



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **LC-2023-000668**

Property : **Roof of multi-storey car park, St Marks Road, Mitcham, CR4 2JS registered under leasehold Title SGL625097 and freehold Title SGL460614.**

Claimant (Operator) : **CORNERSTONE TELECOMMUNICATIONS INFRASTRUCTURE LIMITED (CTIL)**

Representative : **James Tipler of counsel instructed by Osborne Clarke LLP**

Respondents : **(1)The Mayor and Burgesses of the London Borough of Merton
(2)Centrica Combined Common Investment Fund Limited**

Representative LLP : **Aaron Walder of counsel instructed by Freeths on behalf of the 1st Respondent**

Application : **Electronic Communications Code Paragraph 26 – interim rights**

Tribunal : **Judge D Barlow**

Date of Hearing : **1 February 2024**

Date of Order : **7 February 2024**

DECISION and ORDER

Background

1. The Claimant (“CTIL”) is a telecommunications infrastructure provider and operator pursuant to a direction under section 106 of the Communications Act 2003. The 1st Respondent (“Merton”) owns a long lease of a multi storey carpark within the St Marks shopping centre at Mitcham, in the borough of Merton. The 2nd Respondent (“Centrica”) is the freeholder of the St Marks shopping centre which extends along and behind Majestic Way and includes the carpark. CTIL 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 1st and 2nd Respondents an agreement for interim Code rights to enable it to carry out a multi- skilled visit (known as an “MSV”) on the roof of the carpark.
2. By Order of Upper Tribunal made on 13 October 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 1 February 2024 which took place remotely using VHS. CTIL was represented by Mr Tipler and Merton by Mr Walder. Centrica the 2nd Respondent freeholder, did not attend having agreed terms with CTIL for the MSV agreement including its transactional costs.
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.
5. The parties reached agreement on the terms of the MSV agreement just before the hearing date. There is however an unresolved issue concerning Merton’s transactional costs of £11,831.50 and the parties have differing opinions on who should pay the parties respective legal costs of the reference (the litigation costs), and in what amount.
6. I considered the Claimants Hearing Bundle of documents (pages 1-216); the supplementary Bundle filed on the morning of the hearing (pages 1-37) and Merton’s statements of transactional and litigation costs filed the evening prior to the hearing. I am also grateful to counsel for their respective skeleton arguments filed shortly before the hearing.
7. 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 February 2022, CTIL’s Agent Waldon Telecom (“Waldons”) first contacted Merton’s Agent, Amsy Chartered Surveyors (“Amsy”) requesting access to the carpark for an MSV.
- 29 March 2022, Amsy responded to say Merton’s lawyers (“Freeths”) had been instructed negotiate a consensual MSV agreement.
- 26 April 2022 CTIL’s lawyers (“OC”) write to Freeths to confirm their instructions to negotiate on behalf of CTIL. They attached a draft MSV agreement to that letter (“the first Agreement”) and chase Freeths for a response to the draft throughout most of May 2022.
- 15 June 2022, having received no substantive response, OC issue a letter before formal Notice requiring a formal response by 29 June 2022.
- 3 August 2022, CTIL’s General Counsel write to Merton direct requesting access. The letter was acknowledged but no substantive response provided.
- 17 November 2022, OC issue a statutory Notice under paragraph 26(3) of the Code attaching to it a further draft MSV on the same terms as the first Agreement.
- 15 December 2022, Simmons & Simmons LLP (“Simmons”) write to OC on behalf of Centrica to say that they want time to review the Notice served on Centrica’s tenant and at this stage could not consent to access for an MSV.
- 13 March 2023, OC write to Freeths concerning Centrica’s involvement and point out that it would be contrary to the decision of the Upper Tribunal in ***Cornerstone Telecommunications Infrastructure Ltd v 1) St Martins Property Investments Ltd*** [2021] UKUT 262 (LC), for a freeholder whose reversion did not fall in for 89 years to be joined as a party.
- 24 March 2023, OC write to Simmons in similar terms and confirm that on the basis of the *CTIL v St Martins* decision they only intend corresponding with Freeths going forward.
- 20 April 2023, Simmons replied to say that Centrica intended to commence a redevelopment of the St Marks shopping centre “shortly” which would include the MSV site. Centrica would consequently oppose access for any Code rights.
- 5 May 2023, OC write to Freeths requesting substantive response by 12 May 2023 failing which they would write directly to Merton.
- 11 May 2023, Freeths respond to say the proposed MSV would be contrary to alienation provisions in Merton’s lease and that Centrica’s redevelopment plans were “likely to require vacant possession of the carpark”. They suggest Centrica should be involved, and the application not proceeded with.
- 12 September 2023, OC write to Freeths re-iterating the consequences of the decision in *CTIL v St Martins* and threaten to issue proceedings if Freeths do not engage substantively on the MSV agreement.
- 12 October 2023, OC issue a Notice of Reference which is transferred to the First-tier tribunal, who on 23 October 2023, list a CMH on 1 February 2024.
- 20 November 2023, Freeths file a response and statement of case on behalf of Merton. It states that Centrica and Merton will agree a surrender of the lease “in the foreseeable future”.

- 30 November 2023, OC seek urgent clarification of the proposed timetable for the surrender, asking if Freeths anticipate it could be in 6 months, 1 year, 5 years or 10 years and follow up with a chaser letter on 5 December 2023.
- 18 December 2023, OC chase again for clarity on the proposed timing of any surrender so that they can make an informed decision about any necessity to join the freeholder. OC write to Simmons in similar terms on the same day.
- 2 January 2024, OC chase both Freeths and Simmons again for clarity on the proposed timing of the surrender. Simmons reply to say they are still waiting for instructions.
- 3 January 2024, having received no clarification from Freeths or Simmons, OC serve a paragraph 26 Notice on Centrica and apply to join Centrica as a party. Attached to the Notice is a tripartite MSV agreement, based on a slightly different precedent to that on which the first agreement was based. Copies of the Notice and tripartite agreement (“the tripartite MSV”) were sent to Freeths and Simmons the same day.
- 3 January 2024, Freeths respond stating that Merton had no issue with the terms of the MSV but was prohibited by Centrica from entering into it without involving Centrica. That Blacks Solicitors LLP (“Blacks”) were instructed by Centrica on the MSV and that Centrica would be transferring its freehold interest sometime in January and surrender of Merton’s lease would happen “shortly thereafter”.
- 12 January 2024, Centrica was joined as 2nd Respondent.
- 17 January 2024, Blacks confirm that Centrica do not object in principle to access for an MSV subject to agreeing the terms of the MSV agreement.
- 24 January 2024, Blacks agree terms including transactional costs of £2000.00.
- 24 January 2024, OC chase Freeths for approval of the tripartite MSV and enclose a clean copy of the draft, as agreed by Blacks.
- 25 January 2024, Freeths respond to express concern that there are a significant number of variations to the first Agreement in addition to those required to join Centrica as a party.
- 26 January 2024, after an acrimonious exchange, Freeths return the draft tripartite MSV tracked to show the changes they require, which are largely to reinstate or revert to the wording of the first Agreement.
- 30 January 2024, the tripartite MSV agreement is agreed apart from costs. Blacks’ costs have increased to £4,000.00 for reviewing and approving the draft rotating between OC and Freeths.
- 31 January 2024, Freeths write to OC seeking agreement of transactional legal costs at £8,800.10 and Agents costs of £3,000.00. Their litigation costs are running at £6,668.30 plus counsel’s fees of £2,900.00 if the hearing is avoided. Otherwise, they will rise to £4,900.00.
- 31 January 2024, OC respond offering £10,000.00 to include all transactional and litigation costs.
- 31 January 2024, Freeths make a counter-offer to settle for £12,000.00 to include all legal transactional and litigation costs, plus the Agents costs of £3,000.00.

8. The reference concerns the roof of the multi-storey car park situated above the St Marks Road shopping centre in Mitcham, a London suburb within the borough of Merton. The freehold of the entire shopping centre, the rear service road including the carpark ramp and multi storey carpark situated above some of the shops is owned by Centrica. The carparking areas are leased to Merton on a long lease which has an unexpired term of 84 years to run. It is a council owned public carpark.
9. CTIL first sought access to the roof of the carpark in February 2022. Contact was initially between CTIL and Merton's respective agents. Access on the terms of the first Agreement was apparently uncontentious and solicitors were instructed to agree the final form of the MSV agreement. Despite this early optimism no further progress was made in agreeing terms until January 2024.
10. The reasons for this remain opaque. Freeths were chased to approve the first Agreement for most of 2022 without any substantive response. In December 2022 following the service of a paragraph 26 notice on Merton, the council's landlord Centrica, involved itself in the matter. A very short letter was sent by Simmons to OC saying that Centrica had only just been made aware of the proposed reference and were not willing to consent to any code right until it had reviewed the proposal.
11. OC, correctly referred both Freeths and Simmons to *CTIL v St Martins* as authority for not involving the freeholder in this case. On 20 April 2023, Simmons give OC the first hint of an explanation for both the inexplicable delay and the freeholders involvement. They explain that redevelopment of the shopping centre including the carpark is intended. Consequently, Centrica will oppose the creation or continuation of any Code rights and CTIL might therefore wish to consider alternative sites. The only timescale offered for this intention to come to fruition is "shortly".
12. In May 2023, OC express frustration about the failure of Merton to engage on the first Agreement and issue a letter before reference. Freeths respond to say, in terms, that Merton did not object to the MSV but could not enter into an agreement without joining the freeholder because to do so would breach the alienation covenants in the lease. The letter refers to clause 28(c) and (d) of the lease without setting out the covenants. No copy of Merton's lease was provided to OC then or in fact at all. OC was it seems expected to simply accept that Merton's lease included covenants that required the freeholder to be joined to the MSV agreement. Unconvinced of this, in September 2023, OC once again correctly refer Freeths to the *CTIL v ST Martins* case and threaten to issue the reference. There is no response which left OC little choice but to issue the reference in October 2023.
13. Merton's response and statement of case filed on 20 November 2023, expand on its objection to agreeing terms, without Centrica being joined as a party. Merton do not dispute that there is a good arguable case that the test in paragraph 21 has been met. It argues that the tribunal should not exercise its discretion to impose an agreement without first joining the freeholder to the proceedings. The reason put forward is that to do so would, or may, put Merton in breach of clause 2 (28)(b) of Merton's lease which is a covenant "*Not to assign or part with the possession of part of the Demised Unit or share the Demised Unit or any part thereof with any other person or persons*".

14. The statement of case states that the Centrica had confirmed it would not object to Merton entering into an MSV agreement provided it was joined as a party. Also, that Centrica was pursuing redevelopment plans for the carpark and adjoining site under which it was likely that Centrica and Merton would agree a surrender of the lease. Until then Merton had an ongoing relationship with Centrica which may be harmed if a Code agreement was imposed on Merton without the involvement of Centrica.
15. Merton argued that this case could be distinguished from *CTIL v St Martins* in that (i) unless joined as a party the freeholder objected to the imposition of Code rights and (ii) there was a realistic prospect the lease might be terminated in the foreseeable future. No copy of the lease was attached, no indication of the timescale intended to be conveyed by the words “foreseeable future” was provided. No evidence of either the nature of the proposed redevelopment or the timescale was provided.
16. OC noted that (for the first time) the possibility that a lease surrender was being advanced and in November and December 2023 and early January 2024 urgently sought further clarification of the timescale from both Freeths and Simmons. On 3 January 2024, Freeths finally responded to say Centrica would be transferring the freehold that month and the lease surrender would happen shortly thereafter. Faced with continued lack of clarity and the possibility of an imminent lease surrender OC had little choice at that point but to serve a paragraph 26 Notice on Centrica and apply to join the freeholder to the proceedings.
17. Unfortunately, in its haste to do just that, the tripartite MSV agreement OC attached to the new Notice was based on a different precedent to that used on the first Agreement. Centrica instructed Blacks to negotiate the MSV and that was quickly done. Within a week of Centrica being joined as a party the tripartite MSV agreement (including transactional costs of £2,000.00) was agreed with Blacks.
18. Freeths appear not to have considered the tripartite MSV until the draft agreed with Blacks was sent to them on 24 January 2024. Having finally turned their attention to the agreement Freeths noticed that the basic form of precedent it was based on varied from the first Agreement. Freeths complained about OC’s failure to inform them of this apparent hi-jacking. Rather than quickly return the clean copy tracked changed to show the material terms they wanted to reinstate, further time was wasted by Freeths and OC arguing about who was at fault and the difference between the two forms of agreement, even where the differences were of no real consequence. There were however some material changes to the indemnity covenants, the RAMS process and a few compliance processes that undoubtedly needed reversing for the terms to be acceptable to Merton. It only took a day or two for these to be addressed once they became the focus of the solicitors’ attention and the final draft was agreed by 30 January 2024.
19. A row then broke out about the transactional costs. OC arguing that Merton’s were excessive given that the agreement had been negotiated in less than a week and that there was no evidence supporting the claim for Agent’s costs of £3,000.00. Freeths arguing that Merton had been happy with the first Agreement and that their costs had been unnecessarily increased by OC changing the basic form of MSV agreement without telling them.

20. At the hearing both counsel made oral submissions on Merton's claim under paragraph for transactional costs

Transactional costs

21. The Respondent provided a statement of transactional costs. 7 fee-earners were involved at charging rates of between £75.00 and £182.00 per hour. About 23 hours was spent attending the client, 3 hours attending Blacks and 2 hours attending OC. Work on documents includes 5 hours work on the MSV. The rest is mostly spent reviewing things. Over 8 hours was spent "considering position and strategy". Agent's fees of £3,000.00 are shown under *other expenses*.
22. Mr Walder relied on ***CTIL v Hackney [2022] UKUT 210 (LC)***, as authority for arguing that the MSV agreement and process of negotiation leading up to it should not leave a respondent out of pocket and that a claimant should expect to reimburse the legal and professional fees a respondent has incurred negotiating the agreement. He argued that the costs reflect that although this was a tripartite MSV agreement and therefore more complex, the costs remained within the "normal" range of transactional costs for cases such as these, as contemplated by the Deputy President's order in ***EE Ltd and another v HSBC Bank Plc [2022] UKUT 174 (LC)***, the heading to which reads "*costs – usual practice explained*". In light of the approach taken by the Upper Tribunal in these cases. the starting point should he argued be that Merton was entitled to its costs in full.
23. Mr Tipler confirmed that there was no issue concerning Merton's entitlement to its reasonable transaction costs under paragraph 84 of the Code, or that the tribunal's usual order is that the costs incurred by a respondent made necessary by the operators wish to undertake a survey should not in principle fall on the site provider. However, the costs are not he argued reasonable in the context of this dispute.
24. There were, he argued unjustifiable delays despite repeated chasing by OC. Merton's refusal to engage with the process is in clear breach of OFCOM's Code of Practice which requires the parties to make every effort to reach a voluntary agreement before employing a reference. The only justification proffered was Merton's groundless insistence that the freeholder should be joined to avoid Merton breaching the alienation covenants in its lease, an argument that bears no scrutiny. Even if there was an inconsistent provision in the lease (which has not been disclosed) Centrica had no complaint it could reasonably pursue for the reasons given in the now familiar decision of *CTIL v St Martins*.
25. The suggestion in Merton's statement of case that plans were being pursued for redevelopment which involved a surrender of the lease have not, he submitted, been substantiated by a shred of evidence, and to date there has been no clarity concerning what is planned or when any consequent surrender might happen. The unjustifiable delay and lack of transparency should not be encouraged.
26. Mr Tipler submitted that OC had provided a simple, short and fair agreement for access which reflected the lack of complexity in this case. This is a public carpark with no special sensitivities. The first Agreement was in a format used and approved by the tribunal on other sites where CTIL had sought standard non-intrusive rights.

It is true that the basic form of agreement used for the tripartite MSV varied from the first Agreement and that, he understood was simply because the standard form had been updated since the first Agreement was issued. The variations were not substantial. The final draft was agreed in less than a week. The time frame had been unreasonably constrained by Freeths' failure to consider the draft agreement until three weeks after receipt.

27. Furthermore if, as is suggested, Merton is about to leave the site how can it justify expensive scrutiny of the MSV agreement by contrast to Centrica who, despite being involved in an imminent sale, could approve the agreement quickly without such expensive scrutiny.
28. Mr Tipler also argued that the Agent's fees are wholly unexplained and unjustified by any material before the tribunal.
29. In relation to the specific issues raised by Mr Tipler, Mr Walder argued:
 - a. Even if as a matter of law, the MSV agreement did not offend the alienation provisions in the lease, Merton had been specifically requested not to agree an MSV unless Centrica were involved. If Merton had proceeded with the MSV it would have prejudicially affected its relationship with Centrica.
 - b. Negotiations concerning the surrender of the lease were likely to have been commercially sensitive.
 - c. Once the freeholder was joined, it was necessary to incur further costs considering the tri-partite MSV. These costs were further increased by OC's failure to notify Freeths that the tri-partite MSV was not based on same form as the first Agreement, which they had no objection to.
 - d. The Agent is a surveyor used by Merton and Centrica. Merton does not have in-house expertise in negotiating Code agreements and it was reasonable for it to use an Agent. The Agent had been involved since February 2022 and had engaged with Merton, Freeths and Centrica on this matter through numerous emails and telephone calls. The Agent had issued an invoice for the costs which could be produced.

Deliberation

30. I considered the parties submissions during an adjournment and reconvened to notify the parties of my decision with brief reasons. I determined that Merton was entitled to its reasonable transactional costs assessed at £6,000.00 for legal costs and to its Agents costs of £3,000.00, for the following reasons.
31. 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 and professional expenses. On the particular facts of this case, I do not consider the legal costs to be reasonable.
32. The legal fees do not appear to be excessive for the work carried out. However, the conduct of Merton has not been reasonable. Merton was first approached almost two years ago to approve access for a straightforward non-intrusive MSV. After initially agreeing to it in principle there was no real engagement until May 2023,

some 15 months later. By then Merton's position had shifted. It argued that Centrica needed to be a party to the MSV. However, in the interim period Simmons had made clear that Centrica would oppose the grant of any Code rights because redevelopment plans were afoot.

33. This contradictory position was not further explained or clarified despite OC's repeated insistence that Centrica did not need to be joined in the light of *CTIL v St Martins*. It was not until Merton filed its statement of case in November 2023 that the Respondents' respective positions were further explained. Merton did not dispute that an arguable case under paragraph 21 has been made. It argued that discretion should not be exercised to impose an agreement unless the freeholder was joined. A clearly unsustainable argument was advanced that a bare licence for temporary access was capable of breaching the restrictions on assignment, underletting or parting with possession. Even if there was an effective lease restriction (and no evidence of any such restriction was provided) the position had been considered in *CTIL v St Martins*. A point repeatedly made by OC in the previous months.
34. The second argument advanced was that *CTIL v St Martins* could be distinguished in that the landlord was only objecting because it had not been joined to the proceedings, and that this was in any event a necessary step due to the possible surrender of the lease in the foreseeable future. Leaving aside the fact that until this point Centrica's position was that it objected to the imposition of any Code rights, *CTIL v St Martins* makes clear that even if a freeholder of a lease, whose interest is deferred for a great many years objected in principle to the Code rights, it could not complain that the leaseholder was in breach of covenant when the Code rights had been imposed by the tribunal. It follows that the freeholder's consent to the grant of Code rights (whether or not qualified by a condition that it is joined to the proceedings) is also not a relevant factor. If there is a realistic possibility that the lease may be surrendered within the licence period that is a different situation. However, other than a bare assertion in Merton's statement, no evidence of the redevelopment plans, or the proposed surrender was provided to enable CTIL to assess if this was a realistic issue.
35. The possibility will nevertheless be of concern to the operator because the reversioner to a surrendered lease may not come within paragraph 10 of the Code. In those circumstances there is some sense in joining a landlord who agrees to its superior interest being bound by the Code rights on surrender of the lease.
36. That is what eventually happened. However, not because either Respondent provided any evidence of the proposed redevelopment or the intended lease surrender. There may well have been commercial considerations at play which caused the otherwise inexplicable delay. The redevelopment of a town centre site can be sensitive and will likely involve the council in relation to the planning process within the context of its development plan. Such sensitivities might well be increased if part of the site is owned by the council and negotiations for the sale of the freehold are in play. Such negotiations may have been at a sensitive stage in 2022/23, which in turn might account for the large chunks of time recorded as "Considering Position and Strategy" on the two costs statements. That is not however a good reason for effectively stonewalling an operator seeking Code rights for some 18 months, only to effectively stampede them into issuing a last-minute

application to join the freeholder. Candour and clarity at an early stage could have avoided this.

37. It was reasonable for CTIL to resist negotiating with Centrica prior to January 2024 because the freeholder's position until December 2023 was that code rights would be resisted, and at no point has either Respondent provided any evidence of the proposed redevelopment or surrender. It was not reasonable for Merton to stall the grant of access for the MSV for reasons that do not fall within the tests set out in paragraph 21 of the Code. If Merton wanted to argue redevelopment and/or prejudice it should have done so. Instead, specious arguments were advanced about lease restrictions and the need for Centrica's involvement, which delayed the MSV for nearly 2 years. Had Merton engaged properly and reasonably when first approached the MSV would have taken place long since. Centrica's involvement and the consequent increase in legal costs would have been unnecessary.
38. In determining what is reasonable I cannot discount Merton's unjustifiable lack of engagement which for the above reasons has unreasonably increased the legal costs. I have therefore discounted a proportion of the costs that I believe fairly reflects the unreasonable additional costs.
39. The Agents fees are also disputed, and it is fair to say that very little evidence justifying the costs was before the tribunal. It is not disputed that Amsy was instructed by Merton or that they have presented an invoice for the claimed amount of £3,000.00. Mr Tiplers point is that there is no evidence before the tribunal that could justify those costs, other than one letter from Freeths which asserts there had been extensive correspondence with the Agent.
40. It would not be usual for confidential correspondence between a party and their agent (or other professional advisor) to be referred to in the evidence, but it is clear from the early correspondence that the Agent was engaged to negotiate the MSV. I have no reason to doubt the representation in Freeths' letter of 31 January 2024, that the Agents had corresponded extensively (around 120 emails) with Merton and Centrica on the MSV. Furthermore, Agents don't, as a rule, work on hourly rates, they agree a price for the job. As the invoice is for the round sum of £3,000.00, it is reasonable to conclude this was an agreed price. Merton do not have in-house expertise on Code agreements and it is therefore reasonable for them to appoint an Agent to negotiate. The Agent's fee does not stand out as being unreasonable for this particular transaction and although the evidence is not conclusive, I have resolved any doubt about the reasonableness of the costs in favour of Merton.
41. Adopting the above approach, I determined that a reasonable sum for the legal costs of the transaction was £6,000.00 and the professional Agent's fee of £3,000.00 also to be reasonable. The total sum of £9,000.00 was so ordered.

Costs of the reference

42. After delivering my decision on the transactional costs orally, I heard arguments on the principle of awarding litigation costs, and on quantum.

43. Merton claim costs totalling £12,207.70 as shown on a statement of costs submitted for summary assessment at the hearing. The total claim comprises solicitor's costs of £7,307.70, Counsel's fees for advice and settling the statement of case, £900.00 and counsel's fees for representation at the CMH, £4,000.00.
44. Mr Tipler argued that no order for costs should be made in favour of Merton. CTIL was not seeking litigation costs of the reference save for counsel's fees of £4000.00 for the hearing, which he submitted was only necessitated by Merton's unreasonable conduct.
45. 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.

46. I 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

47. Mr Tipler argued that the tribunal should make no order for costs against CTIL on the basis that Merton's conduct has led to an unnecessary hearing. Its statement of case contained no more than the same bad points concerning the lease restrictions plus an additional issue raising for the first time the possibility that Centrica's redevelopment plans might include accepting a surrender of the lease in the foreseeable future. No evidence was filed to substantiate the assertion that a surrender was imminent despite OC's considerable efforts to pin down a time-scale. The lack of clarity has still not been explained. Timely engagement on this issue would have avoided the need for a hearing and the need to incur counsel's fees. Mr Tipler was not seeking more than a contribution to CTIL's litigation costs, limited to counsel's fees of £4,000.00, for what he suggested was a wholly avoidable hearing.
48. In relation to quantum, Mr Tipler argued that the time spent appeared to be significant for the amount of work required to conduct the litigation.
49. Mr Walder argued that the clear principle to be drawn from the caselaw on Code rights case was that where rights are being imposed on a landowner it should receive its costs irrespective of issues of conduct and the tribunal should not seek to go behind that basic principle. The litigation has led to a negotiated

agreement. The joinder of Centrica was necessary. Merton could be viewed as the more successful party in that the Agent's fees had been awarded in full.

50. On quantum Mr Walder argued that the charging rates were well below city commercial rates, the litigation involved far more than just preparing and filing the response and statement of case, and Merton was entitled to its costs without deduction.
51. As the CMH had only been listed for three hours and a considerable amount of information only filed on the morning of the hearing (including the costs schedules and the parties offers and counter offers) I decided to consider the costs claims and representations further, and deliver a written decision on the litigation costs, to be issued with the detailed reasons for the transactional costs award.

Deliberation

52. The terms of the MSV agreement were settled immediately prior to the CMH which left the parties just arguing compensation, which was not disputed in principle, the arguments centred on the reasonableness of the claim. The transactional cost award was materially less than claimed but did include the Agents costs. It is difficult to measure if and to what extent the award exceeds CTIL's best offer because both parties chose to put forward global costs offers that were not broken down between the transactional costs and the litigation costs. I have therefore determined that neither party has been the more successful party.
53. The reasons for reducing the transactional costs in this case relate to the same lack of engagement and transparency that carried through to the reference. There was no engagement on the first Agreement despite it being on terms Merton was happy with. There was no substantive response to the statutory notice, other than Merton's insistence Centrica needed to be involved, and no reasonable argument was advanced to explain why, in the face of the clarity provided by *CTIL v St Martins*, this was an issue. The same bad argument did indeed copy through to the statement of case with the additional but completely unevidenced representation that a surrender of the lease might happen in the foreseeable future. No clarity concerning the extent of this foresight was offered until 3 January 2024, and even then the information was scant and unevidenced.
54. I do not agree with Mr Walder's submission that the basic principle that a landowner should not be out of pocket when a Code agreement is imposed applies to litigation costs, or that conduct should not be a relevant issue. Conduct is often the single most important element justifying the level of costs incurred, particularly where they have been incurred or increased unnecessarily by a parties conduct before and during the proceedings. Merton's lack of meaningful engagement obliged CTIL to issue the reference. The failure to provide any clarity concerning the proposed redevelopment and timing of any lease surrender, in a timely manner obliged CTIL to quickly join Centrica just 3 weeks before the CMH. The lack of candour and delay in providing essential information has undoubtedly increased both parties' costs.
55. I have considered the statement of costs. As it does not include the costs of negotiating the agreement (the transactional costs) the only actions required on the reference was to file the pro forma Response to the reference and Merton's

Statement of Case, which was drafted by counsel (for a fee of £900.00, which 1 considered reasonable). The only other disbursement was counsel's fee of £4,000 for attending the hearing which is also reasonable.

56. The only material pleading has been drafted by counsel - that leaves: Attendance with the client 5.9 hours, carried out by a grade A fee-earner (£182 p/h) and a grade B fee-earner (£165 p/h); Attendance on opponents 2.3 hours by the same fee earners; Attendance on counsel 6 hours by the same fee earners plus a Grade D fee earner (£120 p/h; Attendance on Centrica 1.5 hours by a Grade B fee earner, and finally, attendance at the hearing by a Grade A and Grade B fee earner, 6 hours (3 hours each). This accounts for £4,682.20 of the bill. As none the time relates to the intense period of negotiation of the MSV agreement carried out a week before the hearing it is difficult to see what some of the time relates to. Apart from not objecting to the request to join the 2nd Respondent, nothing of any consequence was happening within the proceedings. All the effort was directed to negotiation of the tripartite MSV. The 6 hours attending counsel does not appear reasonable in the light of the 6.8 hours also claimed under *work on documents* for preparing of instructions to and preparation for calls with counsel, on a case that has no complexity, no unusual difficulty and no monetary value.
57. The work done on documents totals £3,641.20 which is not reasonable for a proforma Response and a Statement of Case drafted by counsel. The 6 hours recorded for instructing counsel on what should have been a straightforward reference appears unreasonable, as does the 10.6 hours for preparing the costs statement. It is inconceivable that litigation fee earners do not time record on a unified case management system that is able to produce an electronic record, broken down into the various heads of costs. This information should have been readily available to migrate onto the costs statement without a fee earner needing to spend 10 hours on it.
58. I have determined that a reasonable time to consider the Reference documents and report on them to Merton should not exceed 3 hours, the issues were well known, and the terms of the agreement apparently satisfactory. Instructions to counsel should not have exceeded 5 hours in total. I have allowed 2 hours for preparation of the schedule of costs and 10 hours in total for the limited amount of attendance and correspondence that should have been required. As it is not possible to allocate the hours to the various grades of fee earner involved, I have applied a broad brush approach, applying a blended rate of £165.00 per hour. Counsel was used for the only substantive pleading and for the hearing, there is no real justification for applying higher rates on routine correspondence, attendance and drafting of costs schedules. Applying the blended rate to the 20 hours allowed gives a figure of £3,300.00. I have allowed the cost of the Grade A fee earners attendance at the CMH (£546), had the MSV agreement not been settled, two fee earners might have been reasonable. That plus counsel's fees of £4,900.00, comes to total costs of £8,746.00.
59. I then considered the extent to which the parties' costs had been increased by Merton's conduct before and during the reference. The lack of engagement, delay and lack of candour have for the reasons set out above, undoubtedly caused both parties to incur unnecessary costs. The reference could possibly have been avoided altogether had Merton acted more reasonably. I propose therefore reducing

Merton's assessed costs by 50% (£4,373.00) to reflect its unreasonable conduct both before and during the reference.

60. I am not minded to award CTIL its costs of the hearing. The MSV agreement was settled the day before the hearing by which time both brief fees would have been substantially incurred. The late settlement of the MSV agreement was due in part to OC using a different (and less site owner friendly) precedent on the draft tripartite MSV, which then had to be negotiated. I have considered the conduct issues in this case and made a substantial reduction to Merton's costs to reflect these. I do not see any case for ordering Merton to additionally pay CTIL's counsels fees for the hearing.

IT IS ORDERED THAT:

1. The Claimant 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.
2. The Claimant shall pay compensation to the 1st Respondent for reasonable legal and professional expenses pursuant to Paragraph 84 in the sum of £9,000.00.
3. The Claimant shall pay the 1st Respondent's costs pursuant to Paragraph 96 summarily assessed in the sum of £4,373.00.

D Barlow
Judge of the First-tier Tribunal

7 February 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