FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LC – 2023-000587**
Property	**:**	**Roof of 18-19 Hanover Square, London W1 (part of title number NGL983759)**
Claimant (Operator)	**:**	**CORNERSTONE TELECOMMUNICATIONS INFRASTRUCTURE LIMITED (CTIL)**
Representative	**:**	**James Tipler of counsel instructed by Osborne Clarke LLP**
Respondent (Site Provider)	**:**	**GHS (GP) LIMITED AND GHS (NOMINEE) LIMITED (GHS)**
Representative	**:**	**Fern Schofield of counsel instructed by Bryan Cave Leighton Paisner LLP**
Application	**:**	**Electronic Communications Code Paragraph 26 – interim rights**
Tribunal	**:**	**Judge D Barlow Mr N Wint FRICS**
Date of Hearing	**:**	**6 December 2023**

DECISION and ORDER

Background

1. The Claimant is a telecommunications infrastructure provider and operator pursuant to a direction under section 106 of the Communications Act 2003. The Respondent is a Jersey based property holding company. The Claimant seeks an Order pursuant to Paragraph 26 of the Electronic Communications Code (introduced by the Digital Economy Act 2017 which inserted Schedule 3A to the Communications Act 2003) imposing upon the Respondent an agreement for interim Code rights to enable it to carry out a multi- skilled visit (known as an "MSV") at property described in the Notice of Reference as Prospective Telecommunication Site at 8-19 Hanover Square, London, 64-72 (inclusive New Bond Street, 14-18 (even) Brook Street, 20 Hanover Square, 18 Dering Street and 1 Tenterden Street, London.

2. By Order of Upper Tribunal made on 13 September 2023, this reference was transferred to the First-tier Tribunal (Property Chamber) under Rule 5(3)(k)(ii) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010.

3. The reference was listed for a Case Management Hearing on 6 December 2023 which took place remotely using VHS. The Claimant was represented by Mr Tipler and the Respondent by Ms Schofield.

4. The Order of Upper Tribunal directed that the FTT will consider and (if possible) determine the application for interim rights at the Case Management Hearing. The Tribunal has followed, and where appropriate and with any necessary modifications, the provisions of the Upper Tribunal (Lands Chamber) Practice Direction made on 19th October 2020 and in particular paragraph 14.12 which provides that "Applications for interim or temporary rights will usually be determined at the case management hearing (which may be brought forward in cases of extreme urgency) or on paper.

5. The parties have reached an agreement that will allow the Claimant to access the roof of 18-19 Hanover Square to carry out an MSV on terms that are acceptable to the Respondent owners. There is however an unresolved issue concerning the Respondents transactional costs of £40,977.18 and the parties have differing opinions on who should pay the costs of the reference (the litigation costs) and in what amount.

6. The Tribunal considered the Claimants Bundle of documents (pages 1-423); the Respondent's Bundle of documents (page 1-101) which each included statements of the Respondent's transactional and litigation costs. We are also grateful to both counsel for their respective skeleton arguments filed shortly before the hearing and for the Bundle of authorities provided by Mr Tipler.

7. In order to deal with the question of costs it is necessary to look at the circumstances in which the dispute came to be referred to the Tribunal. A brief chronology of this reference can be summarised as follows:

    - 16 December 2020 Bryan Cave Leighton Paisner LLP (BCLP) acting for the Respondent sent a letter to Mono Consultants (appointed by the

Claimant) confirming that access to the rooftop of the Hanover Square development for a design survey, could be provided on the terms set out in the 2 page letter.

- 1 April 2021, Osborne Clarke LLP (OC), instructed by the Claimant, wrote to BCLP to suggest that it would be preferable for the terms of any MSV to be formally agreed in a short MSV agreement (a draft of which was attached), rather than by exchange of correspondence. The letter made the usual requests for construction drawings, and electrical schematics. It also requested a copy of the Respondent's lease and the Grantor's access contact.

- In May 2021 Respondent installed a beehive on the roof of 18-19 Hanover Square.

- 4, 9 and 16 June 2021 OC chase for BCLP's comments on the draft MSV on the last letter threatening to take action under paragraph 26 of the Code.

- 22 June 2021 BCLP write to say the Respondent did not understand why an MSV was being requested as the site was completely inappropriate, not least because the Respondent intended installing a beehive (which it transpired had already been installed). This would cause practical difficulties for the surveyor and risk disrupting the hive. In the circumstances it was hoped the Claimant would agree that it was not worthwhile to pursue the MSV.

- 4 November 2021 OC serve a ***Letter before Formal Notice*** describing the 'Site' as Hanover Square, 18 Hanover Square, Mayfair, London W1S 1HX registered under title number NGL983759 ("the Land").

- 18 November 2021 BCLP write to say they are discussing the notice and will respond by 2 December 2021.

- 12 January 2022 BCLP write to say they are still obtaining instructions but hope to respond substantively shortly to progress matters. They also threaten to raise costs as an issue if any precipitate action is taken in the meantime.

- 21 October 2022 OC serve a **paragraph 26(3)** ***Statutory Notice***. The notice describes the 'Site' as 18-19 Hanover Square, London as registered under title number NGL983759… and… 64-72 (inclusive) New Bond Street, 14-18 (even) Brook Street, 20 Hanover Square, 18 Dering Street and 1 Tenterden Street, London registered under title NGL895888…("the Land"). The notice recites the history of the correspondence with Mono and BCLP, requests information concerning the beehive and attaches a copy of the draft MSV agreement.

- 15 November 2022 BCLP respond substantively by letter to say that as the Notice appears to now include the Respondents adjoining freehold

title (NGL895888) they will need to consult with the Respondent, their beekeeper and their telecoms surveyor which will take longer than the notice period. Point 4 of the letter provides information on the Respondent's biodiversity and sustainability efforts in connection with the beehive, the beekeepers comments on the effect of an MSV and a brief indication that bespoke terms will be required to protect the bees on any survey visit. Point 8 of the letter states that access to the rooftop would have to be through a sub-demised leasehold premises which requires third party consent, impacting on costs and any undertakings the Respondent required.

- 23 January 2023 BCLP write to say they are finalising discussions with the Respondent in relation to the freehold premises. That the Respondent did not object in principle to granting access to the leasehold premises for a survey. They confirm their costs already stood at £10,769 plus VAT due to the legal and practical impact of the visits including the specific access issues and the need to obtain input from the beekeeper and the third party (while acknowledging £6000 would be more usual for negotiation of an MSV). An initial undertaking of £16,769 plus VAT was requested.

- 7 February 2022 OC reply substantively to say the Notice was served seeking access to 18 Hanover Square which forms part of the Respondent's leasehold and freehold titles.

- 21 March 2023 OC write to BCLP ask for a breakdown of the time spent. They also chase details of the third-party leaseholder.

- 18 April 2023 BCLP write noting that access to 18 Hanover Square is required and questioning why the Notice includes a more extensive list of properties. BCLP say the Notice is confusing and should be withdrawn.

- 16 June 2023 OC write to say the Notice is not confusing, they seek access to the rooftop of 18 Hanover Square as has been clear throughout all previous negotiations, but are uncertain if access through the adjoining freehold title was also required. They ask again for a breakdown of the fees and point out that absence of an undertaking should not hold up negotiating the MSV agreement. Proceedings are threatened.

- 21 June 2023 a senior associate of BCLP wites to say she is now assisting and will review the MSV agreement as she is familiar with the property and has assisted in the lettings.

- 23 June 2023 BCLP return the MSV agreement bearing their first mark up.

- 27 June 2023 BCLP provide a breakdown of their costs incurred up to 16 June 2023 which total £21,707.40.

- 7 July 2023 OC reply to say the costs are unreasonable and offer an undertaking of £4,500 plus VAT.

- 11 September 2023 OC return the MSV agreement with their comments and revisions. They seek clarity on the bee hibernation issue.

- 13 September 2023 ***Notice of Reference issued*** by OC for the conferral of Code rights.

- 20 October 2023 BCLP chase for return of revised draft and say the lease of the 8th Floor does not permit the Respondent to allow access and they are liaising with the tenant.

- 31 October 2023 BCLP advise that their fees now stand at £41,126.40 and request an undertaking of £44,126.40 plus VAT.

- 6 November 2023 BCLP continue to pursue the access point and say that they are awaiting a response from the beekeeper. OC request a copy of the 8th Floor lease (provided by BCLP same day).

- 8 November 2023 BCLP file Respondent's Response to the notice of reference and Statement of Case.

- 13 November 2023 OC write to say the 8th Floor lease does not demise the lift core to the tenant and in any event sufficient rights of access are reserved by reference to the headlease. Also point out that the occupational tenants have unrestricted rights to access the roof with no safeguards. BCLP acknowledge that the Respondent can after all grant access through the building to the roof over the central staircase.

- 15 November to 21 November 2023 draft is turned around several times to deal with the few outstanding points. BCLP fail to obtain any more information from beekeeper and agree to delete reference to hibernation period if access commencing in May is agreed.

- 23 November 2023 MSV substantially agreed with removal of any restriction on timings to accommodate the bees.

- 28 November 2023 OC make final (reasoned) offer to settle transactional costs at £12,000.00 plus VAT

- 29 November 2023 BCLP reject offer and make a (reasoned) counter offer to settle at £29,000.00 plus VAT.

8. The reference concerns a building known as 18-19 Hanover Square, London. It forms part of large corner block of mixed-use properties owned by the Respondent under a freehold and a leasehold title. The block sits adjacent to Hanover Square and incorporates Bond Street tube station. The recent re-development of the block

involved the remodelling of existing buildings and the construction of a nine-storey office building over Bond Street station. Transport for London own the freehold of Bond Street station, 18-19 Hanover Square. A long lease of the 9 storey over-site building was granted to the Respondent in 2018 (title NGL983759). Wrapped around two sides of 18-19 Hanover Square is the remainder of the block which is held under freehold title (NGL895888). It comprises some 6 properties all owned by the Respondent. The title plans show a degree of overlap between the freehold and leasehold titles at certain levels.

18-19 Hanover Square (leasehold title plan)

Adjoining freehold title plan

9. The Claimant first sought access to the roof of the over-site block (18-19 Hanover Square) in December 2020 because the large flat rooftop was on one of the tallest in the vicinity and (subject to an MSV) considered an ideal location to improve service in the area.

Image showing the height of the over-site building at 18-19 Hanover Square

10. Contact was initially between Mono Consultants and Great Portland Estates, who I assume were engaged by the Respondents on the redevelopment. Mono explained in correspondence that CTIL would like to survey the rooftop of the Hanover Square development after 19 Jan 2021. This led to a prompt response from BCLP on behalf of the Respondent, offering supervised access to the rooftop of the Hanover Square property for the purposes of a non-intrusive design survey subject to a few conditions. Mono was invited to sign the letter by way of acknowledgement of the conditions, following which access would be scheduled.

11. Mono referred the letter to CTIL who it seems did not want to proceed as suggested. Contact resumed in April 2021 when OC wrote to BCLP suggesting that the terms of the MSV might be better documented in the form of a short MSV agreement which they attached. It is a short 10-page agreement in standard terms for a non-intrusive inspection survey to assess the suitability of a new rooftop site. Nothing much happened until June 2021 when following a threat of proceedings BCLP questioned whether the Claimant would be able to demonstrate satisfaction of the qualifying conditions for imposition of a Code agreement and suggested that the rooftop would not, in any event, be suitable for installation of electronic code equipment after all because the Respondents had decided to install a beehive on the roof. Matters then became protracted and difficult leading to OC issuing a s26 Notice on 21 October 2022. The Notice made reference to the over-site block (18-19 Hanover Square) and also the adjoining freehold block. It should be noted here that Mono had raised the issue of access back in December 2020 asking for cooperation in establishing the access route to the roof over what CTIL's title report indicated were a number of possible properties.

12. Rather than address what appeared to be the obvious reason for the freehold title being included, BCLP got very exercised at the (unlikely) possibility that CTIL now wanted to carry out a survey inspection of the entire freehold and leasehold block. They reiterated concerns about the beehive in the context of the Respondent's Landscape and Habitat Management Plan and stated that 3rd party consent would also be required from the tenant of the 8th Floor, whose lease apparently did not reserve rights for the landlord to authorise access through that floor to the roof.

The solicitors costs then became a significant issue. BCLP anticipated that considerable costs had and would continue to be incurred looking at three significant issues. Much time was spent on requests for undertakings and counter demands for the costs to be justified by a breakdown or schedule of costs. Meanwhile nothing was happening with the MSV agreement itself.

13. The three issues that the Respondent says account for the costs being in excess of the figure they consider usual for negotiating an MSV agreement (£6,000.00) are (1) uncertainty about the extent of the property to be surveyed and/or the route of access to the roof ("the freehold issue"); (2) uncertainty about the Respondent's ability to permit access through the 8th Floor tenant's demised premises ("the access issue"); and (3) the need to consider the impact of the MSV on the beehive ("the beehive issue").

14. The draft MSV served with the Notice of Reference was in substantially the same form as previously provided. OC clarified in correspondence that CITL's requirements hadn't changed, they just didn't know whether the rooftop could be accessed without passing through the adjoining freehold block and had therefore added reference to the freehold title to the Grantor's Property in the Notice of Reference. It was not until 21 November 2023 that BCLP confirmed access to the rooftop could be obtained direct from the basement of 18-19 Hanover Square without encroaching on the freehold title.

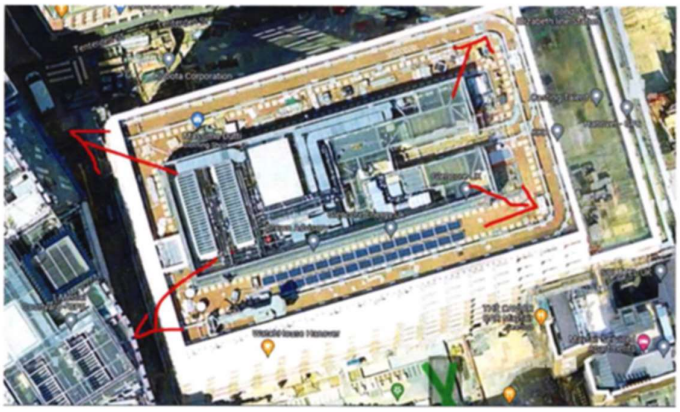
15. BCLP didn't really address the access issue despite saying repeatedly that it was an issue. Eventually on 6 November 2023, OC asked for a copy of the tenant's lease and quickly realised there was no issue. Unsurprisingly, the central stairwell (and lift shafts) had not been demised to the occupational tenants of the building. Why a solicitor specialising in commercial property would, for a second have thought this likely, is unfathomable. BCLP immediately conceded the access issue but then effectively blamed the wasted costs on OC for not seeking a copy of the lease earlier.

16. Much was made of the need for the Respondent to have regard to the welfare of the bees because the beehive installation was part of its Landscape and Habitat Management Plan. Except it is not mentioned in the over-site section or anywhere else in the Landscape and Habitat Management Plan, which covers the entire development. Bio-diversity initiatives are obviously a matter for any owner to determine irrespective of their legal duties. It is however worth noting that at least four tenants have unrestricted access to their designated plant areas on the rooftop.

17. The beekeeper was by all accounts pretty uncommunicative, and the Respondents were unable to provide much information on the conditions the beekeeper thought necessary for maintenance of a healthy rooftop hive. When first consulted he had apparently expressed concern (not relevant to an MSV) that any electrical installation on the roof might disrupt the bees and lead to collapse of the hive. He was also concerned that visits should not take place during the winter months when the bees hibernate, consequently BCLP contended that the agreement period should not commence until 1 May 2024. There was no practical useful information concerning the safe proximity for visitors, actual hibernation times or times of the day that are suitable. Nothing specific that would have allowed for sensible conditions to be negotiated. OC eventually carried out some 'desk top' research which indicated honey bees do not hibernate and suggested that given the size of

the roof, maintaining a safe distance should not be an issue. They provided a satellite image of the roof top to illustrate the point. The beekeeper could not be contacted for input and at the eleventh hour BCLP conceded the beehive issue.

The beehive



The rooftop with arrows indicating the MSV inspection site.

18. The MSV agreement, which had first been sent to BCLP on 1 April 2021 was finally agreed in December 2023. The other issues negotiated were mainly the usual arguments about the scope of the indemnities and the right to conduct/take over proceedings, the period for production of documents listed in the MSV, attendance (and cancellation) costs for building manager and security staff and the beekeeper, effect of non-compliance with RAMS. All standard legal and practical issues routinely negotiated on access agreements.

Transactional costs

19. The Respondent provided a statement of transactional costs to the Claimant on 27 June 2023 totalling **£21,707.40**. The statement covers the **period 7 December 2020 to 16 June 2023**. The letter provides a brief narrative of the work included under correspondence (which totalled £13,260.90) and the MSV *related fact finding and investigatory works* (totalling £8,446.50). At this point in time the Respondent had not addressed the draft MSV agreement itself. The work all appears to be preparatory to the Respondent's solicitor approving or marking up and returning the MSV draft agreement.

20. The three issues referred to above appear to account for the bulk of the preparatory time up to the date of the statement.

21. Nine fee earners were engaged in the preparatory work. A partner and an associate director (£355.00 - £415.00 per hour), 4 associates (£355.00 - £380.00 per hour), 1 associate (£195.00 per hour) and 2 trainees (£195.00 per hour).

22. A second statement of transactional and litigation costs was provided during negotiations in November 2023. It covers the **period 17 June 2023 to 17 November 2023.** No covering narrative was provided but the heads of costs for the transactional costs are consistent with the previous statement. Four of the previously named fee earners have continued involvement during this period plus an additional associate and trainee. The combined figure for correspondence is an additional £11,313.98. The MSV *fact finding and investigatory works* charge an additional £4,351.80. The total transactional costs were therefore running at **£33,021.38 on 17 November 2023.**

23. A further statement of transactional and litigation costs covering the entire period from 7 December 2020 to (and including) the hearing on 6 December 2023, was included in the Respondent's Bundle (filed the day before the hearing) claiming total transactional costs of **£40,977.18**. It unhelpfully adopted a different format and was impossible to reconcile with the earlier statements. It contained no narrative to explain why new heads of costs appeared for areas of work not mentioned in the earlier statements. The Claimant had little or no opportunity to consider the later statement because it was filed on 5 December 2023, after Mr Tipler had filed his skeleton argument on behalf of the Claimant, which was based on the earlier statements. However, the Claimant was keen to see the issue determined at the hearing and did not seek a postponement to consider the later statement in detail.

24. 11 fee earners are shown to have worked on the transaction; a partner, an associate director, 5 senior associates and 4 trainees. The charge out rates remain within the range previously set out. (Three of the transaction fee earners also carried out the litigation work, for which a separate schedule totalling £23,668.62 was also provided.)

25. Ms Schofield's relied on ***Cornerstone Telecommunications Infrastructure v St Martins Property Investments*** [2021] UKUT 262 (LC) at [34]; and *CTIL v Hackney* [2022] UKUT 210 (LC), as authority for her primary argument that it is

well established that the MSV and process of negotiation leading up to it should not leave the Respondent out of pocket and that the Claimant should expect to reimburse the legal fees the Respondent has occurred negotiating the agreement. She submitted that there is no single guideline as to what constitutes a reasonable amount of expenses in MSV cases, or in any other type of case. All depends on the circumstances of a particular case; and that deductions from reasonable costs have generally been by reference to specific amounts considered unreasonable. A 'broad-brush' approach to transactional costs is not, she argued, appropriate.

26. Ms Schofield submitted that, in the light of the approach taken by the Tribunal in other cases the starting point should be the actual costs incurred and any challenge must be to the reasonableness of a specific item.

27. In considering whether the costs were in any way unreasonable she made several submissions, the relevant points I will summarise:

    a) Prior to service of the s26 Notice there had been no indication that a survey of the Respondent's adjoining freehold title was required. This was raised as an issue on 15 November 2021 along with the access issue.
    b) OC's letter of 7 February 2023 failed to sufficiently clarify the reasons for inclusion of the freehold title. It was only confirmed on 16 June 2023, which allowed BCLP to consider the terms of the draft MSV agreement, and return a marked-up draft on 23 June 2023.
    c) The Claimants jumped the gun issuing the Notice of Referral on 13 September 2023, having only returned the travelling draft to BCLP on 11 September 2023. Furthermore, having conceded that rights over the freehold were not required the Notice and Statement of Case continued to seek survey rights over the entire freehold premises. The Respondent's therefore incurred costs considering the implications of a request to survey the freehold premises until a late stage in the negotiations.
    d) The entire 8th Floor of 18-19 Hanover Square had been underlet and the Claimant remained unsure whether the tenant's consent to access would be required. That would have complicated the drafting of the MSV agreement. This point was not clarified until 21 November 2023 because OC did not request a copy of the lease until 6 November 2023.
    e) The unusual nature of the site, in particular, the presence of a beehive complicated the negotiation of the MSV Agreement. It was reasonable to spend time ensuring the MSV would not adversely affect the Landscape and Habitat Management Plan issued in connection with Condition 11 of the planning permission (Bio-diversity management) for the Hanover Square development.
    f) It was also necessary to consult with the building manager and the beekeeper concerning what safeguards were required in the MSV agreement. There had been issues with the beekeeper not responding to the Respondent's requests for information, but the beekeeper was a third party over whom the Respondent had no control. ***CTIL v Hackney LBC*** [2022] UKUT 210 was authority when considering litigation costs, that a party should not be criticised for abandoning points that were reasonable when pursued and the same principle should apply to transactional cost.

28. Mr Tipler acknowledged that the Respondent was entitled to reimbursement of its reasonable costs pursuant to paragraph 84(2)(a) of the Code, but contended they

were unreasonable. He referred to the comments of the Upper Tribunal in ***CTIL v St Martins [2021]*** *UKUT 262 (LC) [33 –35]* but suggested that that this cannot be taken as authority for the proposition that operators must simply underwrite unconstrained billing by large City firms arguing for provisions of questionable necessity. The Respondent's transactional costs must still be reasonable and open to judicial scrutiny in that regard.

29. He also referred the Tribunal to the Deputy President's comments in ***CTIL v Central Saint Giles General Partner Limited & Clarion Housing Association Limited*** [2019]UKUT 0183 (LC) [3] which although directed to the litigation costs incurred on an MSV Code rights claim had, he submitted, general relevance to transactional costs in similar cases.

> "*I also wish to emphasise the importance the Tribunal places on discouraging senseless disputes of this sort, and to put down a marker that the conduct which this case illustrates, over-reaching on one side and obstruction on the other, is disproportionate, inappropriate, and unacceptable. The Tribunal will do what it can to ensure such conduct is not allowed to become a recurring feature of Code disputes concerning new sites. There are legitimate matters to argue about in such cases, and nothing in this decision is intended to discourage those from being raised, but whether a small number of surveyors is permitted to go on a rooftop for a few hours on two or three occasions to establish whether it is even suitable for the installation of apparatus ought not to be one of them."*

And at [4]

> *"The new Code regime is intended to facilitate the provision of telecommunications services without delay and at limited cost. The preparatory stages of the installation of new equipment (at least if the site itself is a new one) will almost always require a survey, conducted over a period of a few weeks and involving a small number of visits by a limited group of individuals, before a decision can be taken about the suitability of the site. If those preparatory stages are allowed to become the occasion for preliminary trials of strength involving legal firepower on the scale deployed in this reference there is a serious risk of the objectives of the Code being frustrated"*

30. In relation to the specific issues Ms Schofield argued justified the level of costs he submitted:

    a) The confusion concerning reference to the Respondent's freehold title was manufactured to cause delay and unnecessary concern. Reference to the Grantor's Property in the headings to the MSV agreement was qualified by the definition of the MSV and the MSV Site which has not changed. The definition in the final agreed draft is the same as in the first draft and the draft attached to the s26 Notice, all clearly refer to parts of the rooftop. The only rooftop ever discussed was that of 18-19 Hanover Square (the over-site building). To the extent there was any confusion it was a simple issue to clarify and unreasonable

to instead incur thousands of pounds assessing the implications of a whole block survey. In any event, any genuine confusion should have been clarified by OC's letter of 7 February 2023. Furthermore, as the Respondent's transactional costs totalled £10,769.00 on 23 January 2023 (two weeks before the letter of 7 February) it is inconceivable that the freehold issue can have contributed much of the final costs figure of over £40K.

b) The access issue was a confusion of the Respondent's own making and difficult to understand given that the Respondent's solicitors had recently negotiated the occupational leases and were familiar with the Respondent's title. The route of access through the buildings to the roof was known to the Respondent and its professional advisors, as were the terms of the occupational leases. All the necessary information was available to the Respondent's solicitor but not provided to the Claimant's until a later stage in the proceedings. This hugely increased the Claimants costs and unnecessarily inflated those of the Respondent.

c) The beehive issue had very little impact of the drafting of the MSV agreement. Little information was available, despite considerable sums having been run up in efforts to consult the beekeeper. Most of the time was spent considering the impact of the bee's hibernation on the commencement of the 6 month period for the MSV. The roof space is massive, it was clearly always possible for the survey team to access 90% of it without going anywhere near the beehive, and yet it was impossible to clarify why non-intrusive surveys and visual inspections should be incompatible with a single beehive, or agree on a safe proximity. Given that no protections of the sort regarded as essential for the MSV had been imposed on the tenants, who had free access to their rooftop plant areas at all times, it cannot have been reasonable for the costs of protracted negotiations on issues that were in the end abandoned, to have been incurred.

d) In relation to specific heads of costs Mr Tipler made the preliminary point that a claim for compensation doesn't prove itself. The Respondent had the burden of properly evidencing its claim (***EE Ltd & H3G UK Ltd v Affinity Water Limited*** [2022] UKUT 08 (LC)).

e) He argued that the £12,768.30 run up for "*fact finding and investigatory works*" was unreasonable. It was for the operator to determine the suitability of the site for survey, not the grantor. The sum claimed appeared to relate to investigation of a title BCLP were familiar with, the fee earner having confirmed on 21 June 2023 that she had "assisted with the title and letting aspects at Hanover Square for the Respondent" and was "familiar with the property". The access issue was unnecessary and later abandoned. The beehive issue was also largely abandoned. The costs described as "internal correspondence" totalling some £6,205.41 were unreasonable in that they appear to relate to internal discussions between the fee earners at BCLP.

f) There was no rush to litigation. The Respondent agreed in principle to an MSV in December 2020, there no engagement for months until the Respondent attempted to resist the inspection in June 2021 when the beehive issue was first raised. It was not premature to serve the s26 Notice. So far as the Reference is concerned, Mr Tipler said that the first mark up of the MSV on 23 June 2023

was extensive, involving wholesale unexplained deletion of clauses. OC returned the agreement to BCLP on 11 September 2023 having largely reinstated the agreement as originally drafted save for the few amendments dealing with the known issues. The Reference was then issued.

g) In keeping with the Code objectives, Mr Tipler submitted that the Claimant had provided a simple, quick and fair agreement for access which reflected the lack of complexity in this case. The draft agreement was in a format used and approved by the Tribunal on other sites where CITL had sought standard non-intrusive rights. It was eventually agreed on terms that varied very little from the draft sent to the Respondent on 1 April 2021. The costs claimed significantly exceed those awarded in other cases where lesser claims had been characterised as "staggering" by the Deputy Chamber President in *Central St Giles*. Furthermore, whilst emphasising that each case turns on its facts, the Deputy Chamber President in the *St Martins* decision also stated at [33]-[35] that a figure of £11,000.00 for transactional costs was "*substantial*" even in the context of a "*relatively complex form of agreement with many detailed provisions*" preceded by lengthy negotiations in which reasonable points were raised. Here the Respondent is seeking more than twice that figure.

h) The limited correspondence on the negotiation which largely took place in October/November 2023 shows that the final agreement still just runs to 10 or so pages and makes limited departures from the original draft.

Deliberation

31. The Tribunal considered the parties submissions during an adjournment and reconvened to notify its decision together with its reasons in brief. The Tribunal determined that the Respondent was entitled to its transactional costs in the sum of £15,000.00 plus VAT for the following reasons.

32. Under paragraph 84(2)(a) of the Code a site provider has the right to compensation for expenses which it has incurred including reasonable legal expenses. On the particular facts of this case, we do not consider the legal costs to be reasonable.

33. The MSV agreement is a short, straightforward document that contains standard terms for a non-intrusive rooftop survey. It varies very little from the draft agreement sent to BCLP on 1 April 2021. A staggering amount of costs were incurred on preparatory work before the draft agreement received any real attention. This delayed active negotiation of the draft agreement for over 2 years.

34. We were not persuaded that reference to the Respondent's adjoining freehold title in the formal Notices caused any real confusion. It was clear throughout all previous discussions and negotiations that CTIL was only interested in surveying the roof of the over-site building on 18-19 Hanover Square. No other roof came near it in height, or was ever mentioned. In 2020 Mono sought cooperation with clarifying the route to the roof through the properties identified on CTIL's report on title. The freehold title wraps around the leasehold block and access through the various parts of the block to the roof would not have been obvious from the title

documents alone. The definition of the MSV and MSV Site in the agreement didn't change. There was no logical reason for BCLP to have jumped to the conclusion that the scope of the area to be surveyed had, without more, expanded to the entire freehold and leasehold block. It was also unreasonable to incur substantial costs examining the possible impact on the freehold properties of such an improbable conclusion. A simple telephone call could have resolved any genuine concern. It is notable that of the £41k transactional costs incurred, only one entry of .5 hour, was spent on telephone calls to OC.

35. The access issue, or rather non-issue, is almost unbelievable. BCLP have been dealing with the freehold and leasehold titles for some time. They prepared the occupational leases. They had access to all documents and information necessary to identify whether any legal or other restrictions needed to be considered. They were in contact with the building manager who would accompany the surveyors. What could be easier? Yet it wasn't until OC requested a copy of the 8th Floor lease in November 2023 that BCLP's concerns were allayed, quickly followed by confirmation that access to the roof could be made directly from the basement of the leasehold block without needing to pass through the freehold title properties. Both issues could have been resolved in 30 minutes by a solicitor familiar with the leases and title. The possibility that the Respondent might have failed to preserve its right to access all parts of the building where necessary to comply with statutory obligations is almost farcical, and even if a genuine concern, one that was easily and quickly resolvable in a more practicable manner at far more modest cost.

36. We accept that the presence of the beehive would have required additional consideration, not because it was part of the Landscape and Habitat Management Plan issued in connection with Condition 11 of the planning permission, it clearly wasn't, but because it was a bio-diversity measure that the Respondent was perfectly entitled to install. However, it is a very small beehive on a very large rooftop. The beekeepers concern about the effect of electromagnetic radiation on the bees was premature, the code rights requested were just for an MSV not an installation. We do not criticise the Respondent for its lack of knowledge concerning the impact of the MSV on the bees, or for having what appears to be a less than competent expert who was difficult to contact. We have no doubt its concerns were genuine in this regard, but lacked any application of basic common sense. The tenants' rights to access their respective plant areas on the roof, at any time, without any protective restrictions did not seem to concern the Respondent and yet the prospect of a few surveyors having extremely limited supervised access on just a few occasions over a 6 month period was apparently justification for a significant part of the staggering costs.

37. In short we accept that the Respondent was entitled to satisfy itself that its interests are protected; that this is a prestigious, high value development; that there are always heightened health and safety issues when permitting access to a roof top. It was right that some time was taken to consider the impact of the inspection survey on these issues and on the beehive, but excessive fact-finding and investigatory work was carried out on issues that were not issues at all, such as the freehold and access issues. Others were disproportionate to the concerns identified, such as the beehive issue.

38. This is well illustrated by the first two statements of costs. The first for £21,707.40, only runs up to 16 June 2023. This was prior to any negotiation of the MSV agreement commencing, and yet includes some £13,260 for correspondence (£2,421 of which appears to relate to internal discussions between fee earners at BCLP); and £8,446.50 *fact finding and investigatory work* for considering the implications of the MSV on the freehold title issue, the access issue and the beehive issue.

39. The later statement of costs which covers the negotiation period up to 17 November 2023 includes a further £4,351. for MSV *fact finding and investigatory work* and another £3,783, for internal discussions, again presumably between BCLP fee earners. It is reasonable for the litigation and transactional fee earners to discuss elements of the case once the reference has been made, but the £6,205.41 claimed for such discussions is in our view unreasonable.

40. Mr Tipler submitted in his skeleton argument that the transactional costs were more than double the £11,000.00 regarded in the *St Martins* case as "substantial" even in the context of a "relatively complex form of agreement with many detailed provisions" preceded by lengthy negotiations in which reasonable points were raised. By the hearing date the costs had risen to almost 4 times that "substantial" sum for what was a straightforward non-intrusive MSV agreement with no real complexity or title issues. There were no unusual security issues, no practical issues other than avoiding close proximity to a small beehive. In short nothing that could account for the staggering level of costs incurred. The negotiations were protracted but not extensive, for long periods nothing was happening on either side. Unreasonable points were pursued, such as the freehold and access issues.

41. We considered Ms Schofield's 'broad brush' point but in this case we were presented with irreconcilable statements covering the same period, which contained different heads of costs and little or no narrative to identify what aspect of the transaction the costs related to. It was impossible to determine which part of the costs listed under correspondence, attendance or letters/emails was referrable to the issues we regard as being unreasonably pursued. A broad brush approach is inevitable when the costs schedules are themselves painted with the broadest available brush.

42. Adopting that approach we determined that a reasonable sum for the transactional costs in this particular case, for the reasons stated, was unlikely to exceed £15,000.00 plus VAT and that sum we so ordered.

Costs of the reference

43. After delivering our decision on the transactional costs orally, we heard arguments on the principle of awarding litigation costs claimed by the Respondent totalling **£23,668.62**.

44. Awards of costs by the tribunal fall under paragraph 96 of the Code:

96(1) Where in any proceedings a tribunal exercises functions by virtue of regulations under paragraph 95(1), it may make such order as it thinks fit as to costs, or, in Scotland, expenses.

(2) The matters a tribunal must have regard to in making such an order include in particular the extent to which any party is successful in the proceedings.

45. We also took account of the recent amended Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013:

13.— Orders for costs, reimbursement of fees and interest on costs

(1) The Tribunal may make an order in respect of costs only—

(d) in proceedings under Schedule 3A to the Communications Act 2003 (the Electronic Communications Code) which have been transferred from the Upper Tribunal

46. Mr Tipler argued that the Tribunal should make no order for costs on the basis that the terms of the MSV agreement had been agreed before the hearing and the Respondent had fallen so far short of its claim for transactional costs that it could not fairly be said to have been the successful party.

47. He argued that there had been no serious negotiation until after issue of the reference. It had been issued because having waited some 2 years for the Respondent to address the draft MSV it made extensive unexplained amendments to a form of agreement previously approved by the Tribunal. The agreement would not have been resolved without issue of the reference. Although the Respondent said in November 2022 that it would be prepared to consider mediation, which the Claimant acknowledged, it was not a proposal and faced with no substantive movement on negotiation of the MSV agreement the decision to issue the reference was reasonable.

48. Ms Schofield argued that the Respondent was clearly the successful party having exceeded the Claimants best offer of £12,000.00 by some margin. She said that access had been offered in December 2020 on simple terms but declined. Mediation had been suggested but not taken up; and the Claimant had issued the reference without warning just days after the Respondent returned its first mark up of the MSV agreement. She submitted that negotiations were underway, there was no need to issue the reference, they would have been where they are now without embarking on litigation.

49. On quantum Ms Schofield confirmed that the costs did not include any time spent on negotiation of the MSV agreement. The costs were all referable just to the Tribunal proceedings. Ms Schofield acknowledged that the rates were a little above the guideline rates but appropriate for the level of expertise required.

50. Mr Tipler argued that the unreasonableness of the Respondents approach to the transactional costs had carried through to the litigation costs, there was nothing unusual in this case to account for the high level of costs. The actual work amounted

to no more than filing the Respondent's response to the reference and its statement of case which had been prepared by counsel. In particular 14 hours for instructing counsel was unreasonable as was 6 hours spent on the Respondent's statement of case which was drafted by counsel. Mr Tipler also took issue with the reasonableness of 7 hours claimed for drafting the statement of costs.

51. Ms Schofield submitted that the instructions to counsel reflected the long history of the dispute and the 7 hours on the statement of costs reflected the need for the litigation costs to be stripped out of the total costs.

Deliberation

52. We determined that the Respondent had been the more successful party. It is true that our award did not come anywhere near the costs claimed by the Respondent, but it did materially exceed the Claimants best offer.

53. We don't criticise the Claimant for issuing the reference. The negotiations had barley moved in 2 years and when eventually they got underway issues of dubious relevance were pursued by the Respondent. It can hardly be said to have jumped the gun.

54. The detailed statement of costs was filed the day before the hearing without the schedule of work carried out on documents. It was later emailed to the tribunal during the hearing. As it only featured three entries no point was taken on the late submission.

55. We agreed with Mr Tipler's assessment that having stripped out all the transactional costs the only action required on the reference was to file the pro forma Response to the reference and the Respondent's Statement of Case, which was drafted by counsel (for a fee of £1000.00, which we considered reasonable). The only other disbursement was counsel's fee of £2,500 for attending the hearing which we also considered reasonable.

56. Given that the only material pleading had been drafted by counsel that left: correspondence and attendance with the client totalling 11.51 hours, carried out by by a grade A fee-earner (£415 p/h); a grade B fee-earner (£340 p/h); and a grade D fee-earner (£195 p/h); letters to opponents 10.37 hours by the same fee earners; attendance on court, counsel and others 7.68 hours by the same fee earners. This accounts for £8,228.10 of the costs. As none this relates to the intense negotiation of MSV Agreement carried out during this period, it is difficult to see what all this time does relate to. Apart from agreeing an extension of time for the Respondent to file its statement of case, nothing of any consequence was happening within the proceedings.

57. The work done on documents totalled £7,995.75 which is clearly not reasonable for a proforma Response and a Statement of Case drafted by counsel. We considered the 14.6 hours recorded for instructing counsel on what is a straightforward reference to be unreasonable, as was the 7.4 hours recorded for work on a Statement of Case that counsel had drafted. We also thought 6.5 hours for preparing the costs statement to be very high. Litigators working across disciplines know that their litigation costs are always subject to challenge and

should be recorded separately. Expecting a paying party to foot the bill for additional time spent stripping out costs that should never have been on a consolidated leger is not reasonable.

58. We determined that a reasonable time to consider the Reference documents and report on them to the Respondent should not exceed 3 hours, the issues were well known, there were no surprises. Instructions to counsel should not have exceeded 5 hours in total. We allowed 2 hours for preparation of the schedule of costs and 5 hours in total for the limited amount of attendance and correspondence that should have been required. As it was not possible to allocate the hours to the various grades of fee earner involved, we took a broad brush approach and applied a blended rate of £ 366.00 per hour. Counsel had been used for the only substantive pleading and for the hearing, there was no real justification for applying higher rates on routine correspondence, attendance and drafting of costs schedules. Applying the blended rate to the 15 hours allowed gives a figure of £5,500.00. That plus counsel's fees of £3,500.00 comes to total costs of £9,000.00.

59. We then considered the extent to which the Respondent had not succeeded on the substantive issue and discounted the costs by 25% to reflect this. This gives a net award of £6,750.00 plus VAT which we believe reflects the Respondent's degree of success and the costs proportionate to achieving that success.

IT IS ORDERED THAT:

60. The Claimants shall be granted the rights in accordance with the Agreement annexed hereto to take effect from the date of this Order as an agreement granting interim code rights in accordance with Paragraph 26 of Schedule 3A of the Communications Act 2003.

61. The Claimants shall pay compensation to the Respondent for reasonable legal expenses pursuant to Paragraph 84 in the sum of 15,000.00 exclusive of VAT.

62. The Claimants shall pay the Respondent's costs pursuant to Paragraph 96 summarily assessed in the sum of £6750 exclusive of VAT.

D Barlow
Judge of the First-tier Tribunal 18 December 2023

Rights of Appeal

A party may appeal this decision to the Upper Tribunal (Lands Chamber) but must first apply to the First-tier Tribunal for permission. Any application for permission must be in writing, stating grounds relied upon, and be received by the First-tier Tribunal no later than 28 days after the Tribunal sends this written Decision to the party seeking permission