



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

Case reference : **LC-2024-000071**

Subject premises : **Alder Castle
10 Noble Street
London Ec2V 7JU**

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

Representative : **Osborne Clarke LLP**

**Respondent
(Site provider)** : **Covent Garden IP Limited**

Representative : **Concorde Solicitors Limited**

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

Tribunal member : **Deputy Regional Judge Nigel Gravells**

Date of decision : **9 September 2024**

DECISION AND ORDER ON COSTS

Introduction

- 1 Following a reference to the Upper Tribunal (subsequently transferred to the First-tier Tribunal), by Decision and Order dated 24 July 2024 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 litigation costs in the sum of £62,035.25 (including VAT). The Claimant resists the claim that it should be responsible for the Respondent's costs and seeks an order for its own full litigation costs in the sum of £29,823.12 (including VAT).

Representations of the parties

Representations of the Respondent

- 4 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.
- 5 Furthermore, the Respondent argues –
 - (i) that, contrary to the assertion of the Claimant, the Respondent had sought to co-operate with the Claimant (i) in providing previous access to the subject premises and (ii) in engaging constructively in negotiating the terms of the Claimant's proposed MSV agreement;
 - (ii) that, by contrast, some of the Claimant's correspondence was 'threatening';
 - (iii) that both the Claimant and the Respondent made concessions on the terms of the MSV agreement but that some concessions by the Claimant were made very late in the day;
 - (iv) that the Respondent's solicitor's costs claimed reflect the work undertaken by a specialist telecommunications-related litigator.

Representations of the Claimant

- 6 The Claimant 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. However, the Claimant 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; and
 - (ii) that the Tribunal should depart from the usual order where the relative success and the conduct of the parties justifies it so doing.

The Claimant relies on (i) paragraph 96 of the Electronic Communications Code, (ii) the decision the Upper Tribunal in *Cornerstone Telecommunications Infrastructure Limited v (1) Central Saint Giles General Partner Limited (2) Clarion Housing Association Limited* [2019] UKUT 183 (LC) and (iii) the decisions of the First-tier Tribunal in *Cornerstone Telecommunications Infrastructure Limited v McCarthy & Stone Retirement Lifestyles Limited* LC-2023-000626 and *Cornerstone Telecommunications Infrastructure Limited v VMMC Estates* LC-2023-000710.

- 7 First, the Claimant argues that the Claimant was successful on all issues in dispute at the hearing, namely the consideration payable by the Claimant to the Respondent, the extent of the MSV site and the owner fees payable by the Claimant to the Respondent.
- 8 Second, the Claimant argues that the conduct of the Respondent was unreasonable and drove up the costs in dealing with the reference. In particular, the Claimant referred to –
 - (i) the Respondent's late application for permission to rely on expert valuation evidence;
 - (ii) the Respondent's application for permission to appeal the First-tier Tribunal's refusal to give permission;
 - (iii) the Respondent's pursuit of the issues in dispute at the hearing;
 - (iv) the Respondent's failure properly to engage with the Claimant prior to the issue of proceedings;
 - (v) even after engagement, the Respondent's raising and then dropping various points on the proposed MSV agreement;
 - (vi) the Respondent's last-minute concession that an MSV agreement should be imposed;
 - (vii) the Respondent's solicitor's overly-lengthy and at times pedantic correspondence;
 - (viii) the Respondent's inclusion in its witness evidence of a 21-page expert's report notwithstanding the refusal of the First-tier Tribunal to permit reliance on such evidence.
- 9 For these reasons the Claimant submits that the usual order is not appropriate in the present case; and that no order for litigation costs should be made in favour of the Respondent.
- 10 However, if the Tribunal is minded to award such costs, the Claimant argues –
 - (i) that the costs claimed are entirely disproportionate;
 - (ii) that the costs include the sum of £9,643.54 in relation to an expert valuation witness;
 - (iii) that 20 hours of liaising with the client is disproportionate;
 - (iv) that costs of almost £10,000 for work done on documents (including £3,445 on witness statements) are disproportionate;
 - (v) that Counsel's fees for advice/documents (£6,500) and the hearing (£9,000) are disproportionate.

- 11 In relation to the Claimant's claim for its own litigation costs, the Claimant argues –
- (i) that, although in previous cases the Claimant had claimed Counsel's fees only (see *Cornerstone Telecommunications Infrastructure Limited v McCarthy & Stone Retirement Lifestyles Limited* LC-2023-000626 and *Cornerstone Telecommunications Infrastructure Limited v VMMC Estates* LC-2023-000710), there is no reason for not claiming solicitor's fees in appropriate cases such as the present case;
 - (ii) that the costs claimed compare very favourably with the costs claimed by the Respondent
 - (iii) that, in contrast to the Respondent, which claimed all work at the hourly rate of a Grade A fee earner, the Claimant's costs included minimal charging at the hourly rate of a Grade A fee earner;
 - (iv) that the Respondent's lengthy correspondence and repeated failure to provide marked-up versions of the travelling draft of the MSV agreement drove up costs.

Discussion

- 12 In determining the parties' respective applications the Tribunal has given full consideration to their written representations.
- 13 Paragraph 96 of the Electronic Communications Code provides –
- (1) Where in any proceedings a tribunal exercises functions by virtue of regulations under paragraph 95(1), it may make such order as it thinks fit as to costs, or, in Scotland, expenses.
 - (2) The matters a tribunal must have regard to in making such an order include in particular the extent to which any party is successful in the proceedings.
- 14 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.

- 15 However, the Claimant argues that the usual order is not appropriate in the circumstances of the present case; and that no order for costs should be made in favour of the Respondent.
- 16 As noted, the Claimant was successful on all issues in dispute at the hearing, including the central issue of consideration.
- 17 The Tribunal also finds that the Respondent behaved unreasonably following the reference to the Upper Tribunal, primarily but not exclusively in its uncompromising approach to the issue of consideration.
- 18 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.

- 19 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.

- 20 The Tribunal is persuaded that, in the light of the total success of the Claimant and the conduct of the Respondent, this is a case where the usual order should not be made and the Respondent should be denied its litigation costs.
- 21 That leaves the Claimant's claim for its own full litigation costs.
- 22 It is clear from the observations of the Deputy Chamber President in *EE Limited and Hutchison 3G UK Limited v HSBC Bank plc* that the issue of litigation costs in Code cases does not follow the usual approach. The usual approach is that the successful party is entitled to recover all its reasonable costs from the unsuccessful party. However, in Code cases there is a presumption that in principle the site provider is entitled to recover its reasonable costs. That presumption shifts the balance between the parties so that, even where the site provider does not recover its costs, it does not follow that the operator is automatically entitled to recover all its reasonable costs.
- 23 As the Claimant pointed out, in previous appropriate cases it has limited its claim for litigation costs to Counsel's fees.
- 24 In the view of the Tribunal, that is also an appropriate limitation in the present case.

Order

- 25 The Tribunal orders that the Respondent shall pay a contribution towards the Claimant's costs, which the Tribunal summarily assesses in the sum of £8,400 (including VAT).

Appeal

- 26 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.
- 27 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.
- 28 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.
- 29 The application for permission to appeal must state the grounds of appeal and state the result the party making the application is seeking.

9 September 2024

Professor Nigel P Gravells
Deputy Regional Judge