



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

Case reference : **LC-2023-000410**

Subject premises : **Chilton Court
Station Avenue
Walton on Thames
Surrey
KT12 1NG**

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

Representative : **Osborne Clarke LLP**

**Respondent
(Site Provider)** : **Chilton Court Residents Association
Limited**

Representative : **Eversheds Sutherland (International) LLP**

Type of application : **Application under paragraph 26(1) of the
Electronic Communications Code**

Tribunal members : **Deputy Regional Judge Nigel Gravells
Regional Surveyor Vernon Ward**

Date of Decision : **8 February 2024**

DECISION ON COSTS

Introduction

- 1 Following a reference to the Upper Tribunal (subsequently transferred to the First-tier Tribunal), by Decision and Order dated 18 December 2023 the First-tier Tribunal imposed on the parties an agreement for interim MSV rights pursuant to paragraph 26(1) of the Electronic Communications Code (Schedule 3A to the Communications Act 2003 ('the Code')).
- 2 Following the invitation of the Tribunal the parties made representations on the issue of litigation costs and this is the Decision of the Tribunal on that issue.
- 3 The Respondent seeks an order for its full litigations costs in the sum of £62,326.20 (including VAT). The Claimant does not seek an order for costs against the Respondent but resists the claim that it should be responsible for the Respondent's costs.

Representations of the parties

- 4 The Respondent's submission extends to 26 pages and an additional 16-page breakdown of costs. Although the front sheet appears to have been produced by Eversheds Sutherland (International) LLP, the submission is signed by Deborah Petty, a Director of the Respondent company. Unfortunately, Ms Petty has included an extensive narrative of historic events, which has limited relevance to the present issue of litigation costs.
- 5 Ms Petty submits that 'on the most important and fundamental sticking points' the Tribunal found in favour of the Respondent, arguing –
 - (i) that the Respondent was successful in retaining control of access to the subject premises;
 - (ii) that the Respondent was successful in obtaining a warranty that insurance cover of £10 million included Authorised Personnel;
 - (iii) that the Respondent was successful in obtaining a satisfactory approval condition in respect of RAMS;
 - (iv) that the Respondent was successful in obtaining a term requiring Authorised Personnel to produce training certificates on demand;
 - (v) that the Respondent was successful in obtaining an award of £15,000 in respect of transaction costs.
- 6 Ms Petty further argued –
 - (i) that the Respondent had no real choice but to argue its position before the Tribunal and to incur litigation costs;
 - (ii) that the Respondent acted reasonably in seeking the imposition of the pre-November 2022 draft agreement;
 - (iii) that the Tribunal should take account of the Claimant's overall conduct in relation to its request for an interim agreement;
 - (iv) that the Respondent did not deliberately instruct expensive solicitors;
- 7 The Respondent relies on the decision of the Upper Tribunal in *EE Limited and Hutchison 3G UK Limited v HSBC Bank plc* [2022] UKUT 174 (LC) that the costs incurred by a site provider in a reference made necessary because an operator wishes to have a Code right to undertake a survey ought not in principle to fall on the site provider.

- 8 In relation to the Claimant's overall conduct, some of Ms Petty's arguments relate to the protracted negotiations *before* the reference to the Upper Tribunal. The principal arguments relating to the period *after* the reference are that the Claimant was not wholly transparent in its supposed incorporation of decisions of the Upper Tribunal in its draft agreement.
- 9 On behalf of the Claimant Ms Seitler accepts the statement of principle in *EE Limited and Hutchison 3G UK Limited v HSBC Bank plc* that the usual order on a reference seeking interim Code rights is that the operator pays the site provider's litigation costs; but she submits –
 - (i) that any costs order should reflect (a) the relative success of the parties on the substantive issues in the reference and (b) the conduct of the parties in the reference;
 - (ii) that the Tribunal should depart from the usual order where the relative success and the conduct of the parties justifies it so doing.
- 10 Ms Seitler argued –
 - (i) that the Claimant was successful on the vast majority of the issues between the parties, namely (a) which draft agreement should be the starting point for the Tribunal, (b) the terms of the agreement to be imposed on the parties by the Tribunal and (c) the recoverable transaction costs;
 - (ii) that the conduct of the Respondent was misguided and unreasonable.
- 11 Ms Seitler argued that the question as to which draft agreement should be the starting point for the Tribunal (i) dominated the parties' statements of case and skeleton arguments and (ii) occupied significant time at the hearing; and that the Tribunal determined that the Claimant's draft agreement was the sensible and appropriate starting point.
- 12 In relation to the terms of the agreement Ms Seitler stated that the Tribunal was initially faced with 47 disputed terms, although the Respondent conceded eight of those during the hearing. She submitted that the agreement imposed by the Tribunal included only five substantive changes to the Claimant's draft agreement (including one not referred to by the Respondent). The other four changes match the success claimed by the Respondent in paragraph 5(i)-(iv) above; but Ms Seitler submitted that in each case the success was only partial ('representing a compromise position that more closely resembled [the Claimant's] proposals'). In summary Ms Seitler submitted that of the 47 disputed terms, the Respondent conceded eight during the hearing, partially succeeded on four and failed to persuade the Tribunal on 34 disputed terms – meaning that the Respondent was fully successful on only one term relating to the timing of the provision of letters of authority.
- 13 In relation to transaction costs, the Tribunal awarded £15,000 compared with the Claimant's offer of £14,400 and the Respondent's claim of £61,449.47.
- 14 In relation to the conduct of the Claimant, Ms Seitler submitted that the Claimant (i) failed to engage with the draft agreement that was the subject of the reference, (ii) adopted an approach to negotiations that was stubborn and pedantic, (iii) failed to provide details of transaction costs and (iv) insisted on the production of lengthy and unnecessary documentation for the Tribunal hearing.

Discussion

- 15 In its Decision issued on 18 December 2023 the Tribunal set out the legal and factual background to the reference and it is not necessary to do so again for the purposes of this decision.
- 16 In determining the issue of liability for litigation costs, the starting point is the decision of the Upper Tribunal in *EE Limited and Hutchison 3G UK Limited v HSBC Bank plc* [2022] UKUT 174 (LC) where the Deputy Chamber President stated (at paragraphs 8-10) –
 - 8 As for the costs of the reference itself, most references under paragraph 26 of the Code for the imposition of an agreement conferring interim Code rights to enable operators to conduct surveys of potential telecommunications sites are resolved by consensus, without the need for a hearing. Often parties file an agreed form of order which they invite the Tribunal to make, including in it an agreement that there shall be no order for the costs of the reference.
 - 9 It should nevertheless be appreciated that the costs of references under paragraph 26 are in the discretion of the Tribunal. Where parties have not agreed that there should be no order for costs the Tribunal's usual order in such cases is that the operator should pay the site provider's costs which will then usually be summarily assessed ...
 - 10 The Tribunal's usual order reflects the principle that the costs of a reference are necessary because interim Code rights cannot be conferred by agreement but may only be imposed by order of the Tribunal. Statutory rights of compensation may also only be conferred by order of the Tribunal. The costs incurred by a site provider in a reference made necessary because an operator wishes to have a Code right to undertake a survey ought not in principle to fall on the site provider.
- 17 As paragraph 9 of decision makes clear, the usual order is not an order for the full costs claimed by the site provider: the costs will usually be summarily assessed.
- 18 However, Ms Seitler, on behalf of the Claimant, argued that the usual order was not appropriate in the circumstances of the present case; and that no order for costs should be made.
- 19 The Tribunal accepts Mr Seitler's argument that the Claimant was successful on the vast majority of issues in dispute. First, the Tribunal wholly rejected the argument of the Respondent on the issue as to which draft agreement should provide the starting point for the agreement to be imposed by the Tribunal: see paragraphs 29-33 of the Tribunal's Decision issued on 18 December 2023. Second, of the 47 disputed terms of the agreement, the Tribunal did not accept the argument of the Claimant in relation to only five. Third, the Tribunal awarded transaction costs to the Respondent only £400 more than the sum offered by the Claimant and less than 25 per cent of the sum claimed.
- 20 The Tribunal also accepts that the Respondent behaved unreasonably following the reference to the Upper Tribunal in its refusal to engage with the Claimant's draft agreement and its largely uncompromising approach to negotiations on that draft: see paragraphs 34-38 and 69 of the Tribunal's Decision issued on 18 December 2023.
- 21 However, the Tribunal is not persuaded that this is a case where the usual order should not be made and the Respondent should be denied all its litigation costs. There were some terms of the Claimant's draft agreement which, in the view of the Respondent, did not address fundamental concerns and required a decision of the Tribunal. Moreover, the Respondent succeeded, at least in part, in persuading the Tribunal to amend the Claimant's draft agreement accordingly.

- 22 Although the Tribunal is minded to make an order for costs, that order must reflect the overall limited success of the Respondent and the view of the Tribunal on the Respondent's conduct of the litigation. The manner in which it has conducted the proceedings has been disproportionate to the dispute.
- 23 Moreover, although the Respondent was entitled to instruct solicitors with expertise in the Code, the hourly rates charged well exceed the guideline figures.
- 24 The Tribunal notes the comments of the Deputy Chamber President in *Cornerstone Telecommunications Infrastructure Limited v Central Saint Giles General Partner Limited* [2019] UKUT 183 (LC). At paragraph 2, he said –

I also wish to emphasise the importance the Tribunal places on discouraging senseless disputes of this sort, and to put down a marker that the conduct which this case illustrates, over-reaching on one side and obstruction on the other, is disproportionate, inappropriate, and unacceptable. The Tribunal will do what it can to ensure such conduct is not allowed to become a recurring feature of Code disputes concerning new sites. There are legitimate matters to argue about in such cases, and nothing in this decision is intended to discourage those from being raised, but whether a small number of surveyors is permitted to go on a rooftop for a few hours on two or three occasions to establish whether it is even suitable for the installation of apparatus ought not to be one of them.

- 25 And at paragraph 4 –

The new Code regime is intended to facilitate the provision of telecommunications services without delay and at limited cost. The preparatory stages of the installation of new equipment (at least if the site itself is a new one) will almost always require a survey, conducted over a period of a few weeks and involving a small number of visits by a limited group of individuals, before a decision can be taken about the suitability of the site. If those preparatory stages are allowed to become the occasion for preliminary trials of strength involving legal firepower on the scale deployed in this reference there is a serious risk of the objectives of the Code being frustrated.

- 26 And at paragraph 30 –

The Tribunal wishes it to be known by other parties who refuse access to their land or buildings for surveys that, whatever the outcome, they cannot expect to recover costs on the scale incurred by the parties in these proceedings. Equally, the Tribunal wishes to make it clear to operators, as it has done in the past, that they cannot simply demand unquestioning cooperation from property owners.

- 27 The Tribunal has considered the detailed statement of costs provided by the Respondent. The Tribunal is satisfied that the appropriate order in this case is that the Claimant should pay £8,000 towards the costs of the Respondent. The Tribunal considers that to be a proportionate sum for the resolution of the issues on which the Respondent can be considered to have been successful. That figure is very much less than the Respondent has incurred in this reference. But in the view of the Tribunal, the Respondent need not have incurred nearly as much as it has.
- 28 The order the Tribunal makes is therefore that the Claimant shall pay a contribution towards the Respondent's costs, which the Tribunal summarily assesses in the sum of £8,000.

Appeal

- 29 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.
- 30 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.
- 31 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.
- 32 The application for permission to appeal must state the grounds of appeal and state the result the party making the application is seeking.

8 February 2024

Professor Nigel P Gravells
Deputy Regional Judge