecting its students and seeking to accommodate the claimant. We would expect those considerations to be borne in mind by those who negotiate Code agreements, and by their representatives.

71. Two further points specific to this dispute have to be mentioned. On 18 May 2020 the Tribunal gave directions about the transmission of a travelling draft between the parties, and for the most part those directions have been complied with. However, the claimant says that some of the respondent's amendments were added to the travelling draft outside the timetable, and the respondent says that the claimant's solicitors failed to include all its requirements in the Schedule of Disputed terms. There was no time to resolve that dispute at the hearing, because the Tribunal would have had to make findings of fact in order to do so. Pragmatically, we said at the hearing that because of the difficulties caused by the inadequate time estimate for the hearing we would decide upon all the terms in dispute between the parties, reserving the procedural issues to be dealt with in the context of costs.

72. Second, we mentioned at the outset that too many witnesses of fact were called about the terms of the agreement. Those witnesses of fact set out their qualifications and gave evidence on the basis of their expertise. Much of their evidence therefore stood on the border between evidence of fact and evidence of opinion. We have taken care to have regard only to evidence of fact, and we understand that witnesses may be able to give evidence of facts of which they are aware because of their expertise. Mr Cowap, for example, gave evidence about the position of the exclusion zones, and we accept that he knows, as a matter of fact, where they are. For the future we suggest that parties to telecommunications disputes content themselves with one witness of fact about the terms of the agreement. That witness should be familiar with the requirements and concerns of his or her organisation (where relevant); to some extent the witness's knowledge will be derived from information provided by colleagues and the Tribunal can be expected to give short shrift to attempts to criticise it as hearsay. Where there is real dispute about technical matters the parties must seek permission to adduce expert evidence but we hope that will be rare. Operational issues, for example access, electricity supplies, and health and safety should be straightforward matters of fact.

73. We now go through the disputed terms in the order in which they appear in the agreement, but combining them where appropriate. We quote, and use, definitions set out in the draft agreement such as "the Grantor", "the Communications Site" and so on, which we think do not require explanation.

The definition of Compensation and of Site Payment

74. Consideration is agreed at a single payment of £50. Compensation is not agreed.

75. The draft agreement provides for compensation, defined as follows:

> "Compensation for any loss or damage that has or will be sustained by the Grantor as a result of the exercise of the Rights of £9,600 which includes £1,500 pounds (sic) towards the Grantor's valuation fees and £1,500 towards the Grantor's legal fees in advising and completing this Agreement in the event that the Grantor employs such professional advisers."

76. In proposing these figures the claimant relies upon the unchallenged expert evidence of Mr James Ogborn MRICS, a partner in Axis Property Consultancy LLP. Apart from professional fees, the claimant's compensation figure of £9,600[3] includes a contribution of £5,000 towards the running costs of the LCC building over a period of five years and, it appears, £1,600 for the temporary use of 11 car parking spaces for the Set Down Area based on a rate of £15 per space per day. The claimant says the respondent is protected by the claimant against incurring other costs by provisions in the agreement, e.g. those concerning damage caused during line installation, during the exercise of the right to access, by the Works and on vacation of the site.

77. The respondent proposes instead the following definition of compensation and an additional paragraph 1.2. as follows:

[3] Mr Ogborn did not give a total figure in his expert report

"Compensation for any loss or damage that has or will be sustained by the Grantor as a result of the exercise of the Rights

New paragraph 1.2

1.2.1
Neither the Grantor nor the Operator is able to verify the full extent of the potential compensatable losses that may be properly incurred and due to the Grantor until such time as the Operator has exercised the Rights. The Operator and the Grantor will therefore apply the process set out at paragraph 1.2.2 to any claim that the Grantor may have for Compensation.

1.2.2
The Operator shall pay to the Grantor within 14 days of written demand compensation for any loss or damage that has been sustained or will be sustained by the Grantor as a result of the exercise of the Code rights herein granted. The Operator shall also pay to the Grantor compensation for any loss or damage including expenses (including reasonable legal and valuation expenses, diminution in value of the land and costs of reinstatement)."

78. In essence the respondent does not want a compensation to be paid "up front" in a single sum and requires instead a contractual obligation on the part of the claimant to compensate loss and damage as it arises.

79. That then gives rise to a further difference over the defined term "Site Payment", which the draft defines as a single payment of consideration and compensation at the outset. The respondent does not want compensation to be included in that definition, because it does not want a single payment of compensation but an ongoing liability as discussed above.

80. The claimant says that the respondent's definition of Compensation would lead to potential double recovery of costs and is unnecessary.

81. The Tribunal's practice on this issue was illustrated in *EE Limited and Hutchison 3G UK Limited v London Borough of Islington* [2019] UKUT 53 (LC) at [121]:

> "Our preference is to determine (in principle at least) those claims which can be determined, to dismiss those which are speculative or unfounded, and to leave the respondent to bring a further claim in the event that additional loss or damage (not already taken into account) can be proven to have been sustained in future."

Accordingly we accept the claimant's approach. The payment of a single figure towards running costs and car parking will save time and bureaucracy; it is not in either party's interests to have to make constant calculations, perhaps on a daily basis, of such costs.

82. We accept Mr Ogborn's assessment of compensation in the absence of any challenge to it by the respondent (the respondent took the view that the cost of obtaining an expert valuation report probably would have exceeded the compensation identified). We also

accept Mr Ogborn's conclusion that, given the LCC building is to be redeveloped in five years' time there is unlikely to be any diminution in its value caused by the exercise of code rights or any need to reinstate the property following the removal of the claimant's electronic communications apparatus.

83. That does not of course limit the respondent's ability to claim for any future loss or damage, which the claimant accepts it will be liable to compensate as it arises pursuant to paragraph 25 of the Code which provides:

> "25(1) If the court makes an order under paragraph 20 the court may also order the operator to pay compensation to the relevant person for any loss or damage that has been sustained or will be sustained by that person as a result of the exercise of the code right to which the order relates.
>
> (2) An order under sub-paragraph (1) may be made -
>
> > (a) at the time the court makes an order under paragraph 20, or
> >
> > (b) at any time afterwards, on the application of the relevant person."

84. Under sub-paragraph (5) an order may provide for the operator to make a lump sum payment, periodical payments, payment(s) on the occurrence of an event(s), or in such other form or time(s) as the court may direct.

85. The respondent is not content to rely upon the claimant's obligations under paragraph 25. Its proposed provisions require the payment of compensation as a contractual debt within 14 days of written demand. In our judgment such a provision would be contrary to paragraph 86 of the Code:

> "Except as provided by any provision of Parts 2 to 13 of this code or this Part, an operator is not liable to compensate any person for, and is not subject to any other liability in respect of, any loss or damage caused by the lawful exercise of any right conferred by or in accordance with any provision of those Parts."

86. We therefore accept the claimant's definition of "Compensation" as set out above.

87. Accordingly we also accept the claimant's definition of "Site Payment" as "Consideration and Compensation", i.e. the amount of £9,650, payable at the Term Commencement Date.

The definition and use of the Set Down Area

88. The draft agreement defines the Set Down Area as:

> "the area shown hatched brown on Plan 2 or such other area of land as is agreed between the parties acting reasonably".

89. The respondent wants to amend the definition by adding the words "excluding the Car Park Area" after "Plan 2".

90. The claimant's draft paragraphs 4.2.1.2 and 5.1.1.1 say:

> "4.2.1.2
> to use the Set-Down Area on a temporary basis for storing machinery and parking and turning vehicles and machinery in order to access the Communications Site and for undertaking and managing any Works provided that the Operator shall make good within a reasonable timeframe any damage caused in the exercise of this right
>
> 5.1.1.1
> The Operator shall have the right to carry out works on the Set Down Area that may be required in the exercise of those rights set out in paragraph 5.1.1.2

91. The respondent seeks instead the following wording:

> "4.2.1.2 to use the Set-Down Area and the Car Park Area on a temporary basis for initial installation of the Equipment but provided that the operator shall carry out such works with all due speed and provided that the Operator shall return the Set-Down Area to the Grantor in no worse state than when it took access, making good any damage caused by its use to the Landlord's reasonable satisfaction
>
> 5.1.1.1 to use the Set Down Area on not less than 3 days' prior written notice (save in the case of emergency or Operational Urgency) for storing machinery, in order to access the Communications Site and for undertaking any Works provided that the Operator shall make good within a reasonable time frame any damage caused in the exercise of the right.

92. So there are three disputes; first, should the Car Park Area be excluded from the definition of the Set Down Area so that it cannot be used after the initial installation; second, should the respondent's additional wording about reinstatement be included in the two clauses; and third should the respondent's requirement for written notice be included in paragraph 5.1.1.1 (which relates to use of the Set Down Area after the initial installation).

93. We can deal shortly with the second and third points. We note that the suggested requirement for written notice duplicates the requirement elsewhere in the draft agreement for the claimant to give advance written notice of access; so there is no need to duplicate it here. We also regard the additional wording about "due speed" and the standard of reinstatement as unnecessary elaborations upon the wording proposed by the claimant.

94. That leaves the first point, namely whether the car park is to be included in the definition of the Set Down Area so that it can be used as part of that area after the initial installation of the equipment. This is not agreed because of the importance to the claimant of the Set Down Area on an occasional basis after installation, and because of the importance to the respondent of the car park not only for parking but also as a fire escape.

95. Mr Daniel Savage, the claimant's Head of Engineering, described a set down area "as an area of land outside of a Communications Site that is used by Cornerstone whilst works are being carried out to, among other things, store construction material, store Apparatus, locate and operate cranes used to transport bulky Apparatus (such as antennas and heavy steelwork) to Communications Sites and for the placement of temporary toilets."

96. Mr Savage said a set down area is required for the initial installation of ECA; intermittently during the life of the Code agreement where the apparatus needs to be upgraded or replaced; and at the end of the Code agreement when the apparatus is removed. The proposed set down area at the LCC building is at ground, sub-roof (mezzanine) and roof levels. It will be necessary to use a mobile crane to install and remove apparatus and there is provision for a drop zone while the crane is in use as defined by the crane's operating radius.

97. In his first witness statement Mr Mathew Chandler, an Associate Director of UAL, said the fire escape for the LCC building was through the car park and that it had to be kept clear at all times. It was also necessary to provide three disabled car parking spaces. Without control of the car park UAL could not function effectively as a teaching campus. The claimant sought to meet these concerns by including in the definition the words "or such other area of land as is agreed between the parties acting reasonably". The claimant noted that the use of the set down area would also be regulated by the access requirements contained in the agreement as well as other provisions concerning health and safety and terms specifying that the Works must be carried out with as little inconvenience to the respondent as reasonably practicable and to make good any physical damage caused.

98. The respondent accepted that Mr Savage acknowledged the legitimacy of its concern about the fire escape and that there would need to be very careful consideration of the risks involved in using the car park area. He had accepted that an obligation for the claimant to consult the respondent would not be onerous and that the claimant's approach was to try and ensure it did not add any burden to the occupier. Apart from emergencies there needed to be clear prior communication between the parties to minimise the impact of the use of the set down area.

99. Mr Halford-Reeves, the claimant's Site Access Manager, said that he understood the problems UAL would face if the claimant wanted to get its apparatus to the site on an Open Day and that the claimant did not wish to be discourteous or damage relations with the site provider.

100. It was pointed out for the claimant that not only would it have to give written notice of its wish to use the Set Down Area (as we observed above) but also that it would have to comply with the respondent's reasonable health and safety and security requirements notified in writing. Therefore the claimant would not be able for example to use a crane on an Open Day under the wording of the Code agreement that the claimant had always sought.

101. This issue illustrates the gulf that exists in this case (and many others) between those drafting the Code agreement and those who will be called upon to implement it. The

former are the lawyers who are concerned with what *could* happen under the terms of the agreement while the latter (engineers, access managers, estate managers and the like) are more concerned with what *should* happen and in so doing are generally desirous of working pragmatically and sensibly towards finding a solution that will work without adversely affecting either party's reasonable requirements.

102. Our approach to the determination of the disputed terms is described in paragraphs 69 and 70 above and applying this to the definition of the Set Down Area we do not consider it appropriate to exclude the Car Park Area from it. We are satisfied that in practice the claimant would not, and, indeed, could not, occupy the Car Park Area without giving due notice and complying with the respondent's reasonable health and safety and security requirements. This may not satisfy the respondent's desire to minimise any adverse impact upon its use of the LCC building for Open Days and/or examinations. But it must be remembered that there are likely to be very few occasions when use of the Set Down Area will be required other than for installation and removal of the ECA. When such occasions arise we consider the parties' relevant officers capable of acting reasonably in reaching a practical solution.

103. We accept the claimant's definition of the Set Down Area as :

> "The area shown hatched brown on Plan 2 or such other area as is agreed between the parties acting reasonably."

It follows from this definition that there is no need to include a definition of the Car Park Area in the agreement.

The definition of the Access Route

104. The claimant proposes that part (b) of the definition of the Access Route[4] should be:

> "Access through and on the Building including the right to use any Common Parts to and from the Communications Site and to and from the Equipment".

The Communications Site means that part of the Building (LCC) shown edged in red on Plan 2; Equipment is as defined (see below) and the Common Parts means (as recently agreed between the parties) "such fire escapes, entrance, lobbies, passages, lifts, staircases and gantries in or on the Building for use by the Operator in common with others to the extent necessary to gain access to and from the Communications Site and/or the Equipment".

105. The respondent proposes that the definition of part (b) of the Access Route should be:

> "Access through and on the Common Parts (unless an alternative route has been specified) to and from the Communications Site and to and from the Equipment".

[4] Part (a) of the definition is agreed

We assume that the respondent's intention is that it would be the respondent who specified a particular route. The respondent says that it needs to specify and retain control of the Access Route for health and safety, and safeguarding purposes.

106. We do not think it is appropriate for the respondent to retain an unqualified right to specify a particular access route. The use of the Access Route is governed by the Access Requirements (see paragraphs 107 and following below) which the claimant has to comply with at all times[5] and is not an unfettered right. On the other hand we see no reason why the claimant might need to access the whole building, including for example offices and teaching rooms. In our judgment, given the breadth of the agreed definition of Common Parts, part (b) of the Access Route shall mean:

> "Access through and on the Common Parts".

The definition of the Access Requirements and the Access Contact

107. There are a number of disputes under this head.

108. It is agreed that the claimant is to give three days' written notice of access to the respondent's property, save in emergency. There is a dispute as to how this is to be provided. The claimant wants it to be by letter, email or other electronic means, whereas the respondent is only prepared to agree to "written notice" without qualification.

109. We do not consider it appropriate for three days' notice of routine access to be given by hard copy letter only. That is unlikely to be efficient or timely. We think that service of such notice by email should be permissible. The term "other electronic means" is not explained but presumably would include mobile telephone, text or even Twitter messages which we think would be inappropriate in the light of the respondent's reasonable desire to maintain accurate and complete records of the claimant's access to the Building .

110. Both parties accept that in case of emergency or operational urgency such notice shall be given as is reasonable in the circumstances. The claimant wants the ability in that case to give notice by telephone but the respondent requires an email to be sent to the designated Access Contacts using the heading "Emergency Telecoms Issue" and followed up by a telephone call "to the office".

111. We consider that notice in the event of an emergency or in the case of operational urgency should be made by telephone or email, but if made by telephone it should be confirmed by email as soon as reasonably practicable; for the agreement to specify the heading on such emails is unnecessary micro-management.

112. Next, the respondent proposes that Operational Urgency should mean:

> "Significant risk of damage to Equipment and/or significant risk to an electronic communications network."

[5] Paragraph 4.2.3 of the draft agreement

113. The claimant rejects this definition as being "significantly limited" but is prepared to accept a more detailed definition:

> "means all and any incidences or events which arise from, are as a consequence of or are in any way connected to any and all unplanned events, faults and/or unforeseen happenings which require immediate or urgent action and/or intervention to correct, repair, alter, adjust, upgrade, remove and/or protect the Equipment, Lines and/or to maintain the electronic communication services provided from the Communications Site."

The respondent rejects this definition as being too wide, and says that it could include routine maintenance or faults.

114. We do not think that there is any need for a separate definition of operational urgency or that this term needs to be included in the agreement. The expression "emergency", although not defined in the agreement, properly extends in the context of the statutory purposes set out in paragraph 4 of the Code to any matters which require expedited access to the ECA. For instance, a storm might damage the antennae and require early access for repair, a safety matter. At the same time it might cause a power outage requiring the urgent installation of a generator, an operational matter. We consider both consequences of the storm would be emergencies in terms of the Access Requirements. This also appears to be the view of Mr Chandler when he said "This exemption [to the need for prior formal written notice of access] is only in the case of an emergency and not for an 'operational urgency' as we consider that an operational urgency will already be covered as an emergency"[6].

115. To prescribe the circumstances which constitute operational urgency runs the risk of further disputes. It may be too narrow or too wide; for instance, it is not obvious to us why the claimant considers immediate or urgent action might be required to upgrade the ECA.

116. We therefore determine there should be no definition of the term "Operational Urgency".

117. Yet another area of dispute about the Access Requirements concerns the respondent's proposal that the claimant must comply with its "Access Protocol" contained in section 13 of the draft agreement. The claimant agrees to comply with the respondent's reasonable health and safety and security requirements as notified to it in writing but resists the additional requirement proposed by the respondent that such requirements "shall include but shall not be limited to compliance with the Grantor's Access Protocol".

118. The claimant considers the Access Protocol to be unreasonably restrictive of the rights imposed by the Tribunal and says that it would duplicate several provisions already within the draft agreement, e.g. those dealing with the service of notices under the Access Requirements. The claimant says other provisions within the agreement give the respondent adequate protection against the various concerns covered by the proposed protocol. The claimant considers the protocol would be unnecessary, confusing and would lead to future disputes. The potential for such confusion was illustrated at the hearing

[6] Mr Chandler's third witness statement at paragraph 61.

during Mr Chandler's evidence when he explained that he considered the access protocol should be a "bigger raft of documentation" than was provided for in the Access Protocol as defined. For instance, he thought it should include documents such as insurance policies and a traffic management plan. However, the requirement in the Access Protocol to produce its insurance policy every time the site is accessed contradicts the requirement at paragraph 2.1 of the agreement for the claimant to provide evidence of its insurance on request no more than once a year.

119. The respondent revised its Access Protocol on 2 August 2020, shortly before the hearing, but the claimant has rejected this also, apart from partial agreement about access times.

120. We are not persuaded of the need for, or usefulness of, the Access Protocol as part of the agreement. It duplicates (and contradicts) existing provisions in the agreement and appears to be a bureaucratic document that does not secure meaningful or necessary additional benefits to the respondent. It would be straightforward for the parties to produce an extract from the agreement containing the relevant access provisions for use by contractors and security personnel, and the claimant has offered to do so.

121. We therefore determine that the Access Requirements shall be defined as follows, using the claimant's wording subject to the points we have made above:

> "(a) providing reasonable prior written notice to the Access Contact (either by letter or email) of not less than three days, save in case of emergency where such notice as is reasonable in the circumstances may be given by telephone or email (but if given by telephone shall be confirmed by email as soon as reasonably practicable): and
>
> (b) complying with the Grantor's reasonable health and safety and security requirements notified to the Operator in writing;
>
> (c) Providing always that, the Grantor will provide to the Operator an up to date contact telephone number and email address for the Access Contact. Such information will be provided by the Grantor to the Operator in accordance with the notice provisions in paragraph 10.1.2 of this Agreement."

122. "Access Contact" is also a defined term in the claimant's draft; the respondent would delete the definition and would instead rely upon the Access Protocol. Because we have determined that the Access Protocol is not to be included, we determine that the Access Contact shall be defined as follows (the draft does not supply phone numbers and we have removed the email address for the purposes of this decision):

> "(a) Mathew Chandler: email address: [ ]and telephone number [insert here]; and
>
> (b) Francis Hendry: email address [ ] and telephone number [insert here]; and
>
> (c) Mina Ali: email address [ ] and telephone number [insert here].
>
> or such individual(s) as the Grantor shall notify to the Operator from time to time as being the Access Contact. Such notification shall be provided by the Grantor to the

Operator in accordance with the notice provisions in paragraph 10.1.2 of this Agreement and shall only be valid if accompanied by a working email address and contact telephone number for the relevant individual(s)."

123. This definition adopts the wording proposed by the claimant except to make clear, as requested by the respondent, that any notice under the Access Requirements is served on all the contact names and not just one of them. It is also necessary to amend paragraph 10.1.2.3 of the agreement as follows to allow a valid service of a notice by email:

> "Except for notices served under the Access Requirements no notice served by either party by email or facsimile shall be valid."

124. Finally, the respondent seeks to restrict times of access (other than in an emergency) to 09:00 to 20:30 on weekdays only. The claimant accepts these hours but wants them to apply to the weekend as well. We agree with the claimant that access should be available (on notice as already set out) on all days of the week, especially since weekend working would appear less likely to interfere with the respondent's use of the LCC Building for educational purposes.

The definition of the Equipment

125. The draft agreement provides that the claimant shall be entitled to place on the site "Equipment", defined as "electronic communications apparatus as that term is defined in the Code".

126. The respondent says the "Equipment" should be defined as "electronic communications apparatus as detailed in Section 12" of the agreement, with Section 12 being a list of the apparatus that is installed initially. That would mean, of course, that the claimant could only place that listed apparatus on the site, and could not add to it, although it could upgrade it as set out in the agreement (as to upgrading, see below).

127. The claimant argues that the right for the operator to install electronic communications apparatus is an unfettered right under paragraph 3(a) of the Code, without restriction to a list of equipment and therefore with the right to add equipment throughout the term of the agreement. It says the respondent would not be prejudiced by this because it is protected by the relevant provisions in Sections 6 (works and maintenance) and 7 (general obligations) of the agreement. The claimant is also constrained by the boundary of the Communications Site: it is not free to install apparatus wherever it likes on the roof or elsewhere on the LCC Building. Any changes to the equipment would be subject to planning law in any event.

128. The claimant says the respondent's proposed wording would impede the overriding objective of the Code to facilitate the improvement of electronic communications throughout the country. It would prevent it from satisfying the continued need for improved technology and would jeopardise its ability to respond to operational problems and developments in an appropriate and flexible manner. There would be disputes as to whether new equipment was an upgrade, permitted under the agreement, or a change or

addition to which the claimant was not entitled. Moreover, the claimant argues that as the law currently stands following the decision in *Cornerstone Telecommunications Infrastructure Limited v Compton Beauchamp Estates Limited* [2019] EWCA Civ 1755 it would not be able seek the right to install additional apparatus during the term of the agreement, because in the Court of Appeal's view there is no jurisdiction to make an order under paragraph 20 of the Code in favour of an operator in situ. The claimant fears that the need to add or substitute equipment would mean that it had to seek rights outside of the Code which would expose it to the type of financial ransom that the Code was introduced to prevent.

129. The respondent wants to list the equipment placed on site initially, so that it can use that record as a baseline against which any future upgrading can be assessed under paragraph 17(2) and (3); without it the respondent would have no ability to control potentially significant changes to the appearance of its building and threats to its structural integrity. The respondent's concern was heightened by the claimant's alleged failure to undertake adequate, or any, structural surveys before installing the ECA.

130. In the experience of the Tribunal, some Code agreements specify the equipment to be installed and others do not. The need for a specific list may perhaps be greater on open land, for example to specify the height or type of mast to be installed. There is no requirement in the Code to specify what apparatus is to be installed and the parties will reach agreement about this, or the Tribunal will make a decision, on the basis of the facts in a particular case. We are satisfied that in this case the claimant faces a real difficulty if the equipment has to be specified at the outset. It would invite dispute about whether a future installation comprised an upgrade or an addition (and given the propensity of the parties to disagree on an abundance of detailed issues we have no confidence that any such dispute would be resolved pragmatically or reasonably). We accept the changes in technology may mean that equipment has to be changed or added; we note the claimant's concern about the implications of the Court of Appeal's decision in *Compton Beauchamp* (currently being appealed to the Supreme Court) and we think there is a real risk that if the claimant's right to have equipment on this site is constrained by a list drawn up in the agreement its ability to provide a service may be significantly hampered in the future. In practice the amount of apparatus will be limited by the strength of the supporting structure and the size of the Communications Site. We consider it appropriate to impose the claimant's definition of Equipment and we are satisfied that the respondent is adequately protected by the other provisions of the agreement.

"Granting the Agreement"

131. The respondent wishes to add the words in bold below to paragraph C2 of the agreement, which is a warranty to be given by the respondent:

> "The Grantor has obtained any Necessary Consents to enter into and give full effect to this Agreement (save for any Necessary Consents required to be obtained by the

Operator in accordance with this Agreement) **which includes consents for access over any third party land**" (sic)[7]

132. The claimant says the extra words are not required given the definition of "Necessary Consents":

> "all necessary permissions from any mortgagee *or other third party who* may have *a legal or equitable interest in the Grantor's Property, the Communications Site and/or the Access Route* necessary to give full effect to this Agreement (but for the avoidance of doubt exclude any planning permissions necessary or other any [sic] statutory permissions, licences or approvals required for the Works and/or the use of the Communications Site and/or the Equipment)".

Accordingly the claimant says it is already required to obtain third party consents, by the wording italicised above.

133. However, the respondent says part of the Access Route comprises land which it does not own. That being so it should be the claimant's responsibility, and not the respondent's, to obtain any requisite consent from the third party owner of such land, which is why it requires the additional wording in paragraph C2. The claimant asked the respondent to identify the land said to be owned by a third party but the Tribunal was not given any further information on the point at the hearing and such land remains unidentified so far as we are aware.

134. In the absence of evidence that a third party owns land forming part of the Access Route, the respondent's additional words at the end of C2 shall be excluded.

Paragraph 1.5 The Grantor's Costs and Expenses

135. The parties agree in paragraph 1.5 that:

> "The Operator shall pay the [Grantor's] reasonable and properly incurred costs (including as applicable legal and surveyor costs) within fourteen (14) days of written demand in connection with entering into a wayleave agreement or other agreement with the relevant third party supplier(s) pursuant to paragraph 3.4.1"

136. The respondent wishes to expand this paragraph by including a further six areas where it seeks to recover its costs:

- "the enforcement of the Operator's covenants in this Lease, the service of a schedule of dilapidations within 6 months of the Operator vacating the Communications Site after this Lease has come to an end and the service of any notice or any proceedings

[7] We have quoted this wording as it appears in the latest schedule of disputed issues. We think it was intended by the respondent that the parenthesis should be closed after the word "land" at the end of this passage. Otherwise, and as shown, the effect of the additional wording would be the opposite of what the respondent intended. Support for our view is found in the correspondence that appears at paragraph 4 on page 9 of the additional trial bundle.

under section 146 or 147 of the Law of Property Act 1925 notwithstanding that forfeiture is avoided otherwise than by relief granted by the court;

- serving any notice in connection with this Lease under section 17 of the Landlord and Tenant (Covenants) Act 1995;
- a fair proportion of the Grantor's costs of maintaining the Grantor's Property and Building, any accesses thereto … and providing services for the benefit of tenants and occupiers of the Grantor's Property;
- any utilities used at the Communications Site;
- facilitating access to and egress from the Communications Site where applicable; and
- supervising any works to make good being undertaken by the Operator."

137. The respondent's proposed wording would have the effect of supplementing its rights under paragraph 25 of the Code (discussed above) by creating contractual liabilities, which the claimant says is inappropriate because Parliament has specifically prescribed a remedy in compensation.

138. Furthermore, the first two bullet points above assume that the agreement to be imposed is a lease. The claimant accepts that the Tribunal has jurisdiction to impose a lease where one is sought but says that the agreement it seeks is a Code agreement and not a lease and that it would be wrong for the Tribunal to impose a lease under these circumstances. The respondent submits that whether the agreement is a lease is determined solely by reference to the terms of what is sought and the terms of the draft agreement show there is to be a grant of exclusive possession of the site for a term and therefore a lease.

139. The claimant considers the proposed inclusion of a separate provision for the recovery of the Grantor's costs of enforcing the Operator's covenants is unnecessary because the respondent can take action against the claimant to enforce such covenants and will be able to seek its costs if successful in the usual way. Furthermore, this clause would make the claimant liable to pay the respondent's costs of negotiating the terms of settlement of a dispute even if the respondent's case was without merit and would make the claimant liable for all the preparatory work leading to a settlement: see *Agricullo Limited v Yorkshire Housing Limited* [2010] EWCA Civ 229. The respondent denies this would be the case and says any costs would be limited to those which were "reasonable and properly incurred".

140. The claimant also submits that reference to a schedule of dilapidations is unnecessary because the agreement (paragraph 9.3.1) already provides for the Operator to make good to the reasonable satisfaction of the Grantor any damage caused by the removal of the Equipment. It points out that it is the stated intention of the respondent to vacate the building and for it to be redeveloped as part of the West Site, so such a schedule would be inappropriate in any event. The claimant considers the respondent is trying to introduce Landlord and Tenant type obligations that are unsuited to a Code agreement where there is

a comprehensive set of rules governing the relations between the site provider and the operator. The respondent says a schedule of dilapidations might be required if the termination rights under the agreement were to be exercised before the expiry of the term.

141. The claimant considers the proposed provision dealing with the service of notices under the 1925 and 1995 Acts is irrelevant since the parties are negotiating a Code agreement and not a lease. The respondent reiterates its belief that the agreement is in fact a lease. If the claimant does not require a lease then the respondent says it should not be restricted from accessing the Communications Site.

142. Of the four remaining additional grounds for cost recovery the claimant says payment towards the maintenance of the respondent's building is already allowed for in the compensation figure of £9,600; the only utility charge is for electricity where payment is provided for in paragraph 3.2 of the agreement; and the respondent's costs of facilitating access/egress and the supervision of works to make good relates to health and safety matters which are the operator's responsibility, any breach of which would enable the respondent to claim its costs in any event. It is not open to the respondent to demand its costs for unwarranted facilitation and supervision when these are not appropriate or necessary.

143. In reply the respondent says it wants to ensure it is not out of pocket for building maintenance costs incurred as a result of the agreement; that utilities other than electricity might be used; and that payment for facilitating and supervising work is not open ended but restricted by the proposed wording to costs arising from additional security outside normal opening hours and to ensuring the claimant would not carry out works to the building that might be detrimental to its fabric and structure. It is not proposing to supervise anything to do with the claimant's technical work.

144. Whether or not the agreement to be imposed is a lease, we do not think it is appropriate to impose terms that might typically be found in a lease where, as here, the provisions of the agreement offer adequate protection to the respondent on the matters of concern to it, including termination.

145. We are satisfied, for the reasons submitted by Mr Read QC for the claimant and which we have summarised above, that none of the respondent's proposed additional provisions to paragraph 1.5 of the agreement are necessary or appropriate. The approach of the respondent on this issue appears to us to be pedantic and unrealistic. For instance, it is inappropriate to provide for a schedule of dilapidations where the respondent's whole case is centred on the need for timeous redevelopment of the LCC Building and where the claimant is obliged to make good any damage it causes to the building, while to argue there should be provision for the payment of unspecified and unnecessary utilities other than electricity is baffling. Payment of a fair proportion of the respondent's costs of maintaining the building form part of the compensation payment of £9,600 which was unchallenged by the respondent, although of course it is entitled to claim under paragraph 25 of the Code if that proves eventually to have been inadequate. All the other issues raised in the respondent's proposal are adequately dealt with in other existing provisions of the agreement, as explained by Mr Read QC. And we refer again to paragraph 86 of the Code,

which prevents the imposition of obligations in respect of loss or damage beyond what the Code provides.

146. We therefore determine that paragraph 1.5 (Grantor's costs and expenses) shall be worded as proposed by the claimant and that none of the respondent's additions shall be included in the agreement.

Paragraph 3.1.1.1 the right to install an electricity supply

147. The claimant proposes that it should have the right to:

> "install its own electricity supply to the Communications Site either directly or via the regional electricity company on a route to be agreed by the parties acting reasonably and in the event that the Operator directly installs such supply then any such works shall be carried out in a good and workmanlike manner and causing as little disruption as reasonably practicable."

148. The respondent wishes to add the following words to the end of the paragraph:

> "and in compliance with any reasonable requirement of the Grantor"

149. The claimant resists the inclusion of these additional words because it says that the claimant and/or the electricity distribution network operator must retain control of any independent electricity supply to the Communications Site. It would be inappropriate for the respondent to be involved because it does not possess the relevant expertise to comment on or stipulate requirements for the electricity supply.

150. The respondent argues that it will have specific (but necessarily reasonable) requirements concerning such installation, including specifying the cable route and determining when the works can be done. It is not prepared to grant the claimant carte blanche to route the supply wherever or whenever it chooses.

151. We do not think the respondent's additional wording is appropriate or necessary. Firstly, the claimant is correct to say the respondent lacks the technical knowledge to be able to make an informed decision on the cable/line route. Nevertheless, the parties must agree a route (acting reasonably), so the claimant does not have the right to put it where it likes. Secondly, the claimant must cause "as little disruption as reasonably practicable", which would include taking into account any event that the respondent was hosting. In any event the claimant is also bound by the Access Requirements.

152. We therefore determine that the respondent's additional wording should be excluded from paragraph 3.1.1.1.

Paragraph 3.1.1.3 and 3.1.2 the electricity generator

153. The draft agreement at Paragraph 3.1.1.3 enables the claimant to:

"bring onto, keep, refuel and operate a power generator together with associated fuel sockets and Lines onto the Communications Site and/or Set Down Area together with associated fuel sockets and Lines." (sic)

154. The respondent wishes to add provisions to control the circumstances under which a generator may be used, the period for which it is used, where it is located (with a right of approval for the respondent), its noise level and its removal. The claimant resists such additional provisions.

155. Mr Christopher Tennant, the claimant's Operations Lead Project Manager, gave evidence about the need for, and use of, an electricity generator. He explained that if power to a site is lost the active equipment will immediately stop working and the quality of the operator's service will be degraded. There will then be a knock-on effect to the local network as other sites try to plug the hole in coverage caused by the power outage. This in turn can cause a deterioration in the quality of service from surrounding sites.

156. If power is lost for approximately six hours the software which co-ordinates the transmission will start to de-configure and will have to be reprogrammed by specialist engineers. The cabinets which are located on site contain batteries but these only act as a substitute power source for a short period of between 15 minutes to an hour. Their function is to protect the integrity of the transmission software during a brief power cut; they are not designed to be a long-term alternative power source.

157. The first step in restoring power is to install a mobile generator which can provide power for one or two days before running out of fuel. At the same time as the mobile generator is installed one of the claimant's engineers will undertake an assessment to establish what type of generator should be deployed as a longer term solution if power cannot be restored quickly (known as a second phase generator). Such a survey would consider whether there is a need to minimise noise because of the nature of the area in which the generator will be deployed.

158. There are different types of second phase generator. A hybrid generator uses a dual power source: diesel during the day and a battery at night or vice versa, depending on the location. It is used in noise sensitive locations. A second phase diesel generator is a larger version of a mobile generator. In noise sensitive locations a noise reducing shield can be put around the generator. The fuel tanks on all diesel generators are double or triple bunded to prevent leaks and spillage. Stringent risk assessment and health and safety checks are undertaken before a generator is deployed.

159. Mr Tennant considered the respondent's proposed controls over the claimant's use of a generator in the light of these operational parameters.

160. The respondent wants to (i) impose a restriction that a power outage must last at least 24 hours before a generator can be used (of whatever sort)[8]; (ii) have the right to approve the

[8] In the schedule of disputed issues the respondent states "In order to try and reach agreement we have removed the requirement for the interruption to the supply to be for 24 hours". But this statement is not reflected in an

location of the generator; (iii) approve the noise level of the generator; and (iv) impose controls over the storage of fuel.

161. Mr Tennant explained that the imposition of a 24 hour moratorium before a generator could be installed would mean the transmission software would de-configure. A mobile generator has to be installed as quickly as possible to protect the operational integrity of the apparatus. A 24 hour time limit was unacceptable.

162. The claimant would need to install a mobile generator quickly in order to maintain continuity of service. It could not wait for the approval of the respondent about where that generator should be sited. Mr Tennant said the initial generator would be located in the car park. It would not be located on the roof or at mezzanine level. But the claimant would consult the respondent about the location of the second phase generator, if such was required, and would also liaise with it about the type of generator to be used.

163. In cross examination Mr Tennant accepted it was reasonable for the claimant to take account of the respondent's requirements about siting and that it should take reasonable steps to mitigate the noise of the generator, but he considered that giving the respondent the right to control such matters was an unacceptable limitation upon the operational flexibility the claimant would need in the urgent circumstances of a power outage.

164. Mr Tennant said there was no need to make it a condition of deploying a generator that it must be removed forthwith following reinstatement of the power supply because this was axiomatic; the respondent had no reason to deploy a generator for a moment longer than it was needed. As for the storage of fuel the claimant was already obliged to comply with all relevant legislation concerning health and safety and the respondent's proposed additional wording was unnecessary.

165. The respondent says there is no justification for the claimant to have an unrestricted right to install a generator without control of its location, noise generation or compliance with relevant laws. The respondent states "If CTIL considers these concerns are unfounded as the agreement already provides protection elsewhere then CTIL should have no problem with this being repeated/ included for the avoidance of any doubt in relation to the generator".

166. We deprecate the use of duplicated terms in an agreement "for the avoidance of doubt" or otherwise. The claimant is obliged to comply with legislation under Section 7 of the agreement (General Obligations: responsibilities and requirements) and no purpose is served by repeating this in other paragraphs.

167. We think it would be inappropriate for the claimant to have to wait and do nothing until a power outage had lasted for more than 24 hours. Mr Tennant gave cogent reasons why this

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amendment to that effect to the respondent's proposed wording of paragraph 3.1.2. Mr Read QC said in his additional submissions in closing at paragraph 127(i) that "it is understood that the Respondent no longer seeks to impose such an unworkable restriction". Mr Wills does not confirm this in his response to Mr Read's submissions and so for the avoidance of doubt we have considered the issue as though this point has not been conceded by the respondent.

would be unacceptable operationally and there is no valid reason for such a delay. We think the respondent was right, assuming it has done so, to withdraw this proposed condition.

168. Nor do we think it appropriate for the respondent to have a prior right of approval for the siting of a generator given the urgency with which it will need to be installed. Mr Tennant explained the difference between the initial generator and the second phase generator and said the installation of the latter (and its type) would take account of the respondent's requirements.

169. We consider it appropriate, as suggested by the respondent, to provide that the use of a generator will be temporary, i.e. limited to occasions when there is a power outage, and that it will be removed forthwith upon reinstatement of the electricity supply. Mr Tennant said this last point was axiomatic in practice, but it is reasonable to include it as an obligation in the agreement. It is not practicable in our judgment to specify operating noise limits for the generator. Nor do we accept the respondent's suggestion that any back-up power generator should be "suitably quiet". That is vague and invites disputes. Mr Wills said in his closing submissions that when the claimant proposed a paragraph 26 agreement in December 2019 it offered to use reasonable endeavours to reduce any noise and disruption caused to the Grantor's Property when operating a generator. We think that is an appropriate condition to impose and would extend it to the location of the generator as well as its operation.

170. We determine that paragraph 3.1.1.3 should read:

> "install, keep, refuel and operate a power generator together with associated fuel sockets and Lines onto the Communications Site[9] and/or the Set Down Area in the event of a loss of power to the Equipment and provided that (i) the installation of any generator shall be temporary; (ii) the generator shall be removed forthwith following the reinstatement of the electricity supply; and (iii) the Operator shall use reasonable endeavours to reduce any noise and disruption caused to the Grantor's Property when installing and operating a generator."

Paragraph 4.2.1.3 access for the Operator

171. This issue should be seen in the context of what has already been determined about the Access Route (see paragraphs 104 and following, above). The claimant seeks additional rights "to access any other parts of the Grantor's Property as may be reasonably required in order to exercise any right granted in this Agreement…with or without vehicles". The proposed right is subject to giving 14 days' notice (except in emergency) and to the claimant providing full details of its requirements for access.

172. The claimant says that a right to access is an unlimited Code right under paragraphs 3(d) and (e). Both paragraphs refer to carrying out works on the land but the respondent does not accept that this also constitutes a right to access. The respondent argues the proposed

[9] Although Mr Tennant said a generator would not be installed on the roof or mezzanine of the building, i.e. on the Communications Site, it may be necessary to run Lines to it from the generator at ground level in the Set Down Area.

additional rights are not required because the other provisions of the agreement give the claimant all the access rights it needs to effect to its rights under the Code. To grant unlimited rights of access was not necessary and would enable the claimant to enter classrooms and other teaching areas for no good reason.

173. The claimant submits that without these unlimited rights its ability to exercise its Code rights would be jeopardised and would lead to further dispute and litigation with the respondent.

174. Paragraphs 3(d) and (e) of the Code have the effect that the rights to carry out works on the land for the purposes there stated are Code rights. Rights of access to carry out such works are of course also Code rights, but the Code does not say that all operators have unlimited rights to carry out work or to have access. The extent of the Code rights granted is a question for the parties to agree or for the Tribunal to decide in each case.

175. Mr Savage gave details in paragraphs 63 to 66 of his evidence of why the claimant required ongoing access to the Communications Site and the Grantor's Property. In cross examination he was asked whether the claimant's requirements for access as set out in those paragraphs could be accommodated in the Access Route, the Common Parts and the Set Down Area. Mr Savage replied, "I believe so, yes".

176. We therefore consider the proposed paragraph 4.2.1.3 to be unnecessary for the protection of the claimant's Code rights. It is seeking an unwarranted freedom to go wherever it wants within the Grantor's Property, albeit subject to safeguards concerning giving reasons and due notice. Under paragraph 23(5) of the Code the terms of the agreement imposed by the Tribunal must include the terms it thinks appropriate for ensuring that the least possible loss or damage is caused by the exercise of the Code right to occupiers and landowners. We consider the inclusion of the claimant's proposed paragraph would not satisfy this test and would expose the respondent to an unnecessary risk of disruption to its activities. We therefore refuse to include paragraph 4.2.1.3 in the agreement.

Paragraph 5.1.1.1 The right to upgrade and paragraph 8.1.2 the right to share

177. Paragraph 17 of the Code reads as follows:

> "(1) An operator ("the main operator") who has entered into an agreement under Part 2 of this code may, if the conditions in sub-paragraphs (2) and (3) are met—
>
> > (a) upgrade the electronic communications apparatus to which the agreement relates, or
> >
> > (b) share the use of such electronic communications apparatus with another operator.
>
> (2) The first condition is that any changes as a result of the upgrading or sharing to the electronic communications apparatus to which the agreement relates have no adverse impact, or no more than a minimal adverse impact, on its appearance.

(3) The second condition is that the upgrading or sharing imposes no additional burden on the other party to the agreement.

(4) For the purposes of sub-paragraph (3) an additional burden includes anything that—

(a) has an additional adverse effect on the other party's enjoyment of the land, or

(b) causes additional loss, damage or expense to that party.

(5) Any agreement under Part 2 of this code is void to the extent that—

(a) it prevents or limits the upgrading or sharing, in a case where the conditions in sub-paragraphs (2) and (3) are met, of the electronic communications apparatus to which the agreement relates, or

(b) it makes upgrading or sharing of such apparatus subject to conditions to be met by the operator (including a condition requiring the payment of money)."

178. The right of a Code operator to upgrade its equipment is immensely important in view of the constantly advancing nature of technology, and we need not overload this judgment by explaining that. Similarly the practice of sharing infrastructure is prevalent in the telecommunications industry and achieves a number of economies. Some Code operators (the present claimant among them) are providers of infrastructure for the use of operators that provide electronic communications networks and therefore without the ability to share their equipment they are out of business.

179. For those reasons – which we could elaborate over many pages but we take them as well-established – the Law Commission recommended that Code operators must have the right to upgrade and to share their equipment, without being charged extra for doing so as was prevalent under the old Code, subject to safeguards for site providers. That recommendation was accepted, and is expressed by the Code in paragraph 17 set out above. Paragraph 17(2) and (3) enable site providers only to require the safeguards there set out as to the appearance of the apparatus and protection from additional burdens.

180. However, it is open to the parties to agree, or to the Tribunal to order, that the agreement should include the right to share the site and/or to upgrade the equipment without those safeguards. As the claimant points out, the Department for Culture, Media and Sport in its Consultation Document of February 2015 (prior to the introduction of the Digital Economy Bill) at paragraph 64 observed that additional consideration may be payable where broader rights are ordered or agreed.

181. The claimant's draft provisions for upgrading and sharing do not include those safeguards and the respondent requires that they be inserted.

182. We can summarise the parties' arguments as follows.

183. The claimant requires unrestricted rights because of the overwhelming importance to it of sharing and upgrading, and argues that the respondent is amply protected from additional burdens by other provisions in the agreement, in particular:

- Obtaining all necessary consents (paragraph 6.1.1);
- Complying with the Construction Design and Management Regulations (paragraph 6.1.4);
- Taking all reasonable steps to ensure that the works do not make the Grantor's Property (or any plant or machinery therein) unsafe (paragraph 6.1.6);
- Not to overload any part of the Grantor's Property or any plant or machinery there (paragraph 6.1.7);
- To make good any physical damage caused (paragraph 6.1.8);
- To comply with all relevant laws (paragraph 7.2.1.3); and
- To comply with ICNIRP requirements (paragraph 7.3.1 of the Draft Agreement).

184. The respondent's concern is the structural integrity of the building and the risk of overloading if upgrading adds additional weight.

185. Here the quarrel about structural surveys and the Curtins report, to which we referred at paragraph 67 above, rears its ugly head. The respondent's position is essentially that the claimant did not survey the structure of the building properly before seeking to install equipment and therefore (we paraphrase) cannot be trusted not to cause damage in the future. The claimant's position is that it carried out a thorough survey before it sought Code rights, although it did not have the opportunity to carry the work that Curtins did (involving a study of the building over time and some invasive work). Had it commenced work without sight of the Curtins report it would have discovered the structural issues that Curtins revealed and would have stopped work and adapted its plans accordingly. As it was, the material in the Curtins report led it to make some relatively minor changes to its plans, some of them very much out of an abundance of caution rather than as a matter of necessity.

186. A consequence of the short time available at the hearing and the need to expedite these proceedings because of the statutory deadline means that we cannot get to the bottom of that quarrel. We take the claimant's point that it would not have arisen had the respondent disclosed the Curtins report as soon as it could rather than only when ordered to do so, and we do not think that the claimant has been shown to be irresponsible about the structural integrity of the building.

187. Turning then to the terms of the agreement, we begin by considering the starting point: is it for the claimant to justify rights broader than the minimum offered in paragraph 17, or for the respondent to justify insistence on those safeguards?

188. We take the view that the starting point is paragraph 17, which was drafted to express policy framed in full knowledge of the importance of sharing and upgrading. If the claimant wants more than the minimum it should justify that. However if the claimant can show that in this particular case there is little or no reason why the safeguards of paragraphs 17(2) and (3) should be included then that may be a reason to exclude them.

189. Starting then with the claimant's reasoning, we are unpersuaded by the argument that the importance of sharing and upgrading mean, in themselves, that unlimited rights should normally be granted. The Lands Tribunal for Scotland was faced with a similar argument in *Cornerstone Telecommunications Infrastructure Limited v Fothringham* LTS/ECC/2020/007, a decision of 11 August 2020 on an application under paragraph 20 of the Code and said at its paragraph 18:

> "[The importance of sharing and upgrading] is known to and understood by the Tribunal. It was also known to and understood by Parliament when it enacted para 17, so we were considerably surprised to find it said … that the restriction of sharing rights to the extent provided for by para 17 of the Code 'would have devastating consequences for operators under the Code, infrastructure providers in particular, and this for the public interest too.'"

190. The Lands Tribunal for Scotland in that case included the paragraph 17 safeguards in the provisions for sharing and upgrading.

191. However, the decision whether to include those safeguards will depend on the facts of an individual case.

192. This is a building that is going to be demolished in a few years' time. The safeguards distinguish aesthetic considerations – the appearance of the equipment – and additional burdens. The respondent has raised no concern at all about the appearance of the building, and it is in any event going to be demolished before very long; it is unsurprising, given the nature of this building, its predicted lifespan, and the prevalence of electronic communications equipment on the London skyline, that appearance does not seem to be a big issue. Accordingly we determine that the provisions of paragraph 17(2) shall not be included to restrict the right either to share or to upgrade. We expect that there will be other cases, involving different types of buildings or land and different equipment, where the appearance of the equipment matters and where this provision will be important, and so no general rule should be derived from our decision.

193. The respondent's concern about paragraph 17(3) appears to be entirely about the structure of the building. We accept the claimant's argument that the respondent has ample protection on that score in the agreement; if a new antenna makes the roof collapse the respondent does not need paragraph 17(3) in order to recover that loss. Less obvious are

matters of convenience; it is not known whether and how the upgrading of equipment could affect the respondent's enjoyment of the building.

194. Overall therefore the inclusion of paragraph 17(3) will make little difference, but could conceivably be of benefit to the respondent. The starting point is that the safeguard is to be included and in view of that possible benefit to the respondent it is to be included in the provisions both for upgrading and for sharing.

Paragraph 6.1.3 Works (Method Statement)

195. The claimant proposes that paragraph 6.1.3 of the agreement should read:

> "[The Operator shall] provide the Grantor with a method statement for the Works (which may be supplied by its contractors) **upon reasonable request**."

The respondent wants to exclude the wording shown in bold and replace it with "and have due regard to the representations of the Grantor in relation to the same".

196. The respondent argues that it should be entitled to see the claimant's method statement and that the need for a "reasonable request" as proposed by the claimant would be a recipe for further dispute. The method statement should be readily available and easy to provide.

197. The claimant says it would be inappropriate for it to have due regard to the respondent's representations because the claimant is responsible for site safety, as the Tribunal found in *Islington* at paragraph 141 in circumstances where, as here, the operator was entitled to exclusive possession of a roof top site. Furthermore, the claimant is already obliged to comply with the Construction (Design and Management) Regulations 2015 under paragraph 6.1.4 of the agreement and with all laws relating to the carrying out of any Works by the Operator under paragraph 7.2.1.2. It has to carry out the Works in a good and workmanlike manner under paragraph 6.1.2. The claimant says it, rather than the respondent, has the requisite experience to undertake the Works and is therefore best placed to prepare the necessary risk assessment and method statement ("RAM") for the Works. Finally, in Mr Halford-Reeves' evidence, the claimant emphasised the reputational importance of working safely and in accordance with its legal and contractual obligations.

198. In reply, the respondent says that as owners of the building they are entitled to ensure the method statement is consistent with their own health and safety regime. The other obligations placed on the claimant by the agreement do not affect this requirement. The importance of the respondent being able to make representations about the method statement is illustrated by the known structural issues at the building. The respondent employs property professionals and could obtain further professional advice as required.

199. We do not think it necessary or appropriate to adopt the respondent's wording on this issue. It has adequate protection under the agreement to ensure the claimant does not undertake the works in an unsafe manner. The requirement to "have due regard" to the respondent's representations is vague as to meaning and timing, and, as Mr Read QC submits, is likely to provoke yet more dispute. The claimant's wording ensures that a copy

of the method statement will be provided upon reasonable request. That qualification is said by Mr Halford-Reeves at paragraph 46 of his witness statement to prevent the claimant having to provide a copy "every time that Cornerstone's representatives attend a Site", e.g. if an engineer was attending on a routine inspection or safety check of the Equipment.

200. We also note that the claimant's proposed wording echoes that in paragraph 6.1.4 of the agreement which states:

> "[The Operator shall] comply with its obligations under the CDM Regulations and where reasonably requested by the Grantor to provide the Grantor (which may be supplied by its contractors) with details of its safe working practices."

201. The respondent has not raised any of the same objections to this paragraph and has not asked that the claimant should have due regard to any representations the respondent may make about the claimant's safe working practices. If paragraph 6.1.4 is acceptable to the respondent, we cannot see why the claimant's version of paragraph 6.1.3 should not also be acceptable. We think it is and we adopt it.

Paragraph 6.1.9: Works (Structural Survey)

202. This paragraph was originally proposed by the respondent who wanted the claimant to provide it with a structural survey before the installation of any Equipment. Following discussions between the parties' respective engineers, the respondent accepted that there was no need for a structural survey before the initial installation although the requirement for such a survey remained "in respect of any additional equipment"[10].

203. By the time of the hearing the respondent's proposed wording for paragraph 6.1.9 was:

> "[The Operator shall] prior to any installation of [the Equipment or] any equipment during the term provide the Grantor with a structural survey for the Grantor's approval and upon which the Grantor can rely (acting reasonably and expeditiously) which shall include but not be limited to structural calculations for the load bearing of the Equipment to demonstrate that the Equipment shall not cause any structural issues to the Grantor's Property and the Grantor shall allow the Operator reasonable access to the Grantor's Property to carry out the structural survey."

204. We have rejected the respondent's definition of Equipment which sought to list the equipment (ECA) to be installed at the commencement of the agreement. That being so, the words "[the Equipment or]" should be deleted.

205. The parties now agree there is no need for a structural survey before the initial installation of the Equipment, so the remaining dispute on this issue is whether such a survey is required each time Equipment is installed in future.

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[10] Paragraph 12: 6.1.9 of email from Eversheds-Sutherland (respondent) to Osborne Clarke (claimant) dated 2 August 2020 at 23:25

206. The claimant says this is unnecessary for the following reasons:

(i) The claimant is responsible for the safety of the Communications Site;

(ii) The respondent has already obtained several structural surveys which have now been disclosed to the claimant. Further surveys are unnecessary;

(iii) If its structural calculations are wrong, the claimant will be liable for any loss or damage caused to the Building and has agreed to insure against any such loss or damage;

(iv) The respondent is protected by the claimant's obligations under Section 6 of the agreement (Works and Maintenance) and the indemnity the claimant must give under Section 7 (General Obligations) at paragraph 7.4; and

(v) The reputational damage the claimant would suffer if it were not to comply with its obligations and through its actions jeopardised the structural integrity of the Building.

207. In reply the respondent says the claimant has failed to date to comply with its safety responsibilities and to protect its reputation in this matter; the existing structural surveys do not address the design and loading implications of future Equipment installation; and that it is better to avoid problems than to recover damages when they occur.

208. The structural surveys commissioned by the respondent have formed the basis of discussions between the parties' respective engineers. Such discussions, which it seems to us were far too long delayed due to the intransigence and suspicion of both parties, have avoided the need for the claimant to obtain its own structural survey before the initial installation of the Equipment. We are not persuaded that with the benefit of this information about the structure and condition of the Building it will be necessary to obtain further such surveys every time more Equipment is to be installed, replaced, upgraded etc. The respondent is adequately protected by the claimant's various obligations under the agreement and it would be unduly onerous to expect the claimant to obtain the respondent's prior approval to every proposed change in the Equipment. With the type of goodwill between the parties which has been so conspicuously lacking to date, we think there should be no difficulty in ensuring the safe installation and operation of the Equipment.

209. We therefore accept the claimant's position on this point and decline to include paragraph 6.1.9 as proposed by the respondent, or at all.

Paragraph 7.1.4: use of the Site

210. The respondent requires the following term:

> "The Operator shall not use the Communications Site in such a way as to damage the Grantor's Property"

211. The claimant objects to the inclusion of this paragraph and points out that its proper use of the Communications Site will inevitably include some drilling into walls and structures, in order to attach Equipment, and that the term proposed is not practicable. What matters is that the claimant should prevent, or repair, or give compensation for any loss caused by damage to the structure of the Building, and the agreement contains ample provision for that, e.g. an obligation to make good (or compensate in lieu) any damage caused when installing cables (paragraph 3.3.2), or when carrying out the Works (paragraph 6.1.8), and upon removal of the Equipment (paragraph 9.3). We agree with the claimant's arguments on this point and we reject the respondent's proposed term.

Paragraph 7.3.4: Health and Safety

212. This issue is about ICNIRP exclusion zones. We heard evidence about this from Mr Paul Cowap, the claimant's Radio Frequency Site Compliance Manager; he explained that the International Commission on Non-Ionising Radiation Protection provides guidance on the exclusion zones that should be observed around equipment that emits non-ionising radiation, for the public, and for those whose occupations expose them to the radiation. Non-ionising radiation is emitted by dishes and antennae and is too weak to damage DNA, although prolonged exposure can give rise to health risks. ICNIRP is an advisory body, not a regulator, but domestic legislation has translated some of its guidance into legal requirements.

213. The claimant has offered the following obligation in paragraph 7.3.4 of the draft agreement:

> "**The Operator will provide plans showing the occupational ICNIRP exclusion zones upon the Grantor's Property following the installation of the initial Equipment. If during the Term, there are any changes to the** occupational ICNIRP exclusion zones shown on these plans, which extends the occupational ICNIRP exclusion zones, the Operator will provide the Grantor with updated occupational ICNIRP exclusion zone plans within a reasonable period of the change."

214. The respondent agrees the wording of the paragraph as shown in bold but would replace the remainder of the paragraph with:

> "general public ICNIRP exclusion zones shown on these plans, which extends the general public ICNIRP exclusion zones in respect of the equipment on the 15th floor the Operator will provide the Grantor with updated general public exclusion zone plans within a reasonable period of the change."

215. The respondent says its revised wording is to ensure the respondent and "users of the roof" will be made aware of the public exclusion zones, both initially and as and when they change. The claimant points out that it is obliged to comply with all relevant health and safety legislation, both generally in paragraph 7.2.1 and specifically as to the requirements and recommendations of ICNIRP in paragraph 7.3.1 of the agreement.

216. Mr Cowap gave evidence about UK health and safety legislation, in particular the Control of Electric Fields at Work Regulations 2016 ("CEMFAW") and the Management of Health and Safety at Work Regulations 1999. He explained the claimant's safety practices which included giving an information guide to site providers and contact details for further advice should they need it.

217. Mr Cowap said there was no statutory requirement to provide plans to site providers showing public or occupational exclusion zones. Where planning permission was required to install equipment it was sufficient to serve an ICNIRP certificate of conformity, and therefore to include an obligation in the Code agreement to provide plans would circumvent that self-certification regime. Nevertheless the claimant had offered to provide the respondent with plans showing the occupational exclusion zones at the Building. These are relevant to the claimant as an employer under CEMFAW which regulates radio frequency electromagnetic fields ("RFEMF") in the workplace. CEMFAW does not impose any obligation in respect of the general public, but the claimant complies with ICNIRP guidance in any event. Mr Cowap said that only antennae produced radiation and not base station (cabinet) equipment. The antennae in this case would be located at the edge of the building so that the public exclusion zones would be in the surrounding airspace.

218. Mr Read QC noted that Mr Chandler only referred to occupational exclusion zones in his evidence and made no mention of public exclusion zones. Nor had there been any mention of public exclusion zones during discussions between Curtins and Mr Chandler for the respondent and Mr Freemantle and Mr Brennan[11] for the claimant concerning the redesign of the Communications Site in the light of the Curtins report. Mr Wills points out that details of the claimant's initial equipment proposals were only made available on the 8 July 2020 and that a request for the public exclusion zone plans was made the next day. He also says that Curtins would have had no input into matters concerning RFEMF.

219. We are satisfied from the evidence that the claimant's wording of paragraph 7.3.4 is appropriate and sufficient to protect the respondent's legitimate concerns about RFEMF. The claimant has gone further than the law requires and we think this is a reasonable and sensible approach in the circumstances of this reference. The respondent's late request for the inclusion of plans showing public exclusion zones does not appear to have come from its own technical advisers. It is a step too far, especially where the antennae, at least initially, are going to be confined to the edge of the building and the equipment on the 15th floor, to which the respondent refers, comprises equipment cabinets only, and not antennae.

220. Accordingly we accept the claimant's paragraph 7.3.4. We would add, however, that what we say here is not to be interpreted as a general principle; the Tribunal's view about terms relating to exclusion zones will depend upon the type of site, the position of the relevant zones, and other practical considerations in individual cases.

[11] Mr James Brennan, a Director of J B Towers Limited.

Paragraph 7.3.5 drop zone warranty

221. The respondent seeks to include the following paragraph:

> "The Operator warrants that no drop zone on the ground floor level is required in relation to any of the Equipment. If that position changes during the term, then the Operator will notify the Grantor as soon as possible providing detailed plans of any drop zone required."

222. The claimant resists this proposal as being unnecessary. It points out that the evidence of Mr Ralph Freemantle, a Structural Engineer employed by the claimant, was that there were ample mechanisms in place to prevent antennae from becoming detached from the Building and creating a hazard. Apart from the usual fixing of antennae to steelwork by brackets, because some of the antennae would partially occupy space outside the perimeter of the Building it was also proposed to tether the antennae to the steelwork using a cable. Both methods of fixing would have to fail concurrently for there to be any risk to persons below. This was not a matter of concern to the respondent when considering the original site design and nothing had changed in the amended design to make this issue more relevant.

223. The respondent says the proposed paragraph is to take account of the revised scheme and the fact that the antennae will now overhang the edge of the Building creating a drop hazard that did not previously exist.

224. The claimant relies upon the evidence of Mr Freemantle who explains the mechanisms by which the antennae, which he admits will extend beyond the edge of the Building, will be fixed. If the antennae were to become loose they would therefore present a drop risk. Under these circumstances, if the claimant is so confident there is no realistic prospect of the antennae becoming detached and dropping to the ground, there seems to us to be no reason why it should not give the warranty requested. On the claimant's case, the need to provide a drop zone will never arise. We therefore include paragraph 7.3.5 as requested by the respondent.

Paragraph 7.4.1: Indemnity

225. The draft agreement contains the following provision, which we quote showing in bold the words that the respondent seeks to delete and underlined the words that the respondent seeks to add:

> "The Operator shall indemnify the Grantor in respect of <u>all losses, damages, costs and expenses and</u> all claims and proceedings brought against the Grantor **in its capacity as Grantor** of the Communications Site (including associated costs and expenses) ("Proceedings") arising **directly from** any
>
> - unlawful act or omission <u>or act or negligent act</u> by the Operator or
> - unlawful exercise of the Rights and/or
> - unlawful use of the Communications Site and/or

- unlawful use of the Equipment and
- any breach of this agreement.

provided in each case that:

- the Grantor shall promptly notify the Operator of any Proceedings and the Grantor will not compound, settle or admit those Proceedings without the consent of the Operator (such consent not to be unreasonably withheld or delayed) except by an order of a court of competent jurisdiction;
- the Grantor will use reasonable endeavours to mitigate any costs, expenses or losses the subject of the indemnity; and
- **the Operator shall be entitled at its own cost to defend or settle any Proceedings subject to the Grantor's prior written consent (such consent not to be unreasonably withheld or delayed)**
- the Grantor will have due regard to the reasonable expectations of the Operator in respect of any proceedings

This indemnity does not extend to:

- **any Proceedings to the extent that they are in respect of consequential losses and/or losses that would not otherwise be recoverable at common law;**
- any Proceedings to the extent that they result from any negligence, wilful act, default or omission of the Grantor, its employees, servants, contractors, agents or Operators or any other person outside the Operator's control;
- any Proceedings to the extent that the Grantor has failed to take any action that it ought reasonably and properly to have taken to mitigate any liabilities, costs and expenses that it may suffer; and
- claims under this indemnity shall be capped at a level of **thirty five million pounds (£35,000,000)** eighty-five million pounds (£85,000,000) whether in respect of a single claim or a series of claims arising from the same incident (except in the event of death or personal injury where there shall be no limit)

Provided that for the avoidance of any doubt the cap on the indemnity under this Lease shall not impose any limit on the overall liability of the Operator to the Grantor under a contractual claim.

226. The claimant has offered an indemnity to the respondent, the purpose of which it says is to indemnify the respondent from claims arising from third parties. It is therefore in the form of the indemnity contained in clause 8 of Ofcom's Draft Standard Terms, drafted pursuant to paragraph 103(2) of the Code and headed "Indemnity for Third Party Claims". The claimant says the sole purpose of such an indemnity is to regulate and manage how a third party claim against the respondent resulting from an unlawful act or omission of the claimant should be handled. The indemnity has a specific and limited purpose and is not meant to protect the respondent against all loss or damage it may suffer. Such protection against loss or damage caused by the claimant is already provided for throughout the draft agreement.

227. This view of the limited nature of an indemnity under the Code was accepted by the Lands Tribunal for Scotland in *Cornerstone Telecommunications Infrastructure Limited v*

Fothringham LTS/ECC/2019/06 (a decision on an application for interim Code rights, in February 2020) which said at [11]:

> "Mr Thomson [for the site operator] opposed the revisal. In the first place the Code imposed no obligation on the applicants to agree an indemnity clause at all. It had been offered here as a gesture of good will. Secondly, the suggested revisal was inappropriate because it was mixing up two things: compensation for lawful things done by the applicants under the Code, for which the Code provided redress, and indemnity for the consequences of illegal acts or omissions, which was the point of the proffered indemnity. …
>
> [13] …The distinction between rights under the Code and rights under the indemnity clause is clear enough, so we have deleted the proposed addition."

228. Similarly in this case the claimant says the respondent's demand to extend the clause to cover "all losses, damages, costs and expenses" arising, among other things, from "any breach of this agreement" is inappropriate to an indemnity clause that is aimed at proceedings brought by third parties.

229. The respondent does not think the indemnity should be restricted to claims brought against it "in its capacity as Grantor" as proposed by the claimant. Nor does the respondent accept the claimant's limitation that the indemnity should only apply to claims arising "directly from" its unlawful act. Whether a loss is too remote is a question arising at the time of the action and since the claimant will control the Communications Site the respondent says it is unreasonable for it to try and limit its liability in this way. The respondent submits that the indemnity should extend to negligent as well as unlawful acts and to "any breach of this agreement". The respondent insists that it should be entitled to deal as it thinks fit with any claims made against it and objects to the claimant being given the right to defend or settle at its own cost any proceedings to which the indemnity applies. The respondent is prepared to "have due regard to the reasonable representations of the [claimant] in respect of any proceedings".

230. The respondent's requested indemnity cap of £85m is based on Mr Chandler's evidence where he identified this figure as the reinstatement insurance value adjusted to discount irrelevant building areas. It was put to him in cross examination that the tower block, upon which the site would be located, was the only relevant structure and was insured for the sum of £34m, being the figure upon which the claimant's proposed indemnity cap of £35m is based. Mr Chandler explained that if the tower block were to collapse due to an act of the claimant he had no idea what might happen and the respondent's proposed indemnity cap covered it "against something appalling".

231. The respondent refers to a lease the claimant entered into with another site provider in 2018, where an indemnity clause in different and apparently wider terms was offered. Mr Read QC dismissed this as a "jury point" and said the Tribunal had no evidence about why the indemnity was in that form nor of the commercial issues in that case. Mr Wills said it was factual evidence that the claimant was prepared to agree much more in some agreements than it said it could possibly tolerate here.

232. We are unimpressed by the comparison with another agreement concluded in circumstances of which we are unaware and alongside other terms of which we know nothing.

233. Two important points of principle shape our conclusions on this clause. The first is that the purpose of the indemnity is to regulate and manage third party claims against the respondent arising from the unlawful acts or omissions of the claimant. It is not a catch-all protective provision for the benefit of the respondent covering every conceivable loss or damage whatever the cause and regardless of the other provisions of the agreement. That being so it is plainly inappropriate for the respondent to seek an indemnity in respect of "all losses, damages, costs and expenses **and** all claims and proceedings brought against the Grantor arising from [any unlawful act of the Operator]" (our emphasis).

234. We accept the claimant's argument that the indemnity clause is a matter of procedural management. As the claimant says, the respondent is not dependent on this clause for the means to recover from the claimant compensation for claims brought against it by a third party; such loss or damage is covered by paragraph 25 of the Code.

235. The second point of principle is that the clause is drafted so as to protect both parties; it indemnifies the respondent against third party claims but it also, as drafted, gives the claimant control of those proceedings if it wishes to take control. The respondent of course objects to that. We do not think it is appropriate for the respondent to have the sole right to defend or settle proceedings where the claimant is giving a substantial indemnity. The entitlement of the claimant to conduct those proceedings, subject to the respondent's prior written consent, is a reasonable provision.

236. With that framework established we can look take the respondent's other proposed revisions in order.

237. We think the claimant's additional qualification that any claim brought against the Grantor should be "in its capacity as Grantor" is unnecessary. It is sufficient that a third party brings a claim against the Grantor of the Communications Site arising from an unlawful act etc of the claimant.

238. We do not think the claimant's qualification that all claims and proceedings must arise *directly* from an unlawful act to be the subject of the indemnity is justified. The question of remoteness of damage is a matter to be determined as part of the action brought by the third party and in consideration of the cause and nature of its alleged losses. It is inappropriate to make the indemnity subject to a disputatious prior filter. It is reasonable that the indemnity should apply whenever a claim or proceedings are brought against the respondent because of the claimant's unlawful act; we think that that wording is sufficient to encompass proceedings brought against the respondent as a result of the claimant's negligence, and indeed as a result of any act of the claimant that a third party regards as unlawful, but we are content to add the respondent's proposed wording "or negligent act" for the avoidance of doubt.

239. The respondent also seeks to add "any breach of this agreement" to the list but, as we have described above, this is inappropriate to an indemnity that is only concerned with third party actions; the respondent has a remedy under the agreement for any breach of its terms by the claimant.

240. We do not understand the purpose of or the rationale for the exclusion of "any Proceedings to the extent that they are in respect of consequential losses and/or losses that would not otherwise be recoverable at common law" and therefore we omit that exclusion.

241. In the light of what we have said about the purpose of the indemnity, it is quite difficult to find any obvious rationale for a limit upon it. Since it relates only to third-party claims, the value of the respondent's entire property, or of its building, is irrelevant since there is no reason why third-party claims (say, for personal injury) should bear any relationship to those values. The claimant's offer of an indemnity cap of £35m (a revision of its initial proposal of £10 million) is an attempt to narrow the dispute and is without prejudice to its contention, as a point of principle, that it is neither necessary nor proper to base an indemnity cap on insurance values. We observe, as did the Lands Tribunal for Scotland in Fothringham, that there is no obligation under the Code to offer an indemnity and therefore we accept the claimant's figure of £35 million. We repeat that this does not in any way limit the claimant's liability to the respondent for loss or damage caused by the claimant, whether directly or as a result of an action brought by a third party.

242. That said, the respondent's proviso "for the avoidance of any doubt" that the indemnity cap will not limit the claimant's overall liability to the respondent under a contractual claim is otiose and unnecessary.

243. We therefore determine paragraph 7.4.1 shall read:

> "The Operator shall indemnify the Grantor in respect of all claims and proceedings brought against the Grantor of the Communications Site (including associated costs and expenses) ("Proceedings") arising from any:
>
> (i) unlawful act or omission or negligent act by the Operator; or
>
> (ii) unlawful exercise of the Rights; and/or
>
> (iii) unlawful use of the Communications Site; and/or
>
> (iv) unlawful use of the Equipment

provided in each case that:

> (i) the Grantor shall promptly notify the Operator of any Proceedings and the Grantor will not compound, settle or admit those Proceedings without the consent of the operator (such consent not to be unreasonably withheld or delayed) except by an order of a court of competent jurisdiction;
>
> (ii) the Grantor will use reasonable endeavours to mitigate any costs, expenses or losses the subject of the indemnity; and

(iii) the Operator shall be entitled at its own cost to defend or settle any Proceedings subject to the Grantor's prior written consent (such consent not to be unreasonably withheld or delayed).

This indemnity does not extend to:

(i) any Proceedings to the extent that they result from any negligence, wilful act, default or omission of the Grantor, its employees, servants, contractors, agents or Code operators or any other person outside the Operator's control;

(ii) any Proceedings to the extent that the Grantor has failed to take any action that it ought reasonably and properly to have taken to mitigate any liabilities, costs and expenses that it may suffer.

Claims under this indemnity shall be capped at a level of thirty five million pounds (£35,000,000) whether in respect of a single claim or a series of claims arising from the same incident (except in the event of death or personal injury where there shall be no limit)."

Paragraph 8.1.1, 8.2, 8.3 and 8.4: Assignment and the definition of Guarantee Agreement

244. The respondent seeks to include the following paragraph 8.1:

"Save as permitted by clause 8.2 the Operator is not permitted to assign, underlet, transfer, charge, share, or part with possession or occupation of (in whole or in part) the Communications Site."

The wording of the first part of paragraph 8.2.1[12] is agreed:

"The Operator may without the Grantor's consent assign or transfer the whole of the Agreement to any Code [o]perator."

The respondent wants to add "subject to the Operator providing a Guarantee Agreement".

245. There are two sources of dispute here; first the proposed addition of paragraph 8.1 and secondly the requirement for a guarantee agreement on assignment or transfer.

246. The claimant considers paragraph 8.1 to be inappropriate and superfluous to a Code agreement which (it says) is not in the form of a lease. The Code provides a distinct and self-contained set of rights that is not intended to replicate landlord and tenant law. To import standard lease clauses into the agreement would defeat the intention of the Code in matters such as sharing, which would be severely restricted by the respondent's proposed wording.

247. The claimant objects to the respondent's proposal for a Guarantee Agreement in circumstances where the claimant wants to (and can only) assign or transfer the whole of the agreement to a Code operator. The claimant submits that a Code operator is one

[12] Which appears as paragraph 8.1.1 in the claimant's version of the draft agreement

designated and regulated by Ofcom under section 106 of the Communications Act 2003 and will therefore already have been properly assessed as a suitable assignee by Ofcom and subject to its regulation.

248. The claimant has nevertheless offered a mechanism whereby the respondent can request a Guarantee Agreement where "it is reasonable on an objective assessment of the assignee's ability to pay the sums due under this Agreement".

249. The respondent repeats its argument that the agreement is in fact a lease and therefore paragraph 8.1 is appropriate. As to guarantee agreements, it says the Code does not make the giving of such agreements conditional upon an objective means test of the assignee. The Code provides that the Grantor may require a guarantee upon any assignment without qualification. The respondent says it requires a guarantee to ensure it suffers the least possible loss and damage and thereby gives effect to paragraph 23(5) of the Code. It rejects the claimant's proposed mechanism for giving a Guarantee Agreement because it is only triggered (up to two months) after an assignment has taken place, by which time the claimant will have been released from its obligations under the agreement.

250. Looking at the two disputes in turn, we regard the proposed paragraph 8.1 as unnecessary whether or not the agreement constitutes a lease. Assignment and transfer are addressed in paragraph 8.2 and it is not appropriate to include further restrictions that would compromise the claimant's admitted right to share the site.

251. As to the requirement for a guarantee agreement, paragraph 16 of the Code provides as follows, so far as relevant:

> "(1) Any agreement under Part 2 of this code is void to the extent that—
>
> > (a) it prevents or limits assignment of the agreement to another operator, or
> >
> > (b) it makes assignment of the agreement to another operator subject to conditions (including a condition requiring the payment of money).
>
> (2) Sub-paragraph (1) does not apply to a term that requires the assignor to enter into a guarantee agreement (see sub-paragraph (7)).
>
> (7) A "guarantee agreement" is an agreement, in connection with the assignment of an agreement under Part 2 of this code, under which the assignor guarantees to any extent the performance by the assignee of the obligations that become binding on the assignee under sub-paragraph (4) (the "relevant obligations")."

252. The draft agreement defines a Guarantee Agreement as having "the meaning given to it in the Code and shall be in such form as shall be agreed between the Parties acting reasonably".

253. We think it is reasonable for the claimant to give a Guarantee Agreement at the time of any assignment of the agreement. The giving of such a guarantee is expressly allowed for in the Code even where an assignment is to another operator as defined under section 106 of the 2003 Act. It is not to be assumed that another operator will have the ability to meet all the relevant obligations under the agreement merely because it is regulated by Ofcom.

254. The draft paragraph 8.2 therefore now becomes 8.1 and shall read:

> "8.1 The Operator may without the Grantor's consent:
>
> 8.1.1 assign or transfer the whole of the Agreement to any Code Operator subject to the Operator providing a Guarantee Agreement."

Section 13: Access Protocol

255. We considered but rejected the need for an Access Protocol at paragraphs 117 to 120 above.

Claimant's application to amend the plan attached to the interim code agreement

256. On 29 July the claimant made an application by letter to the Tribunal to amend the plans annexed to the interim Code agreement imposed on the parties at the case management hearing and annexed to the draft agreement sought to be imposed under paragraph 20. Those amendments arose from material in the Curtins report (see paragraph 67 above) and from discussion with the respondent.

257. The respondent said that it agreed to the amendments on condition that its wording in relation to the ICNIRP exclusion zones, and the warranty it required as to the drop zones, were included in the agreement (presumably in both agreements).

258. We have given our decision on those terms above, and we see no reason why the amendment of plans, made necessary by safety concerns, should stand or fall on the basis of those terms. Accordingly had it been relevant to do so we would have granted the application to amend the plans. However, the interim Code agreement comes to an end on the date of this decision, and we have refused to impose an agreement under paragraph 20, and therefore the application is academic and no decision is required.

Costs

259. Under rule 10(6)(e) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, as amended, the Tribunal has full power to award costs in references under the Code. The parties may now make submissions on costs and a letter giving directions for the exchange and service of submissions accompanies this decision.

Judge Elizabeth Cooke A J Trott FRICS

Dated: 1 September 2020