



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

Case Reference : **LC-2023-000521**

Subject property : **Telecommunications Site near
Totties Farm
Hever Road
Edenbridge
Kent TN8 5DJ**

**Claimant
(Operator)** : **Cornerstone Telecommunications
Infrastructure Limited**

Representative : **DAC Beachcroft LLP**

**Respondents
(Site Provider)** : **Christopher George Manwaring
Alan Richard Gould
Alexander Charles George Denniss
Calcutt
Jeremy Simon Kenneth Calcutt**

Representative : **Alan Gould**

Application : **Electronic Communications Code**

Tribunal member : **Deputy Regional Judge Gravells**

Date of decision : **16 May 2025**

DECISION

Introduction

- 1 This is the Decision of the First-tier Tribunal on a Reference (issued in the Upper Tribunal on 10 August 2023 and transferred to the First-tier Tribunal on 14 August 2023) including an application under paragraph 33(5) of the Electronic Communications Code (Schedule 3A to the Communications Act 2003 ('the Code')). Pursuant to paragraph 34(6) of the Code the Claimant seeks (i) an order for termination of the existing code agreement between the parties and (ii) an order that the parties enter into a new code agreement; and pursuant to paragraph 35(2A)(a) the Claimant also seeks an order specifying the interim rent payable under the existing order between the date of the Claimant's reference and the commencement date of the new agreement.
- 2 The Claimant is an 'operator' within the meaning of paragraph 2 of the Code. More specifically, the Claimant does not provide an electronic communications network of its own: rather it installs and maintains an infrastructure system (as defined in paragraph 7 of the Code) to providers of electronic communications networks. The users of the Claimant's infrastructure system include Telefonica UK Limited, Vodafone Limited and other third party operators, including EE Limited.
- 3 The Respondents are the current registered proprietors of the freehold of the subject property, which comprises land off Hever Lane, Edenbridge, Kent TN8 5DJ and which is registered at HM Land Registry under title number K978215. The Respondents have largely acted through Alan Richard Gould, initially in his capacity as executor of the estate of Enid Julia Gould (deceased) and subsequently as one of the freeholders of the subject property.

Background

- 4 By an agreement dated 23 February 2004 and made between (1) Jeremy Simon Kenneth Calcutt, Timothy John Calcutt, Herbert George Manwaring and Enid Julia Gould and (2) Vodafone Limited ('the 2004 agreement'), Vodafone was granted rights under the old electronic communications code in Schedule 2 to the Telecommunications Act 1984 ('the 1984 Act') to install and operate electronic communications apparatus on the subject property for a term of 15 years, expiring on 22 February 2019.
- 5 The agreement was varied by Deeds of Variation dated 6 October 2006 and 22 April 2016.
- 6 It is not disputed that the 2004 agreement (i) was an agreement for the purposes of paragraph 2 of the old electronic communications code contained in Schedule 2 to the 1984 Act, (ii) was validly contracted out of Part II of the Landlord and Tenant Act 1954 and (iii) was in force as a contractual agreement when the (new) Code came into force on 28 December 2017. The 2004 agreement is therefore a 'subsisting agreement' within the meaning of paragraph 1(4) of the transitional provisions contained in Schedule 2 to the Digital Economy Act 2017 and thereafter it has had effect as an agreement under Part 2 of the Code, subject to the modifications made by those transitional provisions.
- 7 Pursuant to a licence to assign dated 22 April 2016, the rights conferred on Vodafone by the 2004 agreement were assigned to the Claimant by a Deed of Assignment dated 25 August 2020.

- 8 Notwithstanding the expiry of the contractual term, by virtue of paragraph 30 of Part 5 of the Code (Termination and Modification of Agreements) the 2004 agreement continues in operation: the operator may continue to exercise the rights conferred by the agreement and the site provider continues to be bound by those rights until the agreement is terminated pursuant to Part 5.
- 9 Paragraph 31 enables the site provider to give notice to bring the code agreement to an end; and either party may give notice under paragraph 33 requiring the current agreement to be changed or a new agreement to take effect. Where any such notice gives rise to a dispute between the parties, as in the present case, the matter may be referred to the Tribunal.
- 10 Paragraph 34 sets out the orders that can be made in such references. In particular, paragraph 34(6) enables the Tribunal to order the termination of the existing Code agreement and to order the operator and the site provider to enter into a new agreement that confers Code rights on the operator, on such terms as they agree or on terms ordered by the Tribunal under paragraph 34(10).
- 11 However, following the expiry of the contractual term of the 2004 agreement in February 2019 Respondents took various actions, which can fairly be described as ‘negative’ –
 - (a) they served a notice purporting to terminate the 2004 agreement and requiring the removal of the electronic communications apparatus from the subject property (although the notice did not comply with paragraphs 31, 40 and 89 of the Code);
 - (b) they threatened to disconnect the power supply to the subject property;
 - (c) they requested RICS Dispute Resolution Service arbitration in relation to various alleged breaches of the 2004 agreement.
- 12 Notwithstanding these actions, the Claimant confirmed to the Respondents that it wished to negotiate a new Code agreement. And, with a view to drawing a line under allegations of historic breaches and focussing on the negotiations, in April 2020 the Claimant without admission of liability made a payment to the Respondents in final settlement of the arbitration dispute. However, the Respondents repeatedly alleged that the Claimant had not complied with the arbitration settlement.
- 13 The Respondents then sought to impose strict access protocols in relation to the subject property.
- 14 Despite the earlier purported termination, the Respondents indicated that they wished to enter into a new agreement on substantially the same terms as the 2004 agreement and they proposed that any dispute should be submitted to arbitration.
- 15 The Claimant wished to enter into a new Code agreement; and on 31 January 2022 the Claimant served on the Respondents a notice pursuant to paragraph 33 of the Code in order to set in place a formal timetable to frame discussions for such an agreement.
- 16 In July 2022 the Respondents instructed Cripps Solicitors. In a letter dated 19 July 2022 Cripps repeated the Respondents’ allegations that the electronic telecommunications apparatus was installed in the wrong location and that the paragraph 33 notice was invalid. The Claimant disputed the invalidity of the notice and sent a first letter before action. On the advice of Cripps, the

Respondents appointed Batcheller Monkhouse to negotiate the terms of a new Code agreement; but in the absence of communication from Batcheller Monkhouse, the Claimant sent a final letter before action.

- 17 Over the next ten months Mr Gould continued to repeat allegations that the Claimant had committed breaches of the 2004 agreement, that the electronic telecommunications apparatus was installed in the wrong location, that the assignment of the 2004 agreement from Vodafone to the Claimant was invalid and that the paragraph 33 notice was invalid.
- 18 In August 2023 Mr Gould dispensed with the services of Cripps and submitted an application to the RICS Dispute Resolution Service for arbitration to challenge the validity of the assignment (and/or the licence to assign) but on 8 January 2024 the substantive arguments were dismissed by the arbitrator. The arbitrator commented that Mr Gould's arguments 'contained little merit' and expressed surprise that Mr Gould had failed to instruct a professional to act on behalf of the Respondents.
- 19 On 10 October 2023 the Claimants issued the current reference in the Upper Tribunal and on 14 October 2023 it was transferred to the First-tier Tribunal.
- 20 Following a number of postponed case management hearings, on 19 January 2024 the Tribunal issued Directions. The Directions, which were agreed by the parties, provided for the provision of, and alternate replies to, a travelling draft Code agreement.
- 21 The Respondents failed to return proposed amendments to the Claimant's draft Code agreement. On 28 May 2024, following an application by the Claimant to bar the Respondents from further participation in the proceedings, the Tribunal extended the deadline for the Respondents to comply with the Directions and issued a barring warning. In response the Respondents filed a completely new form of agreement. They also argued that a deed of surrender in respect of the 2004 agreement was necessary.
- 22 The Claimant prepared a revised version of its draft agreement, (i) showing those terms proposed by the Respondents that were already substantively found in the Claimant's original draft and (ii) incorporating other terms that the Claimant was prepared to accept.
- 23 On 1 July 2024 the Respondents filed a new draft agreement in the form of the GLA template lease.
- 24 On 15 August 2024, following a second application by the Claimant to bar the Respondents from further participation in the proceedings, the Tribunal extended the deadline for the Respondents to comply with Directions and issued a barring warning.
- 25 On 30 August 2024 Mr Gould filed a brief witness statement.
- 26 In the light of the apparent impasse, the Tribunal listed the matter for a case management hearing.
- 27 On 26 September 2024, the Tribunal issued Directions, which recorded –
 - (i) that the Respondents did not challenge the validity of the paragraph 33 notice;
 - (ii) that the Respondents did not oppose a new Code agreement, subject to agreement on terms;

- (iii) that negotiations should proceed on the basis of reasonable and proportionate amendments to the Claimant's proposed Code agreement;
 - (iv) that the terms in dispute related to (i) further compensation, (ii) health and safety, (iii) assigning and sharing, (iv) rent reviews and (v) plan;
 - (v) that the site payment was agreed in the sum of £1,750 per year;
 - (vi) that the Tribunal encouraged the Respondents to seek independent specialist legal advice.
- 28 The Tribunal ordered the timetable for further proposed amendments to the Claimant's draft Code agreement.
- 29 On 6 November 2024 the Respondents provided a marked-up copy of the Claimant's draft Code agreement, which reinserted terms to match the GLA greenfield template lease. Mr Gould insisted that this was in compliance with the Tribunal's Order dated 26 September 2024.
- 30 On 25 February 2025 the Respondents applied to have part of the Claimant's statement of case struck out 'due to the assignment [of the 2004 agreement] being legally void'. The Claimant pointed out that that issue had been determined against the Respondents by the RICS arbitrator; the Tribunal pointed out that the application was procedurally defective; and the application was not pursued.

Hearing

- 31 On 24 April 2025 a hearing was held by remote video conferencing. The Claimant was represented by Mr James Tipler (of Counsel). The Respondents were represented by Mr Gould.

Preliminary issues

- 32 In the interests of certainty, the Tribunal determined a number of issues –
- (i) The Tribunal rejects the allegation repeatedly raised by the Respondents that the assignment of the 2004 agreement by Vodafone to the Claimant was invalid. The RICS arbitrator rejected the Respondents' arguments: see paragraph 18 above; the Respondents did not appeal that decision; and at the case management hearing on 26 September 2024 Mr Gould confirmed that the Respondents were no longer taking the point.
 - (ii) The Tribunal rejects the allegation of the Respondent that the electronic communications apparatus was installed in the wrong location. The Respondents failed to substantiate the allegation. In any event, the Respondents have willingly accepted rent from the Claimant for more than 20 years.
 - (iii) The Tribunal rejects the argument of the Respondents that the imposition of the new Code agreement should be conditional upon the Claimant remedying various alleged breaches of the 2004 agreement. Those allegations were the subject of a final settlement: see paragraph 12 above; and any further action in respect of those (largely unparticularised) allegations is a matter for the County Court.

Disputed terms

- 33 As noted above, the Respondents have not pursued their opposition to a new Code agreement but they have continued to oppose the terms of the Claimant's draft Code lease, in relation to both the substance of terms included in that draft and also terms proposed by the Respondents but not included in that draft.

Representations of the parties

Representations of the Claimant

- 34 First, Mr Tipler argued that the 'starting point' for the new Code agreement should be the Claimant's draft agreement, rather than the 2004 agreement (which was originally proposed by the Respondents) or the GLA template lease (which later became the focus of the Respondents' arguments).
- 35 Mr Tipler submitted (i) that the Code was intended to confer broader rights and more flexibility on operators; (ii) that it cannot have been intended that the public benefits and investment incentives conferred by the new Code would be stultified by the continuation of subsisting agreements, with more limited rights at higher rents or fees, for a significant time after their expiry dates; and (iii) that the operator's 'business and technical needs' (the first in a list of considerations to which the Tribunal is required to have regard (see paragraph 34(13)(a) of the Code) are its reasonable requirements as regards the statutory purposes, namely the provision of its network and an infrastructure system, and may also include a need to have a standard form of agreement for its code agreements, for estate management reasons: see *EE Limited and Hutchison 3G UK Limited v Stephenson and AP Wireless II (UK) Limited* [2021] UKUT 167 (LC) ('*Stephenson*') at paragraphs [46]-[53].
- 36 As noted above, at the case management hearing on 26 September 2024 the Tribunal clearly ordered that the Claimant's draft Code lease should form the basis of the new Code agreement.
- 37 In so far as the Respondents sought to focus on the alleged deviation of the Claimant's draft lease from the GLA template lease, Mr Tipler pointed out that large parts of that template were already included in the Claimant's draft and other provisions had been accepted for inclusion. However, in considering further terms in the template, Mr Tipler urged the Tribunal to follow the guidance in *Stephenson*.
- 38 Second, Mr Tipler made a number of submissions by reference to recent decisions of the Upper Tribunal (and the Court of Appeal) as to the approach to disputed terms –
- (i) that the Tribunal should exercise its discretion with the statutory purposes of the Code well in mind: *Cornerstone Telecommunication Infrastructure Limited v London & Quadrant Trust* [2020] UKUT 0282 (LC) at paragraph [44];
 - (ii) that, in considering a site provider's objections to proposed terms (or the omission of terms proposed by the site provider), regard should be had to the agreement as a whole and the protection afforded to the site provider: *EE Limited and Hutchison 3G UK Limited v Hackney LBC* [2021] UKUT 142 (LC);

- (iii) that the agreement should not duplicate safeguards or impose requirements that would be of no or limited practical benefit and should give due respect to the professionalism of the parties: *Cornerstone Telecommunication Infrastructure Limited v University of the Arts London* [2020] UKUT 0248 (LC) at paragraph [70];
 - (iv) that the agreement should not without good reason include terms that give scope for dispute: *EE Limited and Hutchison 3G UK Limited v AP Wireless II (UK) Limited* [2024] UKUT 216 (LC) at paragraph [27].
- 39 Third, Mr Tipler addressed the Respondents' objections to the Claimant's draft Code lease, as set out in the schedule of disputed terms.
- 40 While the Claimant was willing to accept further minor corrections, Mr Tipler submitted –
- (i) that the Respondents appeared to assume, contrary to the guidelines in *Stephenson*, that there was a presumption against changes to the terms of the subsisting agreement;
 - (ii) that many proposed amendments and additions were stated to be 'for completeness' or 'for clarity' without any explanation of their practical significance;
 - (iii) that many proposed amendments and additions seemed to reflect a wish on the part of the Respondents to micromanage the Claimant's operation;
 - (iv) that some proposed amendments and additions were based on factual or legal errors or misunderstanding or on assertions that were unsupported by the evidence provided in Mr Gould's witness statement dated 30 August 2024.
- 41 In relation to the issues in dispute as identified in the Tribunal's Directions dated 26 September 2024 (see paragraph 27(iv) above) Mr Tipler commented –
- (i) that the Claimant had removed the clause relating to further compensation;
 - (ii) that the Respondents' proposed terms on health and safety would impose unacceptably broad and uncertain liability on the Claimant and that the Respondents were sufficiently protected by other safeguards in the draft agreement and the Code itself. Moreover, the proposal that the Claimant should provide a health and safety file on request would be onerous and intrusive and was contrary to the guidance of the Upper Tribunal that due respect should be afforded to the professionalism of the parties;
 - (iii) that the Respondents' proposed terms on assigning and subletting were needlessly elaborate and gave scope for further dispute;
 - (iv) that the Respondents' proposal of an upwards only rent review (and its detailed terms) goes beyond the GLA template, reflected a mistaken view of the facts and ran contrary to paragraph 24 of the Code;
 - (v) that the Respondents' position on the plans was based on the unsubstantiated assertion that the electronic communications apparatus was installed in the wrong location.

Representations of the Respondents

- 42 It is difficult to provide a succinct summary of the Respondents' arguments. At no time have the Respondents provided a structured statement of principles to be applied in determining the appropriate terms to be included in the new Code agreement. Rather, Mr Gould has persisted in sending a stream of emails, which did not reflect a consistent view of the Respondents' proposals for the new Code agreement. While initially seeking a simple extension of the 2004 agreement, the Respondents seemed to accept the Code necessitated a new agreement; but, even after the Tribunal issued Directions for that agreement to be based on the Claimant's draft agreement, the Respondents persisted in seeking to redraft that agreement in terms of the GLA template lease.
- 43 The law relating to the Code is a specialist area of law of some considerable complexity. However, despite repeated encouragement from the Tribunal and from the Claimant's solicitors, Mr Gould has largely acted without specialist professional advice. The Respondents did instruct solicitors (Cripps) during a 12-month period between mid-2022 and mid-2023 and a specialist telecoms agent (Batcheller Monkhouse) for a longer period. However, the correspondence from Mr Gould suggests that he continued to dictate the Respondents' approach to negotiations with the Claimant.
- 44 Unfortunately, despite apparent confidence in his legal knowledge, there was evidence in the documentation (and in his oral representations at the hearing) that Mr Gould failed to understand some of the complexities and subtleties of the relevant law.
- 45 It is also the case that Mr Gould failed to comply with Directions (which he has agreed) for the normal travelling draft procedure. It has already been noted that on two occasions the Tribunal issued barring warnings because of that non-compliance.
- 46 In the end the Respondents presented the Tribunal with their own draft agreement and a lengthy schedule of disputed terms.

Discussion

Statutory framework

- 47 As already noted, the 2004 agreement is a subsisting agreement within the meaning of paragraph 1(4) of the transitional provisions contained in Schedule 2 to the Digital Economy Act 2017 and it thereafter has had effect as an agreement under Part 2 of the Code, subject to the modifications made by those transitional provisions. Notwithstanding the expiry of the contractual term, pursuant to Part 5 of the Code the 2004 agreement continues by virtue of paragraph 30 until the agreement is terminated pursuant to Part 5. Paragraph 31 enables the site provider to give notice to bring the code agreement to an end; and either party may give notice under paragraph 33 requiring the current agreement to be changed or a new agreement to take effect. Where any such notice gives rise to a dispute between the parties, the matter may be referred to the Tribunal.
- 48 Paragraph 34 sets out the orders that can be made in such references. In particular, paragraph 34(5) enables the Tribunal to order the termination of the existing Code agreement and to order the operator and the site provider to enter into a new agreement that confers Code rights on the operator, on such

terms as they agree or on terms ordered by the Tribunal under paragraph 34(10).

- 49 Paragraph 34(11) states that paragraphs 23(2) to (8), 24, 25 and 84 apply to an order under paragraph 34(10) as they do to an order under paragraph 20. In particular –

Paragraph 23(2) provides –

An order under paragraph [34(5)] must require the agreement to contain such terms as the court thinks appropriate ...

And paragraph 23(5) provides -

(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.

- 50 Paragraph 34 also provides -

(12) In the case of an order under sub-paragraph (10) the court must also have regard to the terms of the existing code agreement.

(13) In determining which order to make under this paragraph, the court must have regard to all the circumstances of the case, and in particular to—

- (a) the operator's business and technical needs,
- (b) the use that the site provider is making of the land to which the existing code agreement relates,
- (c) any duties imposed on the site provider by an enactment, and
- (d) the amount of consideration payable by the operator to the site provider under the existing code agreement.

However, paragraph 34(13)(d) is not applicable to a subsisting agreement: see the Digital Economy Act 2017, Schedule 2, paragraphs 2(1), 7(4).

The approach to be taken to disputes about the new terms

- 51 The Upper Tribunal has considered a number of references relating to the terms of new Code agreements under Part 5. A common theme has been the argument made on behalf of site providers that the terms of new Code agreements should mirror those terms of the old agreement. Comparison has been made with the position on the renewal of business tenancies under the Landlord and Tenant Act 1954 and that principle in *O'May v City of London Real Property Co Ltd* [1983] 2 AC 726 that there is an onus on a tenant seeking different terms to justify the change.
- 52 It is now well-established that that argument is not correct. Despite the similarity between paragraph 34(12) and section 35 of the Landlord and Tenant Act 1954, the Court of Appeal in *On Tower UK Limited v JH and FW Green Limited* [2021] EWCA Civ 1858 (*'Dale Park'*) has confirmed that decisions relating to the latter will not necessarily apply to the former. The purposes of the two provisions are different. The Court of Appeal said at paragraph [49] -

[49] The weight to be attached to the fact that a term was included in the existing code agreement will in part turn on its consistency with the aims of the Code. If the relevant term cannot be thought to be in conflict with those aims, the case for replicating it in the new agreement may be compelling. Plainly, the position will be different if the term is at variance with the objectives of the Code. In practice, the terms of a code agreement entered into since the introduction of the Code are more likely to accord with its purposes than those of an agreement which pre-dates the Code.

- 53 The Court of Appeal at paragraph [46] quoted with approval the decision of the Upper Tribunal in *Stephenson*, where the Tribunal (Fancourt J) said -

[53] ... The purpose underlying the Code is to ensure that operators can use and exploit sites more flexibly, quickly and cheaply than had previously been the case, at lower than market rents, in furtherance of the public interest of providing access to a choice of high quality electronic communications networks, while providing a degree of protection to site owners' legitimate interests.

- 54 In *Dale Park* at paragraph [61] the Tribunal said that in making decisions about the terms of a renewal agreement -

[61] ... it may be helpful to think in terms of a balancing process between the claimant's requirements and the respondent's concerns, but the Code does not put it like that. Perhaps a better way to look at it is as follows.

[62] First, the Tribunal should consider the term the operator seeks and the reason why it needs the term in question in order to pursue the business for whose purposes it received its Ofcom direction and in light of the public interest in a choice of high quality telecommunications services.

[63] Second, the Tribunal will consider the concerns or objections raised by the respondent and whether in order to minimise loss or damage in accordance with paragraph 23(5) the term should not be imposed, or should be imposed to a limited or qualified extent.

[64] If those concerns do not prevent the imposition of the term and do not require its qualification, then the Tribunal will consider whether, in imposing that term, it should also impose further terms to minimise loss or damage.

- 55 In the present reference many terms are sought by the Respondents which the Claimant does not want and the Tribunal must determine whether those terms are appropriate. It has to be considered whether the effect of those terms upon the Claimant's business and the efficiency of its operations are in the public interest. Where it can be seen to have an unhelpful effect upon the Claimant's business, the Tribunal must consider whether the term sought, or another term to similar effect, is necessary in order to cause 'the least possible loss and damage' to the site provider.

- 56 The Respondents are rightly concerned with ensuring that appropriate safeguards are in place in order to protect their property. However, this is not a case where the telecommunications apparatus is (to be) installed on the roof of a residential or commercial building and the site provider has legitimate concerns for the protection of the building and its occupants. In the present case, the Respondents have sold most (if not all) of the adjoining land and retain ownership of the subject property. While there appeared to be some dispute as to whether the Respondents retain ownership of some additional land adjoining the subject property, that additional land is at most a small area. Moreover, the subject property is a greenfield site and the risks of potential loss or damage are much more limited than is the case with a residential or commercial building. In those circumstances the need for protective measures

in the Code agreement is much reduced. In the view of the Tribunal many of the Respondents' proposed amendments and additions to the Claimant's draft agreement are unnecessarily complicated and/or burdensome and/or would require the Claimant to follow procedures that are disproportionate. As such, they are not 'appropriate' for the purposes of paragraph 23 of the Code.

Disputed terms

- 57 Dealing first with the five issues in dispute as identified in the Tribunal's Directions dated 26 September 2024 (see paragraph 27(iv) above), the Claimant has conceded the first issue and removed the clause relating to further compensation.
- 58 In relation to the four remaining issues, the Tribunal accepts the arguments of the Claimant summarised at paragraph 41 above, to which the Respondents offered no persuasive counter-arguments.
- 59 Although the Tribunal's Directions appear to have provided a definitive list of the issues in dispute between the parties, Mr Gould insisted that he had reserved the right to identify further issues. The Tribunal therefore invited Mr Gould to identify the further issues and to make representations.
- 60 For reasons already alluded to, Mr Gould did not have the knowledge and understanding to provide a comprehensive and coherent revision of a Code agreement that has been carefully drafted by qualified lawyers who specialise in the relevant area of law. Moreover, although the Tribunal reminded Mr Gould that the Directions had required him to limit any proposed amendments to what is *reasonable and proportionate*, he continued to propose amendments and additions that would lead to a significant re-write of the Claimant's draft agreement.
- 61 A number of the proposed amendments and additions failed to take account of the fact that, contrary to the Claimant's preferred form, the Claimant had agreed to accept the Respondents' insistence that the agreement should take the form of a lease.
- 62 Mr Gould sought –
- (i) to include unnecessary terms as to easements, break clauses, apparatus switch-off and reserved rights;
 - (ii) to include unnecessarily complicated and/or burdensome terms as to access, health and safety, sharing of the subject premises and telecommunications apparatus;
 - (iii) to include terms as to indemnity that reveal a misunderstanding of the wider legal background.
- 63 In respect of paragraph 62(iii) above, in *On Tower UK Limited v AP Wireless II (UK) Limited* [2021] UKUT 240 (LC) the Upper Tribunal stated at paragraphs [56] – [58]
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- [56] ... we look first at the issue of responsibility for safety as a matter of principle, in the context of a site provider who has granted to the operator exclusive possession of the site.
- [57] It is no part of the policy of the Code that such a site provider be responsible, let alone criminally liable, for the safety of a telecommunications site on its land. There was no suggestion of any risk of such liability under the pre-2018 Code. Had there

been any fear of such liability on the part of site providers the Law Commission would have heard about it from its consultees, and it did not. Under the present Code the idea that the site provider is to share with the operator the responsibility for the safety of the equipment and operations on the site is even less plausible than it was under the old Code. Not only are most site providers without expertise in relation to telecommunications, but also they now receive consideration calculated on the 'no network' assumption, which is markedly less generous than was consideration under the old Code. It would be implausible and unfair that they should be at risk of civil or even criminal liability if someone is injured as a result of, say, tools falling into a drop zone or a mast collapsing.

[58] The fear of civil liability for site providers is wholly unrealistic where the Code agreement requires them to give up exclusive possession of the site and gives them no control over what goes on there. In those circumstances liability in negligence or under the Occupier's Liability legislation is not possible. Nor can there be liability for what happens on the way to the site, where the landowner retains possession of the access way, if the Code agreement gives the landowner no say in what the operator does on the land that gives access to the site. If the operator's employee digs up the farm track, the operator and not the landowner is vicariously liable.

- 64 In summary, for the various reasons identified above, the Tribunal determines that the arguments put forward by Mr Tipler on behalf of the Claimant outweigh the arguments put forward by Mr Gould on behalf of the Respondents. The Tribunal determines that the terms of the Claimant's draft agreement are the appropriate terms for the purposes of paragraph 23 of the Code; and that none of the Respondents' proposed amendments or additions to that agreement are appropriate.

Site payment

- 65 The Tribunal's Directions dated 26 September 2024 recorded that the parties had agreed a site payment of £1,750 per year for the first five years of the Code agreement (after which the figure would be subject to review).
- 66 Mr Gould argued that the figure of £1,750 per year for first five years of the Code agreement should be increased to reflect the increase in the retail prices index between 26 September 2024 and the commencement date of the new agreement. The Tribunal is not persuaded that that was the intention of the parties; but, if such an adjustment were to be made, the Respondents would logically have to accept index-linking to *reduce* the interim site payment payable under paragraph 35(2A)(a) of the Code for the period between the date of the Claimant's reference (10 August 2023) and the commencement date of the new agreement.
- 67 In the circumstances, the Tribunal determines that the appropriate site payment payable for the first five years of the Code agreement (and the appropriate interim site payment for the period from 10 August 2023 to the date of commencement of the new agreement) is £1,750 per year.

Order

- 68 In order to give effect to this Decision, the Tribunal has issued a formal Order pursuant to paragraphs 34(6) and 35(2A)(a) of the Code.

Costs

- 69 The parties may make written representations on the issue of costs. Any such representations must be received by the Tribunal not later than 13 June 2025.

Appeal

- 70 If a party wishes to appeal this Decision, that appeal is to the Upper Tribunal (Lands Chamber). However, a party wishing to appeal must first make written application for permission to the First-tier Tribunal at the Regional office which has been dealing with the case.
- 71 The application for permission to appeal must be received by the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
- 72 If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason(s) for not complying with the 28-day time limit. The Tribunal will then consider the reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
- 73 The application for permission to appeal must state the grounds of appeal and state the result the party making the application is seeking.

16 May 2025

Professor Nigel Gravells
Deputy Regional Judge