FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LC – 2023-000626**
Property	**:**	**Dial Stone Court, Oatlands Avenue, Weybridge, KT13 9DE registered under title number SY806350**
Claimant (Operator)	**:**	**CORNERSTONE TELECOMMUNICATIONS INFRASTRUCTURE LIMITED (CTIL)**
Representative	**:**	**James Tipler of counsel instructed by Osborne Clarke LLP**
Respondent	**:**	**MCCARTHY & STONE RETIREMENT LIFESTYLES LIMITED**
Representative	**:**	**Ms Adamson and Mr Dell of McCarthy & Stone Group Legal department**
Application	**:**	**Electronic Communications Code Paragraph 26 – interim rights**
Tribunal	**:**	**Judge D Barlow**
Date of Hearing	**:**	**25 January 2024**
Date of Order	**:**	**31 January 2024**

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 part of the McCarthy & Stone Group which specialise in the provision of high-quality retirement communities. 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") on the roof of a building described in the Notice of Reference as Dial Stone Court, Oatlands Avenue, Weybridge, KT13 9DE registered under title number SY806350 (the Building).

2. By Order of Upper Tribunal made on 27 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 25 January 2024 which took place remotely using VHS. The Claimant was represented by Mr Tipler and the Respondent by Mr Dell.

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. As explained by the Deputy Chamber President in ***EE Limited and Hutchison 3G UK Limited v London Underground*** [2021] UKUT 0128 (LC) At paragraph 2:
   "*…. at paragraph 14.12 of the Tribunal's Practice Directions, and in its directions for the hearing, the Tribunal seeks to determine claims for interim rights by a summary procedure at the first hearing, if that can be done fairly"*

5. The Tribunal considered the Claimants Bundle of documents (pages 1-267); the Respondent's Bundle of documents (page 1-162) and the skeleton argument filed shortly before the hearing by Mr Tipler.

6. The reference under consideration is the Claimant's ("CTIL") application for the imposition of interim rights under paragraph 26 of the Code to enable it to carry out a non-intrusive MSV on the roof of the Building. The reference was issued on 26 September 2023 following sporadic correspondence over an 18-month period which failed to illicit any substantive reason for the Respondent's objection to the proposed MSV, or any consideration of the terms of the draft MSV agreement.

7. A brief chronology of this reference can be summarised as follows:

   - CTIL's agent (Waldon Telecom) first contacted the Respondent to try to reach agreement to carry out an MSV of on 7 March 2022 and on 11 April 2022.
   - 25 April 2022, the Respondent replied refusing to consider the request on the grounds that the proposal "would not be acceptable to our elderly residents".

- On 26 April 2022, 9 May 2022 and 9 June 2022 , further letters were sent by Waldon Telecom; and on 25 October 2022 a formal letter before action was sent by CTIL's solicitor Osborne Clarke LLP ("OC").
- Absent any response, on 18 January 2023 OC issued a Notice under paragraph 26 explaining that the CTIL was only seeking to carry out a non-intrusive survey, no installation was planned until further rights were agreed or imposed. A detailed note of the MSV process was included and an offer to mediate was also made.
- 10 August 2023, OC sent a final letter before action.
- 22 August 2023, the Respondent replied briefly to seek confirmation that the CTIL would not proceed with the action.
- 26 September 2023, the Reference was issued.
- 27 October 2023, the Respondent filed its response and Statement of Case.
- 7 December 2023, CTIL's acquisition manager contacted the Respondent by email to attempt to arrange a call to discuss the application. The Respondent responded on 14 December2023 to say that discussions could only take place following at minimum a stay or preferably the withdrawal of the reference.
- 10 January 2024, OC sent a long letter which addressed the objections raised in the Respondent's Statement of Case and sought to arrange a telephone meeting to discuss and agree the terms of the MSV agreement.
- 12 January 2024, the Respondent replied by letter reiterating its opposition and refusing to cooperate on MSV negotiations because the time scale was too constrained.

Paragraph 26 (Interim Code Rights) and Paragraph 21 (test to be applied)

8. Paragraph 26(3) provides that in relation to interim code rights:

   "The court may make an order under this paragraph if (and only if) the operator has given the person mentioned in sub-paragraph (1) a notice which complies with paragraph 20(2) stating that an agreement is sought on an interim basis and—

   (a) the operator and that person have agreed to the making of the order and the terms of the agreement imposed by it, or

   (b) the court thinks that there is a good arguable case that the test in paragraph 21 for the making of an order under paragraph 20 is met."

9. Paragraph 21 "What is the test to be applied by the court?" provides:

   "(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.

(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.

Issues for Determination

10. The Tribunal explained that the issues for determination are as follows:

    a) Had CTIL established a good arguable case for determining that the paragraph 21 conditions had been met.

    b) Are terms of the proposed MSV agreement appropriate.

    c) Was it possible to determine the above issues at the CMH and exercise discretion to make an interim rights order, without the need for further evidence.

11. This reference concerns Dial Stone Court, which the Respondent describes as a retirement community. The freehold is owned by Aviva Investors Ground Rent GP Limited and Aviva Investors Ground Rent Holdco Limited ("Aviva"). On 27 August 2012 Aviva granted a long lease to McCarthy & Stone Total Care Management Limited (the head-lessor) who, on 27 August 2012, granted a 125-year underlease to the Respondent.

12. There appear to be 28 apartments within Dial Stone Court, occupied by long leaseholders who each hold under a 125-year lease granted by the Respondent. The leaseholders must be at least 60 years of age (55 if a joint occupier). The Building is managed by McCarthy & Stone Management Services ("MSMS"). The head-lessor, Respondent and MSMS are all part of the McCarthy & Stone Group which specialises in providing high quality retirement communities for the over 60s.

13. The Respondent's initial objection to the MSV proposal was that "it was not a proposal our residents would welcome". Having explained that was the Respondent's position it saw no need to respond to the Claimant's further attempts to discuss access to the Building. For the same reason the Respondent saw no point in responding to the statutory notice or letters before action.

14. In its formal response and Statement of Case the Respondent expanded a little on its objections. In relation to the draft MSV agreement ("Agreement") the Respondent complained that it failed to take account of the specific nature of McCarthy & Stone developments. Many of its leaseholders are between the age of 75-85. The oldest is 97. The noise, disruption, undue stress and invasion of privacy that could ensue from permitting unauthorised third parties' access to the Building was not to be taken lightly.

15. In particular:

    i) the Agreement did not provide for compensation for disruption and uncertainty;
    ii) it was only binding on the Operator;
    iii) the Grantor was burdened with an obligation to demand the consideration;
    iv) the scope of the Schedule 3 rights are too broad in that:

        a) the Respondent couldn't guarantee unobstructed access at all times and could not for security reasons make keys and pass codes available;
        b) the list of documents included confidential information the Claimant had no right to, and didn't need;
        c) vehicular access and parking would be difficult due to the small area of parking and the age of the leaseholders;
        d) photographing of common areas and use of drones was unacceptable.

16. The Respondent also objected on the grounds that:

    i) it was bound by its headlease covenants to obtain the consent of its landlord to any alterations to the Building, and to any underletting or parting with possession of part of the Building,
    ii) it would be consenting to a use that was not a "permitted use" under the terms of the planning permission for the Building,
    iii) there were other sites nearby which could support the installation without causing inconvenience and disruption to the leaseholders,
    iv) the survey was a first step leading to the possible installation of an antenna and communication "apparatus" which had not been particularised sufficiently for the Respondent to understand what was being proposed.
    v) the paragraph 21 test was not met in that although the Respondent did not dispute that the proposal met the public benefit test, it was outweighed by the prejudice that would be caused to the leaseholders. The risk that this first step might lead to disturbance, stress and anxiety was not a prejudice that could be compensated with money.

Paragraph 21 – the test to be applied

17. Paragraph 26(3) requires the Tribunal to focus on whether there is a good arguable case that the paragraph 21 test is satisfied. If it is the Tribunal must then decide whether to exercise its discretion to make an order for interim rights.

18. In its Statement of Case (paragraphs 17-22), CTIL explained that it requires a new site in the Weybridge area to prevent a fall in capacity on the decommissioning of another site in the area. That site cannot be upgraded to meet the increasing demand for mobile phone services and the Building has been identified as potentially suitable for the new installation. Other nearby sites have been considered but rejected in favour of this site. The installation will improve existing capacity and coverage, it will provide 2G, 3G, 4G and have the potential for 5G services. Mobile phone customers should receive an improved service with fewer dropped calls and increased data speeds. The potential apparatus should provide a

capacity uplift because all technologies will be deployed including the latest configurations of 4G and the potential for 5G.

19. Mr Dell was asked at the hearing if he wanted to expand on his challenge to the paragraph 21 test. The Respondent had already acknowledged that CTIL was an Infrastructure provider to Vodaphone and others and was itself an operator pursuant to a direction under section 106 of the Communications Act 2003. Mr Dell did not dispute that the provision of high-quality communications systems was of general benefit to the public who rely on good mobile data and coverage. His argument was that the site was unsuitable. He said that a MSV inspection would cause anxiety and concern to the residents about what it may lead to. Such as the possible installation of an ugly mast or antenna on the roof that would be visible to the apartments which overlooked it and may affect their value. Some of the residents were elderly and/or frail and could suffer health issues if they were subjected to anxiety or alarm about future installations.

20. Mr Dell acknowledged that no real discussion had taken place with the residents about the MSV. It was not a conversation the Respondent wanted to have while the application was current. He had however asked the House Manager about the application and the feedback was that the residents would be very concerned about any installation, it was unwelcome and unwanted. That was apparently the extent of the consultation with residents on the proposed MSV.

21. Mr Dell said that the well-being of all McCarthy & Stone residential leaseholders was extremely important to the Respondent. He argued that the good quality homes provided by McCarthy & Stone, promote worry free living which helps to prolong healthy lives. The rights requested would cause undue stress to the residents. In his view, the prejudice to the well-being of the residents, outweighed the public benefit and could not be compensated by money. Particularly as there were other suitable sites nearby which would not result in this degree of prejudice.

22. The Tribunal disagrees with the Respondent's assessment of the lack of suitability of the site. CTIL is only seeking rights of access to the roof of the Building on a few occasions over a 6-month period to carry out a non-intrusive survey. The perceived prejudice appears to be that the inspection visits will cause undue stress to residents about the possibility the visits could lead to the future installation of an unsightly antenna on the roof. There is no evidence that the inspections would significantly disturb the residents in a manner that might lead to complaints. The Respondent has not provided any real evidence of the anticipated stress or anxiety, it has not engaged with the residents to gauge the actual level of concern and has refused to engage with CTIL on measures that it could take to address any that were identified.

23. There is no evidence that the MSV would cause loss or substantial prejudice to the Respondent itself. The Respondent may owe a duty of care to some residents and might have reputational damage concerns about alterations to the Building impacting on the quality of life enjoyed by the residents. However, there is no evidence that the inspection visits themselves would cause stress or anxiety to residents, and certainly not to a degree that would prejudicially affect their health or well-being. The Respondent has on its own evidence, not taken any steps to either assess or manage these perceived concerns. There is no evidence of any loss

or prejudice to the Respondent that cannot be compensated by money, and the prejudice contemplated by the second condition must be significant. The Respondent has not shown:

> "… 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." ***Cornerstone Telecommunications Infrastructure Limited v University of Arts London*** [2020] UKUT 248 (LC).

24. Furthermore, in assessing the public benefit condition the Tribunal need not consider whether alternative sites, or the possibility of sharing another site instead, would do just as much public benefit. It must weigh the public benefit arising from the imposition of the agreement sought as if the alternative were that the claimant does not operate from the proposed site. The benefit is not diminished by the fact that the same benefit might be achieved by the use of an alternative site in the vicinity. See ***CTIL v University of the Arts London [2020] UKUT 0248*** (LC) [27].

25. The Tribunal finds that the roof of the Building is entirely suitable for telecommunications equipment and that the proposed MSV Agreement is not incompatible with the current use of the Building. CTIL seek access for a 6-month period to carry out an MSV. If the site is suitable, CTIL will no doubt apply under paragraph 20 for further rights. There is no evidence of any significant prejudice or inconvenience to the Respondent.

26. The Tribunal finds therefore that CTIL has established a good arguable case that the test in paragraph 21 is satisfied and that it should exercise discretion to impose an agreement on the Respondent.

The MSV agreement

27. There has been no negotiation of the Agreement. The Respondent refused to engage with CTIL's many invitations to discuss terms unless CTIL agreed a stay or (preferably) the withdrawal of the reference. This was not a reasonable stance. The Agreement was provided to the Respondent at an early stage and could have been negotiated without prejudice to the Respondent's objection in principle to the application. It was evident at the hearing that Mr Dell was hoping that having determined the paragraph 21 tests (which he seemed to think was a preliminary issue), the Tribunal would issue directions imposing on the parties a timetable for negotiation of the Agreement.

28. However, in its Statement of Case the Respondent had identified in general terms the parts of the Agreement that it found objectionable These are largely legal or practical, not requiring additional evidence to determine. The Tribunal therefore decided it could hear oral argument on these points and determine whether the terms of the Agreement were appropriate without additional evidence.

29. The Respondent's objections to the terms of the Agreement were set out in its Statement of Case. Some were not pursued with any vigour any Mr Dell, such as the complaint that the Agreement failed to make clear what type of installation the survey was assessing, possibly because this had been made clear by Waldron in a letter dated 11 April 2022 which confirmed CTIL may want to install a *"Monopole/Lattice Tower with headmounted antennas and dishes, ground-based equipment cabinets and ancillary equipment based within an equipment compound; connections to power and transmission infrastructure*" Those pursued by Mr Dell at the hearing (i.e. those not effectively conceded) were:

    a) the Agreement potentially puts the Respondent in breach of alienation covenants in the headlease/superior lease and the Respondent wished to consult with Aviva on and the House Manager on the terms of the Agreement;
    b) there is no planning permission for the proposed installation;
    c) the Respondent couldn't guarantee access at all times, and there were security concerns about giving out keys and pass codes,
    d) parking on site was an issue due to lack of spaces and safety concerns;
    e) privacy was a concern, residents would not want to be photographed, or have photos of their apartments or the common areas published anywhere;
    f) the potential use of drones would cause added anxiety and distress;
    g) the time limit for production of documents was unreasonable short.

Alienation and consultation

30. Mr Dell argued that the headlease prohibited alienation or alteration of parts of the Building without consent. A copy of the headlease was annexed to the Respondent's Statement. This is clearly irrelevant in that the Agreement only confers temporary rights of access for a few surveyors to get on the roof with surveying equipment. It does not trigger either the alienation or the alteration restrictions in the headlease.

31. Mr Dell did not request an adjournment, but it was clear that he was hoping to have an opportunity to discuss the Agreement with both Aviva and the House Manager. He suggested that it might be appropriate for Aviva to be made a party to the Agreement but was unclear as to why. A copy of the lease between Aviva and the head lessor company was not provided, but Aviva appear to be a ground rents company. As such, it is unlikely to have any responsibility for the upkeep or management of the Building. As the freehold reversioner of a superior lease, it is also unlikely to be interested in the imposition of Code rights on the underlessee. Even if Aviva was unusually interested in the proposed MSV, the case of ***CTIL v (1) St Martins Property Investments Ltd and (2) The Mayor and Commonalty and Citizens of the City of London*** [2021] UKUT 262 (LC), confirms that the imposition of rights by the Tribunal neutralises any risk of a respondent being in breach of the headlease covenants; and that there is no need to join a lessor or freeholder whose interest will not (as here) fall in for many years. There is no reason for either the Respondent's lessor or the freeholder to be joined to the proceedings or the Agreement.

32. Mr Dell did helpfully confirm that while he would have preferred to have sought the views of the House Manager on the terms of the Agreement, the House Manager, or another suitable person would be in attendance at all times to facilitate

inspection visits. The Tribunal's view is that the Respondent has had ample time to consider the Agreement. It is a short standard access licence that could have been reviewed with the House Manager and returned with any considered suggestions months ago. It would not be fair or just to delay determination of this reference to allow the Respondent time to do something it should have done long since. Particularly as the points of concern are fairly minor and do not require additional evidence.

Planning Permission

33. This is irrelevant to the proposed MSV. If the site is assessed as suitable it will be for the Operator to seek any necessary consent before seeking any further rights.

Providing unobstructed access and means of accessing them

34. This term appears at clause 3.1 of the Agreement (Section 3: Grantor's Obligations) under which the Grantor covenants to:

> *".....take such steps as reasonably required to enable the Operator to have unobstructed access to and through the Grantor's Property to the MSV Site, including without limitation providing such keys, access codes and information (at the Operator's reasonable cost) as may reasonably be required."*

35. Mr Tipler confirmed on behalf of CTIL that those attending the inspection visit would not demand keys or codes if the Respondent's "access contact", (whether the House Manager or other person) was on-site to facilitate the inspection. It would be entirely a matter for the Respondent to decide whether to accommodate the visit by allocating personnel to accompany the surveyors or provide them with keys/access codes.

36. The Tribunal finds that clause 3.1 of the Agreement only requires the Grantor to take steps reasonably required to facilitate access and therefore makes appropriate provisions for access.

Vehicular Access and Parking

37. These terms appear at clause 4.1.1 and 4.1.2 of the Agreement (Section 4: The Rights), which provides that the rights exercisable by the Operator and Authorised Personnel include:

> *4.1.1 the right to access the MSV Site with (to the extent vehicular access is practical) or without vehicles, with such hand-held equipment as may be reasonably necessary for the purpose of carrying out the MSV by any route as may be agreed between the parties acting reasonably and as often as may be reasonably required;*
>
> *4.1.2 to park, load and unload vehicles in such place(s) (if available) as may be agreed between the Parties acting reasonably and as often as may be reasonably required;*

38. Mr Dell explained that the car park was very small and there was unlikely to be room for additional vehicles. He was also concerned about the safety risks given that elderly residents may be using the car parking area. His preference was for the Agreement to prohibit on-site parking.

39. Although these concerns are perfectly reasonable, the right to access the site with vehicles and park on-site is circumscribed by the proviso that it is practical, reasonably necessary and the route agreed. The right to park is only triggered if parking is available and in such spaces as are agreed. Furthermore, the Respondent will have an opportunity to make any additional concerns known when responding to the RAMS provided by the Operator for each MSV. The Tribunal finds that the Respondent's concerns are met by the wording of clauses 4.1.1 and 4.1.2 which make appropriate provision for vehicles accessing and parking on-site and there are no reasons to suppose that those attending will act with anything other than due care and professionalism when exercising these rights.

Privacy

40. Mr Dell expressed concern about the use of recording equipment including drones. He believed this risked invading the leaseholders' rights to privacy and a quiet life He also conjectured that the use of drones would cause the residents undue stress and anxiety. He additionally expressed concern about the possibility of residents, or their private apartments being captured in photographs or drone footage, which might subsequently be published and argued that the rights should be modified to expressly prohibit capturing images of residents and their apartments or the use of drones.

41. . Mr Tipler confirmed that the recordings and images were for technical use only in connection with the MSV and that there was no intention that any would be published. There was no intention, or indeed reason for the surveyors to capture images of the residents or their private apartments. The right to take photographs and recordings is in any event limited to the MSV Site as is the use of drones. The rights are also subject to the Operator first obtaining all necessary permits. He said that drones are now commonly used by survey teams to capture aerial images of residential developments, including social housing, without triggering these types of concern.

42. These terms appear at paragraphs 4.1.4 and 4.1.5 of the Agreement (Section 4: The Rights), as follows:

> *4.1.4 to take photographs, measurements and recordings at the MSV Site; and*
>
> *4.1.5 (subject to first obtaining all necessary permits) to operate drones over the MSV Site and take drone footage.*

43. The survey will be carried out by a team of professional surveyors often accompanied by a professional network planner, a design engineer, a professional photographer and drone operator. *Section 2: Operator's Obligations*, requires all personnel authorised by the Operator to comply with all relevant health and safety

legislation and the Grantor's reasonable requirements concerning access to the Building and the MSV Site, that are necessary for the safe and effective management of the Building. The rights under clause 4.1.4 and 4.1.5 standard requirements for non-intrusive surveys. They are a practical method of recording the essential data and information required to make the assessment and have the benefit of shortening the duration and number of visits that would otherwise be required. The Operator is contractually obliged to comply with the Respondent's reasonable requirements concerning both access and health and safety risks. The authorised personnel are bound by their respective professional codes of conduct. There is no reason for them to invade the privacy or homes of the residents and/or publish any of the images captured for the MSV. There is no evidence, just conjecture, that the presence of an overhead drone would cause any resident stress or anxiety. The Tribunal finds that the terms are appropriate as drafted and that the professionalism of the authorised personnel can be relied on without the need to include additional safeguards in the Agreement.

Production of Documents

44. Mr Dell abandoned the Respondent's objection on the grounds that the documents listed in clause 3.2 contained confidential information but argued that it was unreasonable for these to be produced within 14 days. He argued that 28 days was a reasonable time and therefore more appropriate.

45. Mr Tipler submitted that the documents requested predominantly related to health and safety risks and statutory risk assessments. None contained information that could be regarded as confidential and should be readily available to produce. He pointed out that the Agreement period is only 6 months, which would effectively reduce to 5 months if 28 days was allowed because CTIL could not prepare the necessary RAMS for the first visit until the documents were produced.

46. While it is true that the majority of the documents should, as matter of good management, be readily available to produce, the list includes all roof guarantee documents and plans; and all original structural designs, reports, drawings and/or structural calculations relating to the Building which was constructed in the early/mid 2000s. These documents may take a little time to locate particularly as they are likely to be in the custody of a different McCarthy & Stone Group company. 28 days would unreasonably reduce the effective period of the rights, but an additional week should give the Respondent a reasonable time to locate and collate the documents without overly prejudicing the timetable. The Tribunal finds therefore that in this case, 21 days is an appropriate time limit to specify in clause 3.2.

Costs

47. Neither party sought to claim transactional costs which is unsurprising given that no negotiation of the Agreement had taken place.

48. In relation to the costs of the reference Mr Dell submitted that no order for costs was appropriate, but if the Tribunal was minded to award CTIL costs it should be on the basis that the use of Counsel for the hearing was unnecessary.

49. Mr Tipler said that the only costs CTIL wish to claim was the costs of instructing counsel for the hearing. His costs for representing the Claimant were in this matter are £3,500 plus VAT.

50. Paragraph 96 of the Code provides:

> ***Award of costs by tribunal***
>
> *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.*

51. The Claimant has been wholly successful in obtaining the imposition of an agreement for code rights on an interim basis, on substantially the terms originally proposed to the Respondent.

52. The Respondent has not acted reasonably. As reflected in the chronology at paragraph 7, the Respondent, despite have an in-house legal team, rejected out of hand the approached from CTIL's consultants in March/April 2022 and failed to respond to the letters before action and statutory notice. Even following service of its Statement of Case on 27 October 2023, which expanded slightly on the vague reason for its initial rejection, the Respondent refused to engage with CTIL on the detailed response set out in OC's letter of 10 January 2024, or on the terms of the MSV agreement. This has led to CTIL having to incur the additional costs of a hearing to deal with the paragraph 21 tests and the terms of the Agreement.

53. CTIL has been wholly successful and should have its costs. The use of counsel in this case is entirely appropriate. The reference deals with a relatively new and expanding area of law which requires specialist knowledge. The Respondent's failure to engage left CTIL having to prepare to argue all issues, nothing had been conceded. It is entirely reasonable for CTIL to instruct counsel in these circumstances.

54. The Tribunal summarily assessed CTIL's costs, which comprise just counsel's fees of £3,500.00 plus VAT, to be both reasonable and reasonably incurred.

IT IS ORDERED THAT:

1. Pursuant to Paragraph 26(2) of the Electronic Communications Code (Schedule 3A to the Communications Act 2003) the Tribunal imposes an agreement on the Claimant and the Respondent, on an interim basis. The Claimant and the Respondent are bound by an agreement in the following terms:

a) As contained in the code Agreement at pages 211-220 of the Claimant's Bundle with the following amendment:

Clause 3.2 shall be amended to show the period of "21 days" in place of the wording "14 days" on the first line of this clause.

b) The Plan to be annexed to the Agreement (Grantor's Property) is the plan at page 19 of the Claimant's Bundle.

2. Pursuant to paragraph 96 of the Electronic Communications Code:

a) The Respondent shall on production of a copy of counsel's fee note, pay the Claimant's costs summarily assessed in the sum of £3,500.00 (plus VAT unless recoverable by the Claimant)

D Barlow
Judge of the First-tier Tribunal 31 January 2024

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