



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

Case Reference : **LC – 2022-000018**

Property : **TESCO SUPERSTORE, STATION ROAD,
HARROW HA1 2TU**

**Claimant
(Operator)** : **EE Limited (1)
Hutchison 3G UK Limited (2)**

Representative : **Camilla Chorfi of counsel
instructed by DWF Law LLP**

**Respondent
(Site Provider)** : **Tesco Stores Ltd**

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 V Ward Regional Surveyor**

Date of Hearing : **28 March 2022**

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 large supermarket retailer. 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 Respondents 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 Tesco Carpark, Tesco Superstore, Station Road, Harrow.
2. By Order of Upper Tribunal Judge Elizabeth Cooke made on 17 January 2022, 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 28 March 2022 which took place remotely using CVP. The Claimant was represented by Ms Chorfi and the Respondent by Ms Schofield.
4. The Order of Upper Tribunal Judge Cooke 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 Tribunal considered the Statement of Case for the Claimant, the Respondent’s Statement of Case and Witness Statement of Ms Emma Astbury. We have also considered the Bundle of documents (pages 1- 207) which includes the Notice of Reference and the travelling draft MSV Agreement; a supplementary bundle of correspondence (pages 1-49) and the parties respective statements of costs. We are grateful to Ms Chorfi for her written note provided on the morning of the hearing.
6. On the morning of the hearing there remained three, fairly trivial areas of dispute and the point of greatest contention, which was the Respondent’s transactional costs, anticipated to be some £7,500.00.
7. At counsel’s request the parties were given time on the morning of the hearing to attempt to resolve the outstanding issues. Agreement was reached on the wording of Clause 3.11 (provision of survey to the Respondent) and 5.3 (use of copyrighted material), but at the point the Tribunal reconvened, no agreement had been reached on clause 5.1 (the scope of the covenant not to interfere with the rights), or clause 3.18 the Respondent’s transactional costs.
8. We heard argument from counsel on the transactional costs by which time the parties had agreed a form of wording for clause 5.1 leaving just the issue of transactional costs to be determined by the Tribunal and any consequent claim for litigation costs.

Transactional costs

9. The Respondent filed a statement of transactional costs. Three fee earners were engaged in negotiating the Agreement. A partner and a consultant each with charging rates of £421 and an Associate whose rate was £356. 2.5 hours was spent on internal letters/emails and telephone and 3 hours on external letters/emails and telephone. The solid time spent reviewing/amending the Agreement amounted to 11 hours in total, most of which was at the higher rate. The bill totalled £6,957.90 exclusive of VAT.
10. Ms Chorfi acknowledged that the Respondent was entitled to reimbursement of its reasonable costs pursuant to paragraph 84(2)(a) of the Code, but contended they should be in the region of £3,000+VAT. She submitted that the comments of the Upper Tribunal in ***CTIL v St Martins [2021] UKUT 262 (LC) [33 –35]*** cannot be taken as authority for the proposition that operators must simply underwrite unconstrained billing by large City firms contending for elaborate provisions of questionable necessity. That would patently controvert the Code's policy. The Respondent's transactional costs must still be reasonable and open to judicial scrutiny in that regard.
11. In keeping with the Code objectives, Ms Chorfi submitted that the Claimant had provided a simple, quick and fair agreement for access which reflected the lack of complexity in this case. This was a simple freehold site with no head lease or underleases to consider, there were no complex issues the parties had to negotiate, and the outstanding issues preventing completion of the agreement were trivial. The request for an intrusive survey had been withdrawn early in the negotiations. There was in short, nothing in the negotiations to have generated the level of costs requested by the Respondent. It was she suggested, only in rare circumstances that transactional costs would exceed £3,500.00. By contrast, the Claimants transactional costs were less than £2,000.00.
12. In relation to the statement of costs provided by the Respondent Ms Chorfi observed that the charging rate of £421 for two of the fee earners, who were based in Manchester, exceeded the London Grade A guideline hourly rate for London Band 2 which was £373. The guideline rate for Manchester was she suggested £258. The use of two Grade A fee earners was excessive for the 11 hours spent negotiating the document. When asked, Ms Chorfi was unable to suggest what was a reasonable time for negotiating the agreement, but said that the number of hours logged may be a consequence of three fee earners being engaged on the job, the necessity of which was questionable.
13. On hourly rates, Ms Schofield said that the fee earner rates sat either side of the Band 2 London Grade A rate of £373.00 and on balance were not unreasonable for this transaction.
14. Ms Schofield explained that the draft agreement had travelled back and forth, 6 times during the negotiations. The initial draft was the Claimants standard form agreement which had not been tailored to make it site specific. There had been a request for an intrusive survey and an overhead crane survey which had not been dropped until the 5th turn of the agreement on the 17 March 2022. The initial draft failed to address the Respondent's site specific concerns and required 96 changes

and 54 additions. Several provisions were entirely removed. The statement of costs reflected the amount of work required to put the agreement in a form reasonably acceptable to the Respondent and should be allowed in full.

15. The operator's transactional costs are not, Ms Schofield contended, a relevant consideration when assessing the site owner's costs. Both have different objectives and concerns. The operator is only concerned with obtaining access for its survey, whereas the site owner must consider the impact of the agreement on its property and its business operation. That more detailed consideration will inevitably take time and the time it has taken is 11 hours. To suggest that 8 or 10 hours might be more proportionate, does not make the 11 hours claimed unreasonable.

Deliberation

16. 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 of in full for the following reasons.
17. 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.
18. The compensation the parties are unable to agree concern the legal expenses incurred by the Respondent in obtaining advice on the Code and negotiating the access agreement. Provision has been made in the Claimant's standard form of agreement at paragraph 3.18 for it to make a contribution towards the Respondents legal fees.
19. We have listened to the arguments but have no reason to doubt that the Respondent's lawyers have spent 11 hours negotiating the agreement or that the figure of £6,957.90 exclusive of VAT is the total sum which has been incurred. We also have no reason to doubt that the efforts made by the Respondent's solicitors to negotiate terms acceptable to the Respondent have been reasonable and the time spent in so doing, to be reasonable. We agree that on this site the Respondent's site specific concerns were not addressed in the original draft and that tailoring access rights to meet the specific concerns of a site provider, is generally likely to be a more time intensive exercise for the site provider, who in this case had to consider the implications of cordoning off areas of its customer carpark on multiple occasions for the survey.
20. Guideline rates are a relevant consideration when assessing litigation costs but less helpful in assessing whether expenses that are to be compensated have been reasonably incurred. The issue is whether it is reasonable for the Respondent to have instructed City solicitors on this job, whose rates are generally high. This must be a decision for the Respondent and the charging rates ultimately a matter of commercial contract between the firm and its client. It has led to the Respondent incurring a substantial fee predominantly because the charging rates of the firm are so high, but this is a valuable retail site with open access to the public, Tesco's staff and customers. It is reasonable for the Respondent to engage solicitors that are familiar with its operational and reputational risks and who are best placed to readily assess the impact on those risks of agreeing access for a MSV. Having engaged BCLP on this job, the Respondent is obliged to pay the bill.

21. Paragraph 84(2)(a) requires the operator to compensate the site provider for all legal expenses, not to make only a contribution towards them, leaving the site owner to pick up the balance. The Respondent is entitled to recoup all of its reasonable legal expenses and in this case, on the material before the Tribunal, we have determined that those reasonable legal expenses are £6,957.90 exclusive of VAT.

Terms of the MSV Agreement

22. At the conclusion of the hearing counsel confirmed that terms have now been agreed. The agreed terms are set out in the MSV Agreement (copy attached) with the exception of Clause 3.18 which has been determined by the Tribunal as above.

Costs

23. After delivering our decision orally we heard argument on costs.

24. 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.

25. We also took account of the recent amendment to 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

26. Both parties filed Statements of Costs for summary assessment. The Claimant using form N260, showed costs of £20,664.80 (inclusive of VAT). The Respondent's statement came to £13,462.56 (inclusive of VAT).

27. Ms Chorfi did not seek to argue that the Respondent had not been substantially successful on the only remaining point in contention. She asked the Tribunal to bear in mind that the three other points at issue had only been compromised on the morning of the hearing and to consider making no order for costs.

28. If the Tribunal decided to make an order in the Respondent's favour, she asked that it exercise discretion to limit the costs to 50% of the claim. The reasons for that request are briefly, that the Claimant was obliged to issue the reference on 14 January 2022, following a flat refusal by the Respondent to accede to a MSV. The MSV was first requested by letter on 3 November 2021 which was met by a simple denial of access on 10 November 2021. Notices were served on 13 December 2021

with a draft early access agreement. The email response on 13 December 2021 simply said the premises were not available for use for telecommunications apparatus.

29. The dialogue since issue of the referral had been on terms that are by any measure trivial and should have been capable of being progressed at an early stage, which would have avoided the need for litigation costs to be incurred.
30. In relation to the Respondent's statement of costs, Ms Chorfi noted that 6 fee earners had been engaged on the file, which seemed a lot given that substantive negotiations only started on 4 February 2022 and raised concerns about duplication. The claim of 1.4 hours for the statement of case which ran to just 5 pages and appeared to have been drafted by counsel, seemed high. 5.1 hours for the witness statement, which had also received some input from counsel also seemed high and gave rise to a concern about duplication. Finally, a broad-brush reduction was appropriate given that the Respondent had instructed an experienced firm that was highly experienced in negotiating Code agreements.
31. Ms Schofield invited the Tribunal to order the Claimant to pay the Respondent's costs in full. She said that the Respondent had clearly succeeded in full on the only remaining point in contention and was therefore the successful party.
32. In relation to the statement of costs, Ms Schofield said that the witness statement was initially much longer and required extensive reference to evidence. However, since the initial drafting many contentious points had been conceded such as the terms of the indemnities, debris clearance and the requirement for a crane survey. She said that the Respondent had on 20 December 2021, confirmed to the Claimant that it would provide access on a consensual basis. There was no further action on agreeing terms until an exchange of emails on 11 January 2022 when the Respondent was chasing a response. The Respondent was therefore surprised that a reference was made on 14 January 2022, just 16 business days after it had agreed in principle to access.
33. There was no apparent urgency. The terms of the temporary order of 2 July 2021 on the Remove site required the site to be decommissioned by the end of February 2022. No contact was made with Tesco until mid-November which indicates the lack of any degree of urgency. In making a premature reference the Claimant had delayed the parties concentrating on the terms of the access agreement which had been agreed in principle. This caused the Respondent to incur litigation costs that could have been avoided if the parties had focussed their attention on the agreement.

Deliberation

34. The Tribunal first determined if there was a more successful party. As the single biggest issue was the transactional costs on which the Respondent had succeeded, we concluded that the Respondent was the more successful party. However, the Tribunal did take note of the settlement of the three other outstanding issues as late as the morning of the hearing. One in fact during the hearing, and while there is little to be gained in an analysis of the three issues, or the compromise agreed, the fact that the parties were able to agree them very quickly when pressed, should focus the minds of those instructed by the parties of the need to engineer a better approach to negotiating what are mostly quite straightforward agreements.

35. The fact that the outstanding points were trivial and more than capable of compromise at an earlier date, is a sword that cuts both ways and not a reason, in itself, to reduce the Respondent's costs.
36. Faced with a substantial reduction in coverage, the Claimant cannot be criticised for jumping the gun when it issued the reference on 14 January 2022. Given that it was required to decommission the Remove site by 28 February 2022, the surprise is that it took so long to find its gun. What is more surprising is the focus after the Reference on the transactional costs, the anticipated level having been flagged by the Respondent's lawyer in an email dated 4 February 2022. Since then the parties have between them incurred just under £35,000.00 in legal costs, arguing a handful of trivial points and about £3,500 of transactional costs, which was apparently the single biggest issue.
37. We then considered the detailed statement of costs and both counsels submissions. The hourly rates charged were largely just below the guideline rates for the relevant grade of fee earner in Band 2 London. A Grade A fee earner with a rate of £410.00 spent a total of 2.6 hours on telephone and correspondence. If reduced to Band 2 London rates this would reduce the costs by just under £125. The time spent overall on documents correspondence and attendances does not appear unreasonably high and counsel's fees appear to be reasonable.
38. Counsel for the Claimant suggested that two of the fee earners were based in Manchester. The statement does not identify the fee earner carrying out the activity other than by grade, or the location of the fee earners that are identified in the description section. If two of the six fee earners are permanently based in Manchester their rates are slightly in excess of those charged, but not to a degree that would significantly increase the overall costs. The Tribunal has therefore, adopted a broad brush approach on the basis that some are above and some below the guideline rates and not made any deduction based on charging rates.
39. When considering the costs of this reference we had firmly in mind the observations the Deputy Chamber President in **Cornerstone Telecommunications Limited v St Martins Property Investments Limited and another** [2021] UKUT 262 (LC)

"42. The Tribunal has in the past made it clear that it does not regard applications for access as justifying the sort of expenditure which it sees yet again in this case. In Cornerstone Telecommunications Infrastructure Ltd v Central Saint Giles General Partner Ltd [2019] UKUT 183 (LC) three parties incurred more than £100,000 in aggregate in a dispute (eventually resolved by agreement) over access to the roof of a residential building. The Tribunal said this, at [4], about the objects of the Code:

"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.”

The Tribunal awarded the site providers a small fraction of the costs they had incurred and added this warning, at [30]:

“The Tribunal wishes it to be known by other parties who refuse access to their land or buildings for surveys that, whatever the outcome, they cannot expect to recover costs on the scale incurred by the parties in these proceedings.”

43. I take this opportunity to reiterate that warning.”

40. Although the costs in this case are not of the order incurred by the parties in the *Cornerstone* reference, the Tribunal is concerned about the disproportionately high costs incurred by both parties on what are trivial issues. The biggest issue being the difference between the sum of £3,500.00 (or thereabouts) regarded by the Claimant as reasonable compensation for legal transactional costs, and the sum requested by the Respondent of £7,000.00 (or thereabouts). How with so little between them the parties can have regarded it as reasonable or proportionate to plough some £35,000.00 into litigation costs is concerning.
41. We find that both parties have failed to conduct this Reference in a way that is reasonable, proportionate or even sensible. There were four outstanding issues on the morning of the hearing, three were compromised, one during the hearing itself. However, in relation to the one remaining issue the Respondent has been wholly successful and is therefore entitled to its costs, which we provisionally assessed at £13,462.56 (inclusive of VAT), adopting the time spent on this matter as set out in the Respondent’s statement.
42. However, the Tribunal’s power to award costs is discretionary and is exercised in accordance with the principles applied in the High Court (see paragraph 24:10 of the Upper Tribunal Practice Direction). The Upper Tribunal has stressed on a number of occasions the special nature of Paragraph 26 applications and the accelerated procedure (**see *EE Limited and Hutchison 3G Limited v Aviva Investors Ground Rent Holdco Limited and others* [2021] UKUT 0057(LC) and *Cornerstone Telecommunications Infrastructure Limited v London and Quadrant Housing Trust* [2020] UKUT 0341 (LC)**).
43. Having regard to the way in which the proceedings have been conducted and the issue of proportionality, we have made a deduction to the Respondent’s costs to reflect the degree of its success and the proportionate costs of achieving that success.
44. The order we make is that the Claimant will pay the Respondent’s costs summarily assessed at £6,750.00 exclusive of VAT.

IT IS ORDERED THAT:

45. 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.

46. The Claimants shall pay compensation to the Respondent for reasonable legal expenses pursuant to Paragraph 84 in the sum of £6957.90 exclusive of VAT. For the avoidance of doubt that sum shall also be inserted at clause 3.18 of the Agreement.

47. 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
1 April 2022

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