FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LC – 2024 – 00098**
Property	**:**	**Rooftop telecommunications site, 143-151 Broadway, Wimbledon SW19 1NE**
Claimant (Operator)	**:**	**Cornerstone Telecommunications Infrastructure Limited**
Representative	**:**	**Oliver Radley-Gardner KC instructed by Osborne Clarke LLP**
Respondent (Site Provider)	**:**	**The Chartered Institute of Personnel and Development**
Representative	**:**	**Fern Schofield instructed by Withers LLP**
Application	**:**	**Electronic Communications Code Paragraph 20(1)**
Date of Hearing	**:**	**3 and 4 July 2024**
Date of issue of Decision	**:**	**31 July 2024**

DECISION

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1. This is the Claimant's application under paragraph 20 of Schedule 3A to the Communications Act 2003 ("the Code") for rights to install and operate telecommunications apparatus on the roof of the Respondent's headquarters in Wimbledon.

2. The installation is designed to replace a loss of coverage caused by the decommissioning of a nearby site in March 2023. The apparatus comprises 6 antennae, a dish, a fixed cabinet and associated cabling. The application relates to a new site and is one to which regulation 3(2) of the Electronic Communications and Wireless Telegraphy Regulations 2011 applies. It must therefore be determined by 13 August 2024.

3. The Respondent's building is a substantial 5 floor office building on The Broadway in Wimbledon constructed about 20 years ago to a bespoke design for the sole occupancy of CIPD.

4. The final hearing took place on 3 and 4 July 2024 remotely using VHS conferencing. Both parties were represented by counsel. The Claimant was represented by Mr Oliver Radley-Gardner KC and the Respondent by Ms Fern Schofield. Evidence concerning operational and design matters was given by Mr Steven Nelson a Programme Manager employed by Clarke Telecom (the Claimant's agent) and by Ms Elaine French, a chartered surveyor and independent consultant advising the Respondent on this reference. Ms Helen Osagie, Finance Director of CIPD also gave evidence concerning the Respondents plans for the Building. Counsel each filed a helpful skeleton argument and a bundle of agreed authorities, for which I am grateful.

5. The hearing was concluded save for one issue concerning the position of the antennae apparatus on the front facing roof balcony. Discussions on this continued throughout the hearing during which a possible resolution was identified. The parties were therefore given further time after the hearing to file an agreed position if possible. Despite agreeing some modifications to the design, the parties continue to differ on the precise position of the equipment and on some preconditions to installing the apparatus introduced post meeting by CIPD. I will address the parties' respective arguments on this point below.

6. The Claimant previously sought orders under paragraph 26 for a multi skilled visit ("MSV") and interim rights to begin preparatory work for the installation. The parties were in dispute concerning the principle of whether a paragraph 20 agreement should be imposed and about the terms of the agreement. The tribunal imposed an MSV agreement but refused to order interim rights for works at a case management conference held on 3 April 2024. There are outstanding issues concerning the Respondent's transactional fees and both parties' litigation costs in relation to those applications.

Matters agreed and issues

7. The Respondent no longer opposes the imposition of a Code agreement. Many of the terms have been settled consensually between the parties (largely following the Claimant's standard form of Code agreement). However, several terms remain in dispute, principally those concerning the date and terms of the break clause and the

terms of the lift and shift clause. Consideration is agreed but compensation for the Respondent's transactional costs is not.

8. The significant terms in dispute are:

    a. The terms of the landlord's re-development break (clause 9.3).
    b. The lift and shift provisions (clause 7.6)
    c. Whether a condition precedent is included for essential roof repair works (clause 4.3-4.6).
    d. The installation of equipment on the front balcony (Section 13).

9. Other less significant terms in dispute are:

    a. Interference (clause 5.3);
    b. Non-interference covenant (clause 7.9);
    c. The Works (clause 6);
    d. User clause (clause 7.1);
    e. Indemnity (clause 7.4);
    f. Powering down (clause 7.8).
    g. Access following road closure (clause 4.2.2.1.1)

10. Paragraph 23(5) of the Code states:

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

11. Paragraph 23(8) of the Code provides:

> *"(8) The court must determine whether the terms of the agreement should include a term—*
> *(a) permitting termination of the agreement (and, if so, in what circumstances);*
> *(b) enabling the relevant person to require the operator to reposition or temporarily to remove the electronic communications equipment to which the agreement relates (and, if so, in what circumstances)."*

The general approach to disputed terms

12. Ms Schofield submitted that an approach to paragraph 23(5) (as noted in ***On Tower UK Limited v. JH and FW Green Limited*** *[2020] UKUT 0348 (at [61] to [64*]) would require the tribunal to firstly to consider the term the operator seeks, and why; secondly to consider the respondent's objections or concerns and whether as a result '*the term should not be imposed, or should be imposed to a limited or qualified extent*'; and then, if the tribunal is minded to impose the term, to consider whether it should *'also impose further terms to minimise loss or damage'*. However, where the Tribunal was faced with a choice of terms, each of which was are fundamentally incompatible,

then giving effect to the principle of causing least possible loss and damage to the site provider should mean giving priority to the requirement of the site provider.

13. I prefer the approach noted in ***Cornerstone Telecommunications Infrastructure Ltd v London & Quadrant Housing Trust*** *[2020] UKUT 282 (at [41] to [48]),* that while paragraph 23(5) has an important part to play in resolving disputes over terms it should not be viewed in isolation. "*It is not a prohibition on the imposition of code rights which may cause loss and damage to the owners and occupiers of the land*." It is a direction to the tribunal to "*incorporate terms intended to minimise loss and damage as part of an agreement which will also include terms as to consideration assessed under paragraph 24 and rights to compensation for loss and damage for the site provider and others under paragraphs 25, 44 and 84*". Where parties contend for terms that are fundamentally incompatible assessing loss and damage to the site provider is one factor to be considered along with the overall purpose of the Code and the extent to which the loss and damage can be compensated under paragraph 25.

The Respondent ("CIPD") and its Building

14. Ms Schofield led evidence from Ms Helen Osagie the finance Director of CIPD and Ms Elaine French. The substance of Ms Osagie's evidence was not challenged. She clarified certain parts of her written testimony and updated the tribunal on progress with CIPD's strategy for the Building. Ms Osagie explained that CIPD is a registered charity overseen by a board of Trustees. It is the freehold owner of the Building which it presently uses it as its operational headquarters. The Building comprises 51,140 sq ft of offices over 5 floors. The layout was designed for CIPD's specific operational needs as a sole occupier. All 5 floors have a common heating and cooling system and open onto a central atrium that runs from top to bottom of the building. This renders it unsuitable for sub-letting or multi occupational use without substantial re-configuration.

The CIPD Trustees (along with the pension trustees of a staff retirement Scheme) hold a legal charge over the building as security for the Scheme. Lower occupancy of the

building following Covid has had two principal effects. First, CIPD are now occupying less than half the available office space and the change to flexible working means this is unlikely to change. The Building is now far too large for CIPD's needs. The second effect is on valuation. A general reduction in demand for office space has materially reduced the value of the Building, which has in turn caused (or added to) the Scheme deficit.

15. In response to the finance issues CIPD reviewed its short- and medium-term plans for the Building. Colliers were instructed to value the Building and to identify and advise how best to maximise returns from the Building on a sale. In a series of reports commissioned in 2021, 2022, 2023 and 2024 Colliers identified CIPD's main options as being to refurbish and reconfigure the Building for multiple letting of parts or refurbish and sell the Building. All reports recognise the sharp downturn in demand for large single use offices and the consequent negative impact on valuation. Refurbishment will involve some urgent repair works to parts of the roof to address leaks. This could include replacing the Buildings mechanical and electrical systems ("M&E) in these areas which are approaching expiry of their anticipated life span. Reconfiguration will also involve extensive alteration and replacement of the M&E housed on the roof.

16. The most recent report (2024) recommends CIPD undertake number of "due diligence" measures to enhance the saleability and value of the Building in readiness for a vigorous marketing campaign in 2025. Once such measure is to remediate the leaking roof. Tender bids from 3 contractors were invited during 2024. 2 bids were received in June 2024 the lower of which was more than double the anticipated quote and did not include some essential works. Furthermore, the survey undertaken during the tender process revealed the roof to be in a more precarious state of repair than anticipated. Urgent repairs are now needed to avoid material deterioration in the fabric of the Building. CIPD is therefore considering two (possibly three) options. First, an immediate sale of the Building at a price that reflects the cost of the urgent roof works. Secondly, to undertake some patched repairs to ameliorate the worst of the water ingress before sale. CIPD are actively looking for alternative premises for their staff and the third possibility, if a buyer cannot be found, is to leave the Building empty (or "mothballed") until the other options can be brought to fruition or re-considered. This appeared however to be an option of last resort rather than a preferred option.

17. Ms French is an independent consultant specialising in mobile telecommunications instructed by CIPD to advise on the Claimant's proposal to install ECA on the roof. She provided two witness statements detailing her concerns about the design proposal and gave oral evidence at the hearing.

18. The certainties that emerge from CIPD's evidence are:

    a. CIPD will not continue in the Building as owner occupier.
    b. CIPD cannot (or will not) fund the roof repairs tendered for.
    c. The Building will be sold as soon as a buyer can be found, with or without patched repairs.
    d. CIPD will move to suitable alternative offices as soon as it can.
    e. A buyer will need to carry out (or complete) the urgent roof repair works without significant delay.

19. It is anticipated but not certain that:

    a. The Building will be marketed early 2025.
    b. A buyer will want to reconfigure the Building to broaden the categories of potential occupier.
    c. Reconfiguration will include the renewal/replacement of M&E on the roof.
    d. A buyer will need to upgrade existing M&E to improve the energy efficiency of the Building to meet new minimum EPC requirements for lettings by 2028.

20. It is conceivable that a buyer might seek planning permission to add floors above the roof.

Claimant's apparatus and the Roof

21. Most of the roof is crowded with M&E leaving limited space for the Claimant's ECA. The roof covering is in urgent need of repair. The apparatus will be mounted on plinths which are affixed directly to the surface of the roof. This is intended to allow repair and maintenance of the roof to be carried out around the apparatus. If temporary removal is required, the apparatus can be detached from the plinths rather than the roof itself. Access to the roof is through the common parts of the Building using either the lifts or staircases and then through a single fire door.

22. There is restricted access through the existing plant for maintenance and escape from fire. The Claimant has attempted to design an installation that does not materially impact on health and safety or CIPD's ability to access and maintain its own M&E. Mr Nelson provided two witness statements explaining the design proposal. The second statement addresses numerous concerns raised by Ms French. Unfortunately, dialogue between the parties' advisors has not managed to allay many of those concerns.

23. The roof construction was a major concern until CIPD's structural engineer was able to consider the design drawings. There was also an issue concerning the proximity of some of the equipment to the fire door leading from the roof, and the route of the fire exit. This was however resolved during the hearing following a discussion between the parties' experts.

24. The main design issue outstanding at the hearing is the proposed position of the sector 1 antenna on the front balcony. This area is used for the periodic assembly of equipment used by the window cleaning contractor to clean the large glass façade at the front of the Building.

25. The lack of available roof space (i.e. that not currently used for the existing M&E, the fire escape route and the Claimant's proposed apparatus) is a major factor in CIPD seeking a rolling break clause and extensive lift and shift provisions.

26. Before considering the less consequential terms in dispute I will consider those relating to termination, lift and shift, a proposed condition precedent to accommodate roof works and the use of the of the front balcony for the sector 1 antenna.

Landlord's redevelopment break

27. The parties have agreed the grant of a 10-year term for the Claimant's electronic communications apparatus ("ECA") to be installed and retained within designated areas shown edged red on the Drawings attached to the agreement.

28. The Claimant agrees that the agreement should include a landlord's redevelopment break at 5 years. CIPD argue that a rolling break on 18 months' notice from day 1 of the term should be imposed. The arguments on each side can be summarised as follows:

29. The Claimant accepts that preventing redevelopment is not a purpose of the Code and that a break to allow for re-development should be included. However, that does not mean that the landlord should have the right to break the lease at any time it chooses. Mr Radley-Gardner KC submitted that five years appeared now to be the most

common minimum occupancy period accepted by the tribunal in cases (such as this) where there is no concrete development proposal. CIPD is not in the business of property development. It has no expertise in property development and no desire to acquire it. If the Building is to be developed it will be by a third-party buyer. At present the building is not being marketed. Most of the due diligence recommended by Colliers to make the Building market ready has not been undertaken and there is no guarantee that any buyer will seek redevelopment in a manner inconsistent with the retention of the Claimant's ECA on the roof.

30. The expenditure incurred in commissioning the site is a material consideration. So should the reasonable expectation of certainty for the Claimant and its customers. The Claimant is making a substantial investment on a new site with no return so far. This is not analogous to a renewal where the operator has already benefitted from the extension to its network. The Claimant accepts that it is a balancing exercise but argues that it is reasonable for an operator to expect a period of certainty where it is making a substantial investment and the site owners plans are uncertain and speculative. The facts of this case tip the balance in favour of a 5-year break. CIPD's proposal provides no period of certainty for the Claimant.

31. CIPD argue this is an unusual case that must be considered on its particular facts. CIPD will not derive any benefit from the imposition of ECA. Conversely it has been obliged to engage in lengthy expensive litigation that could restrict the category of buyer to those not put off by the presence of ECA on the roof. The lack of benefit in other cases has indicated that on balance a break should be included. The issue in this case is when the break should take effect.

32. CIPD's case is that it should have the right to serve a break notice immediately following imposition of the agreement. This will give potential buyers confidence that they can expect to obtain vacant possession within a maximum 2-year period. The Building cannot be left in its current state, it will be sold with or without completion of the urgent roof repairs. A buyer could seek planning permission to add at least one storey to the Building and Colliers have been asked to submit a pre-planning enquiry to the local planning authority concerning this. Colliers indicate that a sale could be concluded by June 2025. As there is little demand for single use offices of this size, the buyer is likely to reconfigure the Building and possibly add a floor. The roof repairs and required upgrade of existing M&E to meet minimum EPC requirements for lettings by 2028, could then carried out as part of the redevelopment. If redevelopment works can be dealt with under lift and shift the buyer won't need to operate the break clause - but to attract the widest category of buyer it is important the Building is offered for sale with that flexibility.

33. It is common ground that CIPD has no current intention to redevelop the Building. It has a fixed intention to dispose of the Building as soon as it can - but at present has not completed the recommended pre-sale due-diligence or identified what type of buyer is likely to be interested. There was contradictory evidence concerning a planning pre-application recommended by Colliers as part of the due diligence exercise. It has either just been or is about to be submitted. Either way it has not yet been determined. Consequently, it is impossible to ascertain when a buyer might be found or whether the category of interested buyer identified might be put off by the presence of the Claimant's rooftop apparatus. The only certainty is that there is no

current, realistic, alternative development proposal that is inconsistent with the retention of electronic apparatus on the roof.

34. However, it is certainly possible that at some future time a buyer may wish to redevelop in a way that is inconsistent with retention of the apparatus, and with this in mind CIPD understandably wishes to keep its options open. The Claimant acknowledges this and has agreed in principle to a redevelopment break after 5 years. The issue is the date on which the break can be exercised and the terms of the break clause.

35. The Claimant is making a substantial investment in the Building and wants an opportunity to recover that investment. It is acknowledged that CIPD will not directly profit from the installation and that is a factor when considering for how long the Claimant should be allowed to stand in the way of any development that would bring the Building back into profitable use. It is not the policy of the Code to stand in the way of such development as is apparent from paragraph 20(4) which provides that a site owner may rely on an intention to redevelop as a ground for opposition to renewal of Code rights.

36. If proposals were afoot for an imminent redevelopment, either by CIPD or a prospective buyer, which could be thwarted by any delay in securing vacant possession of the Site there may be a compelling argument for a rolling break on 18 months' notice. However, there are no such proposals, and it is doubtful whether any will materialise in the foreseeable future. A balance needs to be struck between terms that provide a degree of certainty to the Claimant and terms that introduce a degree of uncertainty to CIPD's future proposals for the Building.

37. The Claimant's draft break clause provides for an 18 month notice period commencing not earlier than the fifth anniversary of the term, and a contractual obligation to offer an alternative Site for the apparatus if possible . This effectively gives the Claimant 6.5 years security not 5 years and a contractual right to relocate its apparatus if not inconsistent with the proposed redevelopment. The Claimant is however protected by the continuation of its Code rights under paragraph 30 and its right to serve a counternotice under paragraph 32 if it believes the site owners redevelopment plans are not bona-fide or can accommodate an alternative site. There is no need for these statutory protections to be mirrored in the contractual provisions of the break clause.

38. The Claimant seeks the certainty of a 5-year return and in the absence of any current development plans or evidence of realistic alternative uses that require vacant possession of the Site within the next 5 years it seems to me that a landlords redevelopment break exercisable on or after the fifth year of the term is appropriate. I bear in mind that the Claimant has additionally agreed to relocate its equipment to accommodate development works or works of maintenance and repair. The break clause is therefore only likely to be necessary if redevelopment is wholly inconsistent with the provision of an alternative rooftop site.

39. I will therefore delete the Claimants proposed clause 9.3 and include CIPD's proposed clause 9.2, renumbered and modified as follows:

9.3.1 If the Grantor or any prospective purchaser of any freehold or leasehold interest in the Grantor's Property wish to redevelop all or part of the Grantor's Property and could not reasonably do so unless this Agreement comes to an end, the

Grantor may terminate this Agreement by giving not less than 18 months' written notice (a Break Notice) expiring on the fifth or any subsequent anniversary of the term commencement date (the Break Date).

9.3.2 The Operator will not object to any planning applications the Grantor (or any agent acting with the authority of the Grantor) submits in relation to the Grantor's Property.

40. I have substituted reference to the Grantor's Property for CIPD's wording to provide greater certainty concerning the possible ambit of the clause.

Lift and Shift

41. The parties agree that CIPD should have the right to seek removal and relocation of the cables and equipment to accommodate works of maintenance, repair and development. The clause (now largely agreed) is intended to provide flexibility for the anticipated replacement of ageing M&E and the roof covering. The parties differ on the length of notice, the contents of the notice and who should pay if relocation of equipment is requested more than twice during the term.

42. The clause provides for CIPD to commence the procedure by serving a relocation notice. The Claimant seeks a minimum notice period of 6 months to allow lead in times for notification of customers, workforce planning, contractual negotiations, crane and possible road closure permissions. Mr Radley-Gardner KC explained that a shorter notice period might be possible for simple works such as relocation of cables but removal and relocation of apparatus and equipment needed a longer lead in time. CIPD seek a more general 'reasonable notice' provision. This reference has unfortunately been characterised by a lack of reasonable accord on most issues. There is a distinct risk that any provision requiring a party to act reasonably will be seized on by the other to delay or frustrate its implementation. The agreement includes a Lift and Shift ADR clause which will no doubt be called into play at some point but to avoid unnecessary debate over time limits I prefer the Claimants more certain wording in clause 7.6.1 which provides for "*6 months' notice (or such other time frame as agreed between the parties acting reasonably).* 6 months does not appear to be an unreasonable time limit where substantial relocation works are involved.

43. The relocation notice must specify the nature of the works and the time frame within which the Grantor wishes the works to be carried out. In clause 7.6.2.3 CIPD want the notice period to have regard "*to the nature of the Grantor's works and the works required of the Operator*". The Claimant's preferred wording is (*having regard to the nature of the works and clause 7.6.1).* As CIPD will not have the technical expertise to determine what works the operator is likely to have to undertake to accommodate the Grantor's works the Claimants proposed form of wording is preferred.

44. In clause 7.6.6 there is a difference as to 5 days or 5 working days. As this is time critical for the Claimant CIPD should notify completion within 5 days. The word "working" is accordingly deleted.

45. The Claimant seeks a limitation on the operation of lift and shift insofar as it relates to relocation of equipment. It is happy to relocate cables/lines whenever necessary without charge. It does not wish to undertake substantial relocation of its equipment

more than once in any 5-year period without charging the costs to CIPD. CIPD agree there should be some limit but seek four substantial relocations in any 5-year period at the operator's cost.

46. The Claimant agreed to include lift and shift provisions to accommodate a perceived need to replace M&E and the roof covering. That is now likely to be a two-stage process due to difficulties funding the full costs of the roof repairs. However, the evidence provided by Mr Nelson indicates that the equipment will be installed on raised plinths which should not need to be removed for patched repairs to the roof. It may be necessary to temporarily relocate some of the equipment mounted on the plinths but there was no evidence confirming this from Garland UK who carried out the inspection survey. The report doesn't specifically address fixed equipment that is mounted on plinths. The position with M&E is even less clear. The Dalkia inspection survey provided by Ms French makes recommendations that are largely based on anticipated life expectancy rather than identified disrepair. There is nothing that identifies specific items of M&E on the roof that need replacement or repair in a way that is inconsistent with the Claimant's ECA.

47. I am persuaded by the evidence of Ms Osagie that the roof is in need of urgent repair. What is not clear is whether the Claimant's equipment will need to be moved for this. It depends whether patched repairs are undertaken or a full replacement. If lift and shift is invoked for patched roof repairs who should pay for any further relocation required for any necessary upgrading of M&E and the permanent roof repair works when undertaken? Should the burden of repeated relocations fall on the operator where the site owner is unable to fully fund all necessary roof and plant works as a single exercise? The issues caused by phasing of the works is something that could probably be managed with proper planning and reasonable interaction with the operator, but the lack of co-operation thus far does not inspire confidence this will happen.

48. I do not think it reasonable for an operator to be required to move its equipment up to 8 times during a ten-year term at its own cost to accommodate works that could be pre-planned and organised to avoid this. To allow such a term would remove any incentive for the site owner to engage cooperatively. It is not unreasonable over the same period to expect to have to move the equipment at least twice. The roof is already crowded with substantial M&E that is nearing its anticipated life span and the Building has limited alternative uses without substantial reconfiguration. I think it reasonable for the operator to meet the costs of two substantial relocations during the term. There is no reason to additionally restrict that to once in each five-year period.

49. Clause 7.6.8 should therefore read as follows:

The Grantor may only exercise its rights under this paragraph 7.6 twice during the Term in respect of a Relocation Notice which requires the Operator to relocate or reposition any Equipment other than Cables/ Lines (a "Substantial Relocation Notice"). For the avoidance of doubt there is no limitation on the number of Relocation Notices that the Grantor can serve which only require the Operator to relocate or reposition Cables/ Lines.

50. This renders the clause 7.6.9 unnecessary as Term is defined to include any statutory continuation.

Condition Precedent

51. CIPD seeks to delay implementation of the installation works for a period of time while it deliberates on the extent of the roof works it wishes to undertake immediately. The rationale being that it would be more efficient to carry out any significant work to replace the roof covering before the ECA is installed. As worded clause 4.3-4.6 requires CIPD to serve a notice by 16 September 2024 confirming whether or not it intends to undertake roof replacement works prior to installation of the ECA. CIPD then have a further 6 months in which to complete the works before the Code rights under the agreement come into force.

52. If CIPD was in a position to accept one of the recent tenders for the roof replacement works this clause would make some sense. CIPD would not have to factor in the potential increased cost of delays if the contractor is obliged to work around the ECA installation. However, Ms Osagie's evidence was that the current tender bids are unaffordable and the most CIPD is likely to do within the next 6 months is carry out patched repairs to keep the roof watertight. It was accepted that placing the ECA on raised plinths should not interfere with this type of roof repair. At most there may be a requirement to temporarily move some equipment to allow space for the contractor to lay roof covering under it. The Claimant is an experienced operator with significant expertise in flat roof installations and the associated risks. It has no incentive to obstruct or delay works necessary to keep the structure of the Building sound. Quite the opposite as it is hoping to operate safely from the roof for the next 10 years. The lift and shift provisions allow for any substantial relocation on notice. If an abridged notice period is required the clause requires the parties to act reasonably in fixing that.

53. The Claimant has lost critical infrastructure which it wishes to replace without delay. The condition precedent introduces an unhelpful avenue for further argument and delay without any concurrent mitigation of losses because CIPD is currently unable to move ahead with the roof replacement works. Clauses 4.3-4.6 are therefore deleted.

Installation of ECA on the front balcony.

54. This is a practical issue for the parties to overcome. The Building has a glass façade to its entire north facing frontage. It curves slightly inwards below the top two floors. There is a glass canopy immediately above the ground floor which runs the width of the frontage. There is a glazed balcony above the top floor which runs the full width of the façade and is accessed from the roof. Historically, cleaning and maintenance of the façade has been carried out by contractors abseiling from the balcony. The method employs the use of a weighted A-frame anchor. The A-frame is moved along the balcony to allow cleaners to abseil down strip by strip. The installation of a plinth, antennae and Remote Radio Units (RRUs) on the western end of the balcony impedes access to the western end of the balcony parapet.

55. Concern about the impact of the installation on safe access to the western edge of the parapet has been the subject of ongoing correspondence between the parties. However, little useful discussion on how these practical issues might be overcome took place until the hearing. The 10 days allowed after the hearing for the parties to file an agreed position only succeeded in narrowing some of the issues.

56. The parties appear to have agreed that the plinth supporting the sector 1 antenna should be rearranged and the antenna set back so as not to obstruct contractors accessing the top of the glazed parapet. The revised position is shown edged red on Drawing 104 Rev E. The Claimant has additionally agreed to mount the RRUs on the vertical wall of the short passage that opens onto the western end of the balcony. The vertical space required for this mounting is roughly shown edged red on a photograph at page 3 of Osborne Clarkes letter of 15 July 2024. The horizontal space required for the wall mounted installation is edged red on Drawing No 104, Rev E.

57. The sticking points are the extent of the red edging for the wall mounted installation [Drawing 104, Rev E and two others], which ties into new concerns about the precise location of the wall mounted RRUs and some new preconditions to the balcony installations contained a draft section 13 provided by Withers on 12 July 2024.

58. Dealing first with the extent of the red edging, the concern appears to be that it includes space that is unnecessary for the installation. The Claimant has agreed to wall mount the RRUs on the vertical wall of a short corridor that opens onto the balcony. The corridor is accessed through a door on the opposite wall. The precise location along the wall is not specified but the width of the RRUs is approximately half the length of the wall. The vertical area broadly outlined on the photograph provided on 15 July is the area of wall immediately opposite the access door. Ms French wants the RRU's to be erected on the southern end of the wall (i.e. not opposite the access door) and to achieve that preference suggests that the red edging on the Drawings is restricted to just that part of the corridor.

59. Concerns that the Claimant may install the RRU's in a position that creates a fire hazard, prevents the window cleaning company from accessing the balcony with their equipment or prevents the replacement of a glass panel (a new concern first raised by CIPD on 17 July 2024) are I believe overstated and unrealistic. The Claimant is a professional code operator. It is obliged to comply with all H&S and CDM regulations. It has offered to move the balcony installation to meet Ms French's concerns despite not being persuaded that they are valid. There is no evidence that the Claimant has or would disregard its statutory and contractual obligations or install its equipment in a way that deliberately thwarts CIPD's reasonable requirements. The actual position of the RRUs mounted above the area edged red is best assessed by the Claimant taking account of the need to maintain a safe distance for access and the potential for damage to its equipment if contractors have to squeeze through during periodic cleaning, or repair and maintenance of the Building. It is unlikely that any operator would place equipment where it was likely to be damaged due to it placing unreasonable constraints on the available space.

60. The additional section 13 is resisted in its entirety by the Claimant for good reason. It imposes a precondition that requires the Claimant to produce a further amended design for the sector 1 antenna that allows access to the front façade for window cleaning and maintenance. The Claimant's position is that this has already been done and Ms French's demands on this front can never be satisfied.

61. The consequence of the redesign not being consistent with use of the current dead weight anchor type system, is that CIPD will be entitled to investigate other means of access to the façade at the Claimant's cost. If not satisfied with those alternatives CIPD

can serve a relocation notice seeking permanent removal of the equipment from the balcony. The scope for ongoing dispute is as obvious as it is endless.

62. The question is does the proposed position of the sector 1 antenna prevent cleaning and maintenance of the narrow strip of façade that sits vertically beneath the antenna plinth. The rest of the façade is unaffected by the installation.

63. There was very little persuasive evidence from CIPD on this point. Ms French devoted 23 paragraphs to this issue but admitted in evidence that she had no specific expertise on the subject. Her evidence is largely based on telephone conversations with Mr Harrup of Quantum Services Group Limited who did not provide a statement or give evidence. Quantum Services is the specialist cleaning company that has been contracted to clean the façade for a number of years. Mr Harrup's written response to an email sent on 4 June 2024 in which Ms French detailed many potential areas of concern was brief. A few lines which stated:

"*The telecoms equipment proposed would present an unnecessary level of risk for any future rope access works to the corner of the building.*

It is unusual to be asked to climb over telecoms equipment in order to access the façade by abseil. I can't think of any other buildings where we have been asked to do something similar. The equipment proposed will prevent safe access to the corner of the building as we require access to the entire glass façade."

A practical issue but nothing to panic the horses, and yet this single issue has taken on increasing significance as most other design issues have fallen away. During the hearing Ms French contacted Mr Harrup about Mr Nelson's suggestion that the plinth could be moved back to accommodate the A-frame legs and asked him to comment on the prospect of "*climbing over the telecoms apparatus*". His email response was that in 15 years he had not been required to climb over telecoms equipment in order to abseil over the edge and that as he needed to put a small step ladder against the parapet in order to climb over, couldn't see how this would be physically possible. Mr Harrup was not asked to suggest whether a practical solution could be found and did not offer one.

64. Mr Nelson has 33 years' experience in telecommunications, 10 years in the military and 23 years within the industry. He is programme manager for this, and other sites. He has extensive experience of project managing new sites, lift and shift, and decommissioning of sites. On this site Mr Nelson is accountable for ensuring the design instructions are progressed to completion in accordance with the Claimants duties as "Principal Designer" under the CDM Regulations 2015. He is also an experienced climber who provides training on the risks of high-level roof work.

65. Mr Nelson gave evidence at the hearing. He explained that there were other options that could be considered if Mr Harrup's operatives did not want to abseil down from the corner of the balcony once the ECA is installed. Reach and Wash from ground level, scissor lifts, the use of fixed eye bolts rather than an anchor system, or the use of a cherry picker (which he acknowledged was not ideal as it would involve temporary road closure) are viable alternatives. When pressed by Ms Schofield to acknowledge there were insurmountable issues with safely positioning of the A frame equipment due to the plinth position and the ECA he disagreed. His evidence was based on an

estate of over 20,000 sites ¼ of which were rooftops. He encounters this type of situation routinely, managing CDM risks was a big part of his work, one element of which was training roof workers to reduce risks. Mr Nelson said there was scope to move the plinth back if it would allay concerns. He did not however think access to the parapet was unreasonable constrained by the antennae or the RRU's if the contractors were experienced in high roof work. He said that roof clutter was usual and navigating around ECA was no more unusual or unsafe for experienced contractors than working around other roof clutter.

66. The discussion at the property on 10 July 2024 with Mr Harrup was intended to resolve outstanding issues. Mr Nelson came away believing that had been achieved. However, a follow up email from Ms French that evening summarising "*the proposed way forward discussed and agreed"* differs from Mr Nelsons understanding of the discussion. There followed a slightly tetchy exchange from which agreement on some points can be discerned. It was agreed that:

    a. The design would allow for the current method of window cleaning to continue- (all other proposals were apparently dismissed by Ms French and Mr Harrup).
    b. New drawings would be issued showing the front balcony door and other structures.
    c. A portable step/ladder solution would be investigated to assist shorter members of Mr Harrup's team access the top of the parapet. (Other suggestions put forward by Mr Nelson had apparently not been accepted.)
    d. The plinths would be repositioned to abut the edge of the parapet (although this would be reviewed once the AccessAnka specification documents had been analysed within CAD.)
    e. RRUs would be relocated to the adjacent brick wall without introducing additional risks with access to the balcony area.
    f. Cabling will be mounted in covered trays.
    g. The antennas would be located so as not to impede access to the horizontal glazing.

67. I have not referred to the numerous other points that were either not discussed or if discussed not agreed.

68. To summarise, Mr Nelsons evidence is that the original design and the revised design should not prevent an experienced contractor from accessing the parapet edge for the purpose of abseiling over to clean the windows. If Mr Harrup's team lack the expertise or the risk appetite for this, other methods could be considered. The portable anchor device is just one of a number of possible methods. For example:

    a. Reach and Wash is a viable option previously rejected by Mr Harrup . Mr Nelson re-checked the front aspect of the building below the balcony return, and could not see any viable reason why. It would not in his view impede access to the main entrance, and could effectively be barriered during works. Reach and Wash is effective up to 80 foot in height (c24.4m), which exceeds the balcony height and is an option that could be investigated. From a hierarchy of risk perspective, Mr Nelson believes it ranks as a safer method.
    b. The proposed structural infrastructure could be utilised as a suitable anchor point, to allow abseil without the need to deploy the gravity anchor system.

c. Eye bolts could be fitted, as opposed to looping ropes around the infrastructure (poles and support beams), which the Operator would test and certify as suitable for rope access use. This system is apparently utilised on the remaining run of the balcony apart from both end returns.

69. CIPD's position is that the design remains unsuitable and until CIPD receives a design that meets all its concerns it cannot confirm that the proposed installation is compatible with its need to clean and maintain the front façade of the Building.

70. Placing the sector 1 antenna on the front balcony clearly introduces a challenge to deployment of the equipment currently used to clean the windows immediately beneath the western end of the balcony. It is however a practical issue that should be capable of resolution. Mr Nelson gave examples of alternative approaches based on his experience of project managing many other rooftop sites and his personal expertise in the arena of rope safety. I have no reason to doubt his evidence. Ms French's approach to this and other issues is that risks were being designed in when they should be designed out. She rarely attempted to analyse the degree of risk or suggest practical alternatives. Those proposed by Mr Nelson appear to have been largely rejected without reasoned explanation. This may in part be due to Ms French's acknowledged lack of any expertise on this issue. The current method of cleaning carries considerable risks which Ms French appears comfortable with. No method will be entirely without risk. The designer is responsible for assessing and minimising those risks. I am persuaded by Mr Nelsons evidence that cleaning and maintenance of the strip of façade beneath the sector 1 antenna can be safely carried out. Either by practical adjustment to the position of the plinth and equipment to allow safe employment of the current method or by an alternative method of the type he has suggested.

71. There may be further discussion on the precise location of the balcony apparatus and method of cleaning the glazing beneath it but that is not a reason to introduce a contractual pre-condition which will almost certainly lead to further expensive litigation. This issue should be capable of practical resolution if a sensible approach to risk management is adopted. I therefore reject the additional section 13 and CIPD's amendment to the red edging on the Drawings.

Other disputed terms

Clause 5.2 Interference.

72. CIPD wishes to review the possibility of material interference following any upgrade of M&E and seeks the right to serve an 'Interference Notice'. The consequence of non-compliance with the Notice includes switching off and ultimately termination of the agreement. Mr Radley-Garner KC submitted that interference was not an uncommon problem. It was a risk the Claimant would manage appropriately once it was made aware of any new M&E installations on the roof. This clause introduces a back door termination provision which runs counter to the intention of the Code which is to protect an operator exercising Code rights from common law claims in nuisance.

73. CIPD raise a legitimate concern but have provided no evidence of any M&E likely to be installed that might be sensitive to interference. The Claimant's ECA needs to be considered when new M&E is planned so that any necessary protections can be incorporated. The risk of including CIPDs wording is that useful discussion won't

happen when it should. CIPD would not need to concern itself about compatibility because it could bowl ahead and simply invoke this clause if there was incompatibility. That may not be the intention, but in this case there is a clear risk that CIPDs amendments would end in an unnecessary dispute. It removes any incentive for the parties engage sensibly at the appropriate time. Clause 5.3.1 is therefore approved without the additional wording "*or after the date of this agreement in respect of any mechanical and electrical plant installed by the Grantor after the date of this Agreement*".

74. Clause 7.9 Non-interference. The above determination affects a consequential amendment to paragraph 7.9. The subjection in red at the start of clause 7.9.1 should also be deleted for consistency.

Clause 6.1 Works

75. CIPD have introduced a new clause 6.1.3. It is precondition to any visit by the Operator to carry out works or maintenance. The condition requires the Operator to provide plans and/or appropriate details of the works 14 days before the visit (2 days in emergencies) together with a Notice and description of the works, including any Equipment brought onto the property. Mr Radley-Gardner KC argued that this was unnecessary and disputatious. RAMS provisions were not deemed necessary for the initial installation and there is no reason to place an administrative burden on the operator for ongoing works and maintenance. Ms Schofield submitted that CIPD just wanted to be kept informed about what was happening particularly if significant works were planned.

76. I am not convinced this clause has any real benefit to CIPD. Access arrangements are dealt with under clause 4.2. Clause 4.2.2 already requires the operator to provide 14 days' notice (or reasonable notice in an emergency) and details of its requirements for access including vehicles and machinery to be used. CIPDs additional clause 6.1.3 does not give any right for CIPD to object or make representations concerning the planned works or maintenance. Given CIPDs lack technical knowhow this is unsurprising. It places a significant burden of the operator to explain what and why the works are taking place, for no useful purpose. I propose therefore deleting clause 6.1.3.

77. CIPD have also introduced a new clause 6.1.12 which following any incident of damage requires the operator to provide any information reasonably requested *"to enable the Grantor to ascertain the cause of such damage and any remedial works required to rectify such damage*". I am unsure what this adds to CIPDs position in the event of damage. The operator is obliged under clause 6.1.10 to promptly make good any damage caused in the exercise of the Rights to CIPDs reasonable satisfaction. I doubt the Grantor will rely on the operator's assessment of the damage, it will make its own investigation and seek an explanation if not satisfied. This appears to be a contractual disclosure provision which unnecessarily opens another unecessary avenue for dispute. I therefore propose deleting it.

Clause 7.1 Use

78. The user clause states that the operator (and any permitted third party under the operator's control) shall not 'use' the Site in such a way as to damage the Grantor's Property. The Claimant seeks to restrict this obligation to 'knowingly use'. Knowledge

is not defined. It presents a risk that liability could be avoided if, for instance, damage was caused by a latent defect in the ECA or equipment used by the Claimant or its contractors. This is not a hurdle the Grantor should have to overcome. The primary liability should be that of the operator who can join in or seek a contribution from any third party that is responsible for the damage. I shall therefore delete the word 'knowingly' from clause 7.1.4

Clause 7.4 Indemnity

79. Clause 7.4 is a broad, fairly standard indemnity against third party claims brought against the Grantor which arise from any negligent act or omission or unlawful exercise of the Rights by the operator.

80. The Claimant seeks to exclude from any indemnity proceedings: "*losses which are not reasonably foreseeable to the Grantor and the Operator and therefore which are too remote and/or losses that would not otherwise be recoverable at common law in the absence of a contract.*" - or losses which "*result from the lawful exercise of the Rights.*"

81. The purpose of the indemnity is to regulate and manage third party claims against the Grantor arising from the unlawful acts or omissions of the operator. It is not a catch-all protective provision covering every conceivable loss or damage whatever the cause and regardless of the other provisions of the agreement. However, issues such as remoteness of damage and foreseeability are determined within the proceedings brought by the third party and the Upper Tribunal has said in ***Cornerstone Telecommunications Infrastructure Ltd v University Of The Arts London*** [2020] UKUT 238 (LC) that it is inappropriate for the indemnity to be "*subject to a disputatious prior filter*" such as this. The exclusion of losses arising from lawful exercise of the Rights is unnecessary as the indemnity is already limited by clause 7.4.1 to '*unlawful*' exercise of the Rights.

82. I therefore determine that clause 7.4.3.1.and clause 7.4.3.2 should be deleted from the agreement.

Clause 7.7 Powering Down

83. This clause deals with Grantor works that cannot be safely carried out without powering down the ECA. The occasions include the quarterly cleaning of the façade which can be pre-planned and should not create any practical issue. Other occasions are less predictable. It depends on the works. CIPD want to include surveys. The Claimant says the lack of a defined term leaves it open to arbitrary requests. To avoid repeated arbitrary requests the Claimant wishes to delete reference to surveys and limit the number of occasions to 6 per calendar year. CIPD seek 12 occasions. There is also a difference concerning whether 5 or 10 working days' notice should be given.

84. The procedure set out in clause 7.8.2 is that following receipt of a Notice the operator will power down the equipment in accordance with the Notice (which will also indicate the length of the powering down). The Claimant seeks an amendment that allows it to consider *(acting reasonably)* whether the equipment needs to be powered down. If it accepts there is a need it will be required to power down '*as soon as is reasonably practicable*'.

85. Ms Schofield submitted that the operator should not have any right to dictate whether Grantor works are reasonable. That is a discretion for the Grantor alone. There may be emergency situations that require shorter notice than 10 working days and given the amount of work likely to be required to the roof and ageing M&E two additional occasions over the 4 required for window cleaning was inadequate.

86. Mr Radley-Gardner KC explained that powering down required the Claimant to make adjustments across other parts of its network. The ECA was not passive it affected other networks and interruptions could be disruptive. It should be the role of the operator to determine whether the scope of the Grantors works required powering down the ECA. As drafted the clause included ill-defined triggers with no opportunity for challenge. 10 days' notice provided a reasonable time for the Claimant to consider necessary adjustments.

87. It is difficult to foresee why a routine survey might require powering down. An intrusive roof survey could require it, but intrusive works would be covered by the generic term 'works'. Whether any planned works present a risk that requires powering down is better assessed by the party that has the technical expertise to fully understand the risks and carries liability for loss and damage arising from use of the equipment. That is clearly the operator. This is not to say that the operator can opine on the reasonableness of the Grantors works, just on whether the proposal requires any equipment to be powered down. This should be a practical issue capable of resolution following sensible pre-planning with the operator.

88. It seems likely that the section 1 antenna will need to be powered down 4 times a year. It is impossible to predict in what other circumstances powering down might be necessary outside exercise of the lift and shift provisions. I agree inclusion of 'surveys' without limitation could be used disruptively and no explanation of why powering down would be needed for surveys that do not involve intrusive works has been provided. The Notice period is less significant if the operator's obligation to power down is expressed as '*as soon as is reasonably practicable'*. A Notice period of *"not less than 10 working days (save in the case of urgent works*)" should not prove onerous for the operator if powering down is required "*as soon as is reasonably practicable*".

89. CIPD accept that there should be some limit to the number of requests they can make and suggest that 12 per calendar year is reasonable. It is difficult to see how the possibility of 12 service interruptions every year is reasonable. I am inclined to agree with the Claimant that an additional 2 occasions (over and above window cleaning) should be sufficient but will exclude from this number powering down for emergency works. The operator would have to power down if urgent works were required to meet an emergency and those occasions should not count toward the requests for planned works. I determine therefore that clause 7.8 should be worded as follows:

> *7.8.1 In the event that the Grantor intends to undertake any works (including for the avoidance of doubt window cleaning) of the Grantor's Property and is unable to do so without the Equipment being powered down or switched off the Grantor may serve not less than 10 working days' prior written notice (save in the case of urgent works where a reasonable period will be specified) on the Operator requesting it to power down or switch off the Equipment or*

such part of it for such reasonable period(s) as is required by the Grantor to carry out such works (the "Grantors Powering Down Notice"), provided that the number of requests made by the Grantor under this provision shall be no more than 6 per calendar year not including any requests that relate to urgent works necessitated by an unexpected emergency.

7.8.2 Following receipt of the Grantors Powering Down Notice, if the Operator agrees (acting reasonably) that the Equipment should be powered down or switched off in order to enable the Grantor's works to take place, the Operator shall power down the Equipment or such part of it as soon as reasonably practicable and will not power up or switch on the Equipment again until expiry of the reasonable period given in the Grantor's Powering Down Notice or such other extensions as may be agreed between the parties (acting reasonably) provided that the Grantor will use reasonable endeavours to minimise disruption to the Operator.

Clause 4.2.2.1.1. Road closure

90. Finally, I note the proposed amendment to clause 4.2.2.1.1 remains in the red line draft. An issue which the parties appeared close to resolving at the hearing following Mr Nelsons evidence that three dates were generally proposed in the application for a temporary traffic management order which meant it was not possible to give a specific date until the order was made. On behalf of CIPD Ms Schofield indicated that 3 dates would at least provide some advance warning of potential dates to avoid. The Claimant's objection was just that it is administratively burdensome to comply with. Road closures can cause significant disruption to a site owners' operations in this type of location. This prejudice clearly outweighs the administrative burden placed on the operator to keep the site owner informed.

91. As this appears to remain a live issue I determine that clause 4.2.2.1.1 should read as follows:

4.2.2.1.1 the Operator giving the Grantor written notice of the proposed date or dates of crane works within 14 days of making an application for a temporary traffic management order authorising a road closure and within 14 days of the date on which the local authority makes a temporary traffic management order authorising a road closure where Works are to be undertaken utilising a crane; and

Decision

92. Pursuant to Paragraph 20 of the Electronic Communications Code (Schedule 3A to the Communications Act 2003) the Tribunal imposes an agreement on the Claimant and the Respondent. The Claimant and the Respondent are bound by an agreement in the following terms:

a) As contained in the ECC Code Agreement amended in red and blue sent with this Decision as varied by the determinations set out in the paragraphs above.

b) The Plan(s) to be annexed to the Agreement are those sent with this Decision.

Costs

93. The Tribunal will make an order for both litigation and transactional costs (if not agreed) in respect of which the following directions apply:

    a. The parties to exchange updated schedules of costs for the interim and substantive applications by **23 August 2024**.

    b. The parties to exchange written submissions in relation to the principle and quantum of costs by **21 September 2024**.

    c. The parties to exchange replies to written submissions in relation to costs by **11 October 2024.**

    d. The tribunal proposes determining costs on the basis of the paper representations unless by 23 August 2024 either party seeks a hearing.

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

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