FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LC – 2022 – 000361**
Property	**:**	**Nine Mile Water, Nether Wallop, Stockbridge, Hampshire SO20 8DR**
Claimants (Operator)	**:**	**On Tower UK Limited**
Representative	**:**	**Gowling WLG (UK) LLP**
Respondent (Site Provider)	**:**	**IX Limited**
Representative	**:**	**Freeths LLP**
Application	**:**	**Electronic Communications Code Paragraph 96 (costs) Paragraphs 25 and 84 (expenses)**
Date of Decision	**:**	**07 March 2023**

DECISION

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1. The Respondent owns some 800 acres of land at Nine Mile Water. The Claimant (formerly known as Arqiva) and its predecessors in title Orange and EE, have occupied a small part of the land since 2003.

2. On 15th April 2020 the Claimant served a Notice under Paragraph 33 of Schedule 3A to the Communications Act 2003 ("the Code") seeking to terminate the subsisting Code agreement and requiring the parties to enter into a new agreement.

3. A Reference pursuant to Paragraph 33(5) of the Code was received by the Upper Tribunal on 21st July 2022. By Order dated 18th August 2022 the Deputy Chamber President transferred the reference to the First-tier Tribunal.

4. On 20th July 2022 the Claimant served Statement of Case. The Claimant's Proposed Agreement appears at Annexure 2. The Claimant's proposed rent of £1,500 p.a. is set out at paragraph 19 and is included in the Proposed Agreement.

5. On 20th September 2022 the Respondent served Statement of Case. The Respondent's position is that it seeks imposition of an agreement by the Tribunal under paragraph 34 of the Code in order to safeguard its position on compensation under paragraph 25. The Respondent agrees the figure of £1,500.

6. This matter was listed for Case Management Hearing by way of remote video platform before me on 24th October 2022. Martin Thomas (Gowling) appeared for the Claimant and Jonathan Willis (counsel) appeared for the Respondent.

7. At the CMH Mr Willis invited me to impose an agreement in the form annexed to the Claimant's Statement of Case. Mr Thomas resisted imposition of an agreement because the proposed rental figure was on the basis of a consensual agreement. Absent a consensual agreement the Claimant's position is that rent should be £750-850 based on Affinity guidelines as the site is rural with housing in the vicinity but not immediately adjacent.

8. The CMH was adjourned until 13th December 2022 for consideration of the following issues:

    - Does the Claimant need permission to amend proposed rent as set out in its Statement of Case under FTT Rule 6(3)(c) or otherwise?
    - If so, should permission be granted?
    - If permission is refused does the Tribunal have power to summarily impose agreement under paragraph 34(6) at the next hearing?
    - Determination of applications for and summary assessment of costs on application by either party under paragraph 96 (and also Respondent's application for costs of the CMH on 24th October)
    - Determination of Respondent's reasonable transactional costs under paragraphs 25 and 84.

9. However shortly before the adjourned hearing the parties finally reached a settlement. By Consent Order dated 12th December 2022 and pursuant to Paragraph 34(6) of the Code, the Tribunal ordered that the existing agreement will terminate and the Claimant and Respondent will enter into a new agreement on the terms proposed by the Claimant as at Annexure 2 of the Claimant's Statement of Case, save that the rent will be £850 per annum; and the rent commencement date to be 12 December 2022.

10. The Consent Order contained the following further Directions:

    The Tribunal to make an order for both litigation and transactional costs on paper, where the following directions will apply:

    a. The parties to exchange schedules of costs by 20 December 2022;
    b. The parties to exchange written submissions in relation to costs by 6 January 2023; and
    c. The parties to exchange replies to written submissions in relation to costs by 13 January 2023.

11. I have, as requested determined both litigation and transactional costs without a hearing. I have considered Respondent's submissions dated 13th January 2023, Claimant's submissions dated 17th January 2023, Respondent's Reply of 24th January and Claimant's Reply also dated 24th January 2023. I have also considered Bundle of correspondence running to 499 pages.

12. The parties seek costs as follows:

    - Respondent's surveyors transaction costs - £14,960
    - Respondent's solicitor's transaction costs - £9,087.61
    - Respondent's litigation costs - £27,390.84
    - Claimant's costs - £22,300.32

    No claim for VAT is made.

Is the Claimant entitled to its costs?

13. The Claimant accepts that the Respondent is entitled to its reasonable transaction costs. The Claimants position on litigations costs is:

    - No Order for costs up to 19/10/22
    - Respondent should pay Claimant's costs after 19/10/22 as Respondent failed to accept Claimant's Consent Order
    - In any event Respondent to pay Claimant's post- CMH costs

14. Having heard from both parties at the CMH I am satisfied that the rent set out in the Claimants Statement of Case and draft Agreement annexed was incorrect. I was told by Mr Thomas that the rent of £1500 p.a. was for a "consensual deal". If that is correct that figure should not have been set out in the Claimant's Statement of Case. The Respondent was represented by counsel with considerable experience of Code cases. I entirely understand why Mr Willis invited me to impose an agreement based

on the Claimant's case. In doing so he raised an interesting and important point on amendment and the Tribunal's powers to summarily determine a Reference. I equally appreciate why the Respondent subsequently took the pragmatic course of settling the Reference. It might well have been disproportionate to continue to incur substantial costs arguing over the difference between £850p.a. and £1500 p.a.

15. Despite the Claimant's wish to reach a "consensual deal" the Respondent wished to protect its position in relation to compensation. The Respondent was fully entitled to insist on the imposition of a new agreement by the Tribunal. I find that to be a thoroughly principled position to take. The Respondent was fully entitled to agree a lower rent than that offered under a "consensual deal" in order to retain its future rights to make application for compensation.

16. Under those circumstances I find that there is nothing in the Respondent's conduct which entitles the Claimant to its costs nor to displace the convention that a site owner which does not unreasonably oppose renewal in principle should be entitled to its reasonable and proportionate costs.

Transaction Costs

17. Paragraph 25(1) of the Code provides:

"If the court makes an order under paragraph 20 the court may also order the operator to pay compensation to the relevant person for any loss or damage that has been sustained or will be sustained by that person as a result of the exercise of the code right to which the order relates"

18. Paragraph 84(2)(a) provides:

"Depending on the circumstances, the power of the court to order the payment of compensation for loss or damage includes power to order payment for—

(a) expenses (including reasonable legal and valuation expenses, subject to the provisions of any enactment about the powers of the court by whom the order for compensation is made to award costs or, in Scotland, expenses),"

These provisions are applicable in this case by virtue of paragraph 34(11).

19. The test to be applied when considering transaction costs is set out by Judge Cooke at paragraph 94 of **Cornerstone Telecommunications Infrastructure Limited v The Mayor and Burgesses of the London Borough of Hackney** [2022] UKUT 210 (LC):

"Finally we come to transaction costs. The MSV, and the process of negotiation leading up to it, should not leave the respondent out of pocket; it is well-established that it can expect the claimant to reimburse the legal and professional fees that it has occurred in the negotiation of the agreement."

Transaction costs in that reference (£29,580 less litigation costs to be stripped out) were *"higher than normally seen for an MSV, because this has been an unusually fraught and indeed hostile negotiation"*

20. In **EE Limited and Hutchison 3G UK Limited v Affinity Water Limited** [2022] UKUT 08 (LC) the Deputy Chamber President reiterated, at paragraph 88, that:

    "The claimants' standard documents are themselves complex and deal with an extremely complicated subject matter. A site provider is entitled to seek advice on the lease and to recover the reasonable cost of doing so."

    In that case legal expenses were reduced from £7,449 to £6,000 *"allowing for some duplication"*.

21. In **On Tower UK Limited v AP Wireless II (UK) Limited** [2022] UKUT 152 (LC) Judge Cooke allowed claims in respect of two properties in the sums of £6,276 and £6,472 observing at paragraph 261:

    "These were never going to be inexpensive transactions, in view of the number of terms that the parties had to negotiate and of the fact that both parties regarded the health and safety terms as issues of principle. As is pointed out for APW the complexity is seen by the number of colours on the travelling drafts; these were not three matching leases and none of them was simple. We accept the transaction costs as claimed, and we point out that there is no reason for them to be matched in less complex deals where the parties are able to reach agreement."

22. Finally I bear firmly in mind the decision of the Deputy Chamber President in **Cornerstone Telecommunications Infrastructure Limited v St Martins Property Investments and another** [2021] UKUT 262 (LC) at paragraph 34:

    "The notion that an operator should be required only to make a contribution towards the legal expenses incurred by a site provider, and that the site provider should thereby be left out of pocket, is flawed. The site provider is entitled to recoup its reasonable legal expenses – all of them"

    In that case reasonable legal costs were £11,000. However the Upper Tribunal made it clear that:

    "Neither that figure nor the figure that I award in this case should be regarded as setting a norm; they are simply the figures produced by the application of the proper principle to the circumstances of a particular case"

23. Paragraph 33 Notice was served in April 2020. A consensual deal was always on the table at a rent of £1,500 p.a. By the end of 2021 all terms were agreed save that the Respondent sought a clause safeguarding its future position in relation to compensation. In addition the parties were unable to agree the level of the Respondent's legal and valuation costs. In December 2021 the Claimant's agent suggested that the Respondent apply, at its own cost, to the Tribunal on the basis of a Consent Order with rent of £750 p.a. It is not unsurprising that the Respondent did

not take up that invitation. It was not until July 2020 that the Claimant issued proceedings.

24. The Claimant has allowed negotiations to become protracted. Despite serving Notice in April 2020 it did not make Reference to the Upper Tribunal until July 2022, over two years later. The Claimant seems to have been overly wedded to the notion of a "consensual deal". It is inevitable that the longer negotiations drag on without reaching a conclusion the greater the parties' transaction costs. The Claimant, having started the ball rolling in seeking a new agreement to replace arrangements in place since 2003 should have got on with matters and applied to the Upper Tribunal much sooner than it did. The Claimant's dilatory attitude has only prolonged negotiations and increased transactional costs.

25. I have been assisted by the very helpful analysis by Mr Willis in Submissions of the Respondent on the Question of Costs dated 13th January 2023. From paragraph 29 onwards Mr Willis makes submissions on what was done by Mr Bays (BCM - Respondent's Agent) and Freeths LLP (Respondent's solicitors) during what were clearly protracted negotiations. Page numbers are references to the Bundle containing a comprehensive schedule of correspondence albeit helpful set out in chronological order by Mr Willis in Annex 1 to his Submissions

26. At paragraphs 30 – 39 of his Submissions Mr Willis analyses the first six months of negotiations. Heads of terms were issued to the Respondent Ltd on 21st January 2020 (pages 271- 279). Following an exchange of correspondence between surveyors Mr Bays asked for a copy of the 4G Exclusion Zone plan in March 2020 (page 286). On 24th March 2020 the surveyors began discussions in relation to covenants requiring the Claimant to comply with Health and Safety legislation (including ICNIRP) (pages 288- 290). Email correspondence continued between the respective parties' surveyors into early June (page 294). On 15th April 2020 and whilst that exchange of correspondence was ongoing, Paragraph 33 Notice was served.

27. On 11th June 2020 Mr Bays (BCM) set out the Respondent's position (pages 295-298). The Respondent discloses that service of Paragraph 33 Notice *"has rather forced us to take further legal advice in this matter".* Matters in dispute appear to be rent, legal and surveyor's costs, rent review, sharing, equipment rights, indemnity, insurance, health and safety, break clause, access rights, wayleaves, generator and emergency temporary base station. Requests for disclosure were renewed.

28. It is clear that the Respondent had legitimate concerns about the new agreement. The mast appears to be in proximity to *"my client's house, various other residential tenancies and a business park" (page 289).* 5G exclusion zones are of *"paramount importance"*. It also appears that the Respondent was in the middle of a fibre broadband rollout which was at the *"second phase"* as part of *"ongoing development plans for the estate"* (page 298).

29. During June and July 2020 the parties agents exchange lengthy emails negotiating those matters in dispute (pages 299-305). The Respondent remains *"deeply concerned*" about radiation from the 5G mast. It appears (page 301) that the Claimant appreciated those concerns, and there is discussion about an ICNIRP survey "*at their own cost*". The Respondent also expresses reasonable concern about

the extent of rights sought over its 2,000 acre estate which includes livestock and a farm shoot. It is clear that there are also special circumstances at play in relation to personal health concerns (page 305 – para. d)

30. It is therefore clear that even during the first six months of negotiation that the Respondent had legitimate concerns both in relation to residential occupiers and development plans for the wider estate. It had reasonably taken advice from Mr Bays of BCM, who at that stage was fronting negotiations for the Respondent, and also from solicitors who appear to have been providing legal advice in the background.

31. At paragraphs 40 -57 Mr Willis analyses what was done by the Respondent's advisors during "later moments in negotiations".

32. Pages 308 – 315 of the Bundle evidence discussions and negotiations between agents between June and November 2020 as to 5G and health concerns including discussions as to the undertaking of an independent RF survey. I note the potential interest in the site from AP Wireless (page 317) which will no doubt have been a consideration for the Respondent during negotiations.

33. By January 2021 the parties had reached agreement on all matters with the exception of upgrading and sharing and the question of valuation (page 316). It is worth noting that negotiations in relation to rent took place prior to the Affinity Water Guidelines set out by the Upper Tribunal in 2022 (**EE Limited and Hutchison 3G Limited v Affinity Water Limited** [2022] UKUT 08 (LC)). Accordingly negotiations on the level of site payment took place against a background of developing caselaw.

34. On 8th February 2021 Mr Bays sent a detailed email to the Claimant's surveyor enclosing amended heads of terms and setting out the Respondent's position on alternative use value and allowance for additional benefits (pages 349-359). On 8th March the Claimant's surveyor responded suggesting a figure of £750 p.a. together with Heads of Terms highlighting in yellow those matters still in dispute (pages 360-375). On 21st April 2021 the Claimant offered £1500 p.a. on the basis of a consensual agreement (pages 376-379).

35. By June 2021 the Respondent was proposing a without prejudice meeting. I also note that the Respondent's agent was continuing to take legal advice (page 380). It appears that the proposal of a meeting met with some resistance (see pages 381- 384 and in particular page 383).

36. Despite the indication given in January 2021 that substantial agreement had been reached email exchanges September 2021 – December 2021 (pages 455 – 464) and January 2022 (pages 452 – 454) indicate that ICNIRP, emergency equipment, wayleave, indemnity and application to the Tribunal to obtain compensation remained in dispute. It is significant that by this time Freeths LLP were leading negotiations on behalf of the Respondent and inter parties correspondence comes from them rather than Mr Bays (the Respondent's agent).

37. In January 2022 the Claimant's surveyor sought confirmation from Freeths that they would issue proceedings "*as it is they who are seeking the ability to claim compensation via the Tribunal*" (page 452).

38. On 15th March 2022 the Respondent's agent provided details of legal and agent's transactional costs (page 389). The parties were unable to reach any sort of agreement on costs - the sum claim was "*vehemently rejected"* by the Claimant (page 387). At this point an impasse was reached resulting in letter before action (page 49) and ultimately reference to the Upper Tribunal (see page 66) (and see also pages 385 – 386).

39. I have dealt in some detail with the history of these protracted negotiations in some detail. I have done so in order to attempt to understand how transaction costs (properly called reasonable legal and valuation expenses) could possibly have reached £14,960 incurred by surveyors and £9,087.61 incurred by solicitors.

40. This is a renewal of an agreement which has been in place for nearly 20 years. None of the complexities associated with a new Paragraph 20 agreement or an MSV arise. The new Lease is for a term of 10 years (with a break clause after 3 years) and a rent of £850 p.a. (with a review after 5 years). The parties were able to agree terms shortly after the CMH. This has not been an unusually fraught or hostile negotiation. Whilst the operators standard documents are themselves complex and deal with an extremely complicated subject matter there is nothing in the documentation here which suggests anything particularly unusual or novel to justify the extraordinarily high figures claimed for transactional costs. Valuation issues here were straightforward - £850 was agreed in accordance with Affinity guidelines and no valuable alternative use has been put forward. Transactional costs relate solely to Heads of Terms. A draft Lease was not circulated until a draft was attached to Claimant's Statement of Case in July 2020.

41. Transaction costs usually fall into three distinct categories. Firstly there is valuation advice usually provided by the site owner's surveyor or agent. Second comes negotiations of Heads of Terms. At the third stage solicitors will consider and approve the draft Lease.

42. Under the first heading Mr Bays has provided valuation advice. As that advice was provided prior to Affinity Water Guidelines he will have had to keep abreast of developing caselaw in this area. However ultimately a very modest rent of £850 p.a. was agreed. Clearly this is not a case where very significant or time consuming valuation advice was reasonably required or given.

43. The vast majority of legal and valuation costs arise under the second stage and are attributable to negotiating heads of terms. Negotiations were carried out initially by Mr Bays. It is however clear that he sought legal advice as and when necessary. However Mr Willis' analysis of the correspondence shows that by September 2021 Freeths had taken over negotiations on behalf of the Respondent. There is no reason why Heads of Terms cannot be negotiated either by solicitors or agents. Indeed there is no reason why both cannot be involved. Code agreements involve complex legal issues and it is entirely reasonable that a site owner will want to take both legal and valuation advice on proposed Heads of Terms.

44. Negotiating and drafting the lease was straightforward. A draft Lease was not circulated until a draft was attached to Claimant's Statement of Case in July 2020. As Mr Willis concedes at paragraph 7(xii) of his Submissions the Respondent

immediately agreed to the draft agreement in the form attached to the Claimant's Statement of Case. Accordingly costs at the third stage will be modest as very little work was done or required. This is not a transaction where a travelling draft of the lease passed backwards and forward during disputes over drafting.

45. This leads me to ask how such extraordinarily large amounts of costs were incurred by solicitors and surveyors/agents for the Respondent merely to agree heads of terms? The first answer to that question must be that the Claimant allowed these negotiations to become protracted. The period from service of the Notice (April 2020) to date of issue of the reference (July 2022) exceeds two years. Protracted negotiations inevitably lead to increased costs. I have no hesitation in finding that those additional transaction costs must be borne by the Claimant. As Mr Wills puts matter at paragraph 6 of his Submission: "*the matter has dragged on and on, for a tiny saving in rent, delivered over a 10 year period, which has been dwarfed by the costs that both sides have now incurred. R should not be left out of pocket for that.*"

46. However I am drawn to the inescapable conclusion that the only explanation for the level of transaction costs is that there has been very considerable duplication here. There has been duplication on two levels. The first is duplicated work by solicitors. Whilst I have no hesitation in finding that it was reasonable for the Respondent to take legal advice during the negotiation of heads of terms it was not reasonable for the Respondent to field a team of 6 solicitors. I note that rather than adopt the usual approach of utilising the services of a separate specialist transactional lawyer the team of 6 solicitors who provided the transactional advice were also the same team that conducted the litigation. I have considered Schedule of Costs in the sum of £9,087.61. I am satisfied that the only possible explanation for such a high level of costs simply for negotiating Heads of Terms and approving Claimant's draft lease as drawn is that there has been substantial duplication.

47. In addition to legal costs of £9,087 agent/surveyors costs run to a further £14,960. The work done by Mr Bays relates to valuation of a very modest annual rent (£850 p.a.) and negotiating heads of terms. I find that the total costs of approximately £24,000 can only be attributable by duplication between solicitors and agent/surveyor both of whom were involved in negotiations at the same time. As I have found when considering analysis of correspondence significant issues were raised. I entirely understand why the Respondent would have concerns about a very valuable 2000 acre estate consisting of residential properties, a business park, livestock and a farm shoot. I appreciate that service of the Notice coincided with the Respondent's own plans for fibre roll out. Above all I entirely understand the Respondents personal circumstances and health and safety concerns. Nevertheless none of those matters or concerns begins to explain transactional costs of nearly £24,000

48. How do I assess the level of duplication here? I am mindful that I am not carrying out a summary assessment of costs. I am required to determine reasonable expenses. The question of proportionality does not arise. I also bear firmly in mind the warning of the Upper Tribunal:

"*The notion that an operator should be required only to make a contribution towards the legal expenses incurred by a site provider, and that the site provider should thereby be left out of pocket, is flawed*"

49. To reflect duplication I reduce both legal and surveyor/agent costs by 30% to reflect duplication between the two disciplines and I reduce legal costs by a further 10% to reflect duplication amongst the team of 6 fee earners. I make it absolutely clear that I am not ordering a contribution towards expenses. In making a deduction for duplication I am seeking to arrive at a figure for reasonable legal and valuation expenses. Having done so those reasonable expenses are allowed in full.

50. I determine reasonable legal expenses in the sum of £5452, say, £5500 and reasonable valuation expenses in the sum of £10, 472, say, £10,500.

Litigation Costs

51. Paragraph 96 of the Code "Award of costs by the Tribunal" 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

52. In exercising my power to award costs I have regard to the Upper Tribunal (Lands Chamber) Practice Direction issued by the Chamber President on 19th October 2020:

24.10 The Tribunal's power to award costs is discretionary, and it will usually be exercised in accordance with the principles applied in the High Court. The general rule is that the successful party ought to receive their costs from the unsuccessful party. (A different general rule applies to applications to discharge or modify a restrictive covenant – see paragraph 15.10 above). The Tribunal will have regard to all the circumstances of the case, including the conduct of the parties; whether a party has succeeded on part of their case, even if they have not been wholly successful; and admissible offers to settle. The conduct which may be taken into account will include conduct during and before the proceedings; whether a party has acted reasonably in pursuing or contesting an issue; the manner in which they have conducted their case; whether or not they have exaggerated their claim; and whether they have unreasonably refused to engage in ADR or comply with a relevant pre-reference protocol.

24.11 The Tribunal will normally award costs on the standard basis. Costs will only be allowed to the extent that they are reasonable and proportionate to the matters in issue, and any doubt as to whether costs were reasonably incurred or reasonable and proportionate will be resolved in favour of the paying party.

53. I think it may be helpful at the outset to remind the parties of what was said by the Deputy Chamber President in **Cornerstone Telecommunications Infrastructure Limited v St Martin's Property Limited and another** [2021] UKUT 262 (LC) at paragraphs 42 – 46:

42. The Tribunal has in the past made it clear that it does not regard applications for access as justifying the sort of expenditure which it sees yet again in this case. In Cornerstone Telecommunications Infrastructure Ltd v Central Saint Giles General Partner Ltd [2019] UKUT 183 (LC) three parties incurred more than £100,000 in aggregate in a dispute (eventually resolved by agreement) over access to the roof a residential building. The Tribunal said this, at [4], about the objects of the Code: "The new Code regime is intended to facilitate the provision of telecommunications services without delay and at limited cost. The preparatory stages of the installation of new equipment (at least if the site itself is a new one) will almost always require a survey, conducted over a period of a few weeks and involving a small number of visits by a limited group of individuals, before a decision can be taken about the suitability of the site. If those preparatory stages are allowed to become the occasion for preliminary trials of strength involving legal firepower on the scale deployed in this reference there is a serious risk of the objectives of the Code being frustrated." The Tribunal awarded the site providers a small fraction of the costs they had incurred and added this warning, at [30]: "The Tribunal wishes it to be known by other parties who refuse access to their land or buildings for surveys that, whatever the outcome, they cannot expect to recover costs on the scale incurred by the parties in these proceedings."

43. I take this opportunity to reiterate that warning.

44. I do not think the Tribunal's view of how this sort of litigation should be conducted is unrealistic. The issues are usually quite narrow. They do not require extensive evidence. They do not require complicated statements of case which obscure the issues or elaborate bundles of documents. They ought to be capable of being conducted within a relatively restricted budget, proportionate to the matters in issue. The Tribunal knows from other cases that they are capable of being conducted in that way. This is the second paragraph 26 reference the Tribunal has dealt with today. In the first reference the site providers agreed in principle that Code rights should be imposed but the parties were in dispute over a number of the terms. The dispute had not gone on for as long as this one, but the bill of costs provided by the site provider's solicitors came to a little over £6,500. I do not think I can regard this that case as setting a benchmark for cost in MSV cases because each case will involve a particular building and particular issues. In this case, for example, there was an important dispute over intrusive works. Nevertheless, I am influenced by the confirmation provided by that bill of costs that these proceedings can be sensibly conducted at really quite modest expense. It can be done; and since it can be done, it ought to be done.

45. In this case the respondent will recover its transactional costs in full but I do not intend to make an order for its litigation costs in anything like the figure which it seeks. The claimant has managed to conduct this litigation at a cost of £30,500, which I consider to be hugely disproportionate for a case in which the principle of access was not in dispute and the elaborate evidence concerning satisfaction of the paragraph 21 conditions was therefore unnecessary. Yet the respondent's bill comes in at more than twice as much and again features much irrelevant evidence and unproductive activity (as the Tribunal itself has experienced in the last few days).

46. The order I make is that the claimant will pay the first respondent's costs assessed at £12,500 and the second respondent's costs assessed at £1,500. That sum reflects both the extent of the respondent's success and the proportionate cost of achieving it.

54. I would respectfully seek to add to the warning given by the Deputy Chamber President in two respects. Firstly the matter before me involves an uncontested renewal of a longstanding agreement. It is a much more straightforward piece of litigation than an MSV involving an intrusive survey. The Deputy Chamber President's observations - trials of strength, legal firepower, hugely disproportionate and unproductive activity – resonate even more strongly in the context of an unopposed renewal.

55. The second point is that both sides (and indeed most of the firms of solicitors that appear before me in Code cases) have simply failed to appreciate that these are proceedings before the First-tier Tribunal. The Upper Tribunal has transferred this reference because no point of principal is engaged and there is no other compelling reason for it to continue there. I do not expect parties to conduct cases before the First-tier Tribunal as if it were the Upper Tribunal or the High Court.

56. Paragraph 96(2) requires me to consider the extent to which the Respondent has been successful. The reality is that the Respondent has achieved very little. The Claimant has secured a new agreement, modernised terms and a significant reduction in the rent to £850 p.a. On any view the Claimant has been by far the most successful. Indeed it is only the convention that a site owner who does not unreasonably oppose renewal should have its costs that protects the Respondent from an adverse costs order.

57. What sum reflects both the extent of the respondent's success and the proportionate cost of achieving it? Certainly not £27,390.84.

58. I have before me the Respondent's N260 filed at the CMH on 24th October 2022. The total claimed was £10,856.98. On this occasion the Respondent fielded a team of 5 solicitors together with counsel. The CMH was adjourned for both parties to serve witness statements and was relisted for 13th December 2022. However that hearing was not effective and a Consent Order disposing of proceedings was entered into. Thereafter both parties prepared Submissions and Replies on costs. As a result the Respondent's costs have increased to £27,390.84 (6 solicitors plus counsel). It would appear that over £17,000 in costs has been incurred in preparing a single Witness Statement, entering into a Consent Order and making written submissions on costs and expenses.

59. The reality is that the Respondent has achieved very little following adjournment of the CMH. It has accepted the agreement proffered by the Claimant in its Statement of Case served in September 2020. It has accepted the rental figure set out by Mr Thomas at the CMH of £850 (rather than £1500 offered for a consensual deal). On any analysis the Respondent has not been successful following the CMH. I am afraid that the Respondent's conduct following the CMH can only be characterised as the preparation of irrelevant evidence and the undertaking of unproductive activity.

60. Having considered N260 and in particular Schedule of work done on documents I allow £1000 for work on witness statement and £750 for instructing counsel. Both the Respondents Submission on costs and its Reply were ably and helpfully drafted by Mr Willis of counsel. It appears that his fee for that work was £2,300 (deducting amounts already incurred up to and including CMH). That fee is entirely reasonable and proportionate.

61. I add those sums to the cost incurred up to the CMH (£10856.98) which gives a total of £14906. I deduct 20% for duplication amongst the 6 solicitors and find the sum of £11924, say £12,000 to be reasonable and proportionate.

Decision

62. Pursuant to Paragraph 84(2)(a) of the Code the Tribunal orders the Claimants to pay to the Respondent the sum of £10,500 being reasonable valuation expenses and the further sum of £5,500 being reasonable legal expenses in relation to the Agreement imposed upon the parties by paragraph 1 of the Order of the Tribunal dated 12th December 2022.

63. Pursuant to Paragraph 96(1) of the Code the Tribunal orders the Claimant to pay the Respondent's costs of these proceedings summarily assessed in the sum of £12,000.

64. Payment of expenses and costs shall be made within 28 days of the date of this Decision.

D Jackson
Judge of the First-tier Tribunal

Either 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 its written reasons for the Decision to the party seeking permission.