



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

Case Reference : **LC – 2024 – 000234**

Property : **Bankside 2, 100 Southwark Street,
London SE1 OTF**

**Claimants
(Operator)** : **EE Limited (1)
Hutchison 3G UK Limited (2)**

Representative : **Winckworth Sherwood LLP**

**Respondent
(Site Provider)** : **RREEF Bankside II Limited**

Representative : **Macfarlanes LLP**

Application : **Electronic Communications Code
Paragraph 96 (costs)
Paragraphs 25 and 84 (expenses)**

Date of Decision : **20th June 2024**

WRITTEN REASONS

1. The Respondent is the registered leasehold owner of Bankside 2 and the occupier for the purposes of conferring Code rights.
2. On 27th May 2022 the Claimant served a Notice under Paragraph 26(3) of Schedule 3A to the Communications Act 2003 (“the Code”)
3. A Reference was received by the Upper Tribunal on 5th April 2024 including an application for an order imposing an agreement for rights under the Code on an interim basis. By Order dated 8th April 2024 the reference was transferred to the First-tier Tribunal.
4. The application was listed for determination at a Case Management Hearing which took place by way of remote video platform on 17th June 2024. James Tipler appeared for the Claimant and Michael Ranson for the Respondent
5. On 13th June 2024, in accordance with Paragraph 26(3)(a) of the Code, the parties agreed to the making of an order by the Tribunal and also the terms of the agreement to be imposed. Accordingly I have, by consent, made an Order to take effect as an agreement granting interim code rights in accordance with Paragraph 26 of the Code
6. The only matters remaining in dispute are:
 - Respondent’s solicitor’s transaction costs - £17,075.50
 - Respondent’s litigation costs - £21,287.50

No claim for VAT is made.

Transaction Costs

7. 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”

Para 25(1) applies to interim agreements by virtue of para 26(4)(e)

8. 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 26(4) (f).

9. 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.”

10. 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”.

11. 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.”

12. 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”

13. At paragraph 26 of his Skeleton Argument Mr Ranson helpfully sets out how the Tribunal should approach transaction costs:

“The task for the Tribunal is therefore to identify the amount of R’s reasonable legal expenses. Having done so, the Code requires Cs to pay all of those expenses to R”

14. My task is made more difficult by the paucity of information contained in “Summary of Transaction Costs” prepared by the Respondent’s solicitors. Work was done over four periods between April 2022 and June 2024. (I assume that the periods confusingly referred to as “August-November 2022”, “August-September 2022” and “November- February 2023” are in fact to be read as two periods: August- September 2022 and November 2022 – February 2023). The Summary breaks down each period into correspondence between parties, correspondence with client, internal correspondence/liaison and work on documents. The Summary discloses 6 fee earners working on this matter and provides an hourly rate for each fee earner together with total hours taken. There is however no detail at all as to exactly what was done, when and by whom. The Summary concludes with a certificate. It is not clear who provided that certificate, but I am told it was a Senior Associate.
15. How then am I to make sense of the “Summary of Transaction Costs” and how do I begin to determine whether or not those costs were reasonable? The Property is valuable London real estate. The Respondent acted entirely reasonably in ensuring that its leasehold interest was protected. The Respondent was entitled to take advice from solicitors of its own choosing and was entitled to instruct a major City law firm. Detailed advice and drafting was required as a survey involving intrusive work was being sought. The delay by the Claimant between serving the Notice in 2022 and applying to the Tribunal in 2024 no doubt increased cost.
16. Balanced against those considerations I look at the end product. The final MSV agreement runs to 3 pages with a half page schedule attached. It is frankly difficult to see how any significant costs have been incurred over such a slight document. Of course the Respondent would in addition have reasonably taken detailed advice in 2022 when the Code Notice was served.
17. I have no hesitation in stripping out work described as “Macfarlanes Internal Correspondence and Liaison” which amounts to a little over of £4,300. In addition I find that the use of 6 fee earners is not reasonable and deduct times claimed by fee earners 1, 5 and 6 which amounts to just over £1500.
18. As far as the balance of transactional costs is concerned, I have to do the best I can with the limited information provided in the Summary. Tribunal proceedings were commenced in April 2024. The Respondent’s solicitors recommenced work in May 2024. Transactional costs incurred May – June 2024 amount to approximately £2,762 (after deduction of “Macfarlanes Internal Correspondence and Liaison”). That sum is entirely reasonable for negotiating, drafting and advising on a 3 page MSV agreement.
19. No work was done on documentation during the various periods August 2022 – February 2023. However the Respondent’s solicitors will have provided important and significant advice in 2022 following service of the Notice. The Summary does not assist me as to what was done by whom during 2022. Doing the best I can I find that the

amount of work done on receipt of the Notice would have been broadly the same as the work done in connection with the MSV agreement. That results in reasonable legal expenses of, say, £5,500.

20. I determine reasonable legal expenses in the sum of £5,500.

Litigation Costs

21. 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

22. Rule 13(1)(d) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rule 2013 makes provision for an order in respect of costs in proceedings under the Code.

23. The starting point in MSV cases is **EE Limited and Hutchison 3G UK Limited v HSBC Bank PLC** [2022] UKUT 174 (LC):

“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. This case is no exception.

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.”

24. There is nothing here to displace the usual order and the Respondent should have its costs of the reference.

25. 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 of 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.

26. I would respectfully add a further warning. These proceedings took place before the First-tier Tribunal. It is inappropriate for parties to conduct proceedings before the FTT in the same manner as they would before the Upper Tribunal or the High Court. For that reason costs incurred in FTT proceedings should be significantly less than costs incurred if the reference proceeded before the Upper Tribunal.
27. What is the extent of the Respondent's success and what are the proportionate costs of achieving it? The Respondent did not oppose an intrusive survey. There was no dispute here. The MSV Agreement, running to 3 pages, was agreed without difficulty. The parties finalised a Consent Order shortly before the CMH. The Respondent was entitled to ask the Tribunal for an Order for its transaction and litigation costs. The Respondent was successful in obtaining its costs but in a much reduced amount.
28. I summarily determine the Respondent's reasonable and proportionate costs of the reference in the sum of £7250.

Decision

29. Pursuant to Paragraph 84(2)(a) of the Code the Tribunal orders the Claimant to pay to the Respondent the sum of £5,500 being reasonable legal expenses.
30. 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 £7250.
31. 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.