FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LC – 2022 – 000482**
Property	**:**	**Central Cross, Tottenham Court Road, London W1T 1BJ**
Claimant (Operator)	**:**	**EE Limited and Hutchison 3G UK Limited**
Representative	**:**	**DWF Law LLP**
Respondent (Site Provider)	**:**	**Derwent Central Cross Limited**
Representative	**:**	**Eversheds Sutherland (International) LLP**
Application	**:**	**Electronic Communications Code Paragraphs 25 and 84**
Tribunal	**:**	**Judge D Jackson** **Mr N Wint FRICS**
Date of Decision	**:**	**07 February 2023**

DECISION
(Compensation – Legal Expenses)

Background

1. By Notice dated 18th July 2022 given under Paragraph 26 of the Electronic Communications Code ("the Code") the Claimants seek interim code rights allowing for access and survey (an "MSV") in respect of the rooftop of a building known as Central Cross, Tottenham Court Road, London W1T 1BJ of which the Respondent is the freeholder.

2. Notice of Reference under Schedule 3A of the Communications Act 2003 was received by the Upper Tribunal on 16 September 2022 including an application for an order imposing an agreement for rights under the Code on an interim basis. By Order of Judge Elizabeth Cooke dated 30th September 2022 the reference was transferred to the First-tier Tribunal.

3. This matter was listed for Case Management Hearing ("CMH") by way of remote video hearing on 10th January 2021. James Tipler of counsel appeared for the Claimants and Fern Schofield of counsel for the Respondent.

4. By the date fixed for the CMH the parties had agreed terms of an Early Access Agreement for Survey Purposes (non-intrusive survey only). By Order dated 23rd January 2023 the Tribunal imposed that agreement upon and parties. The Claimants also seek to carry out intrusive surveys. At the CMH the Tribunal gave Directions in relation to intrusive surveys with a further hearing to be listed after 4th July 2023. The Tribunal has not been asked by either party to deal with litigation costs at this stage.

5. The parties have requested a determination of reasonable legal expenses in relation to the Early Access Agreement imposed by the Tribunal. The Tribunal has considered Mr Tipler's Skeleton Argument dated 9th January 2023 and Ms Schofield's Skeleton Argument of the same date. The Tribunal has also considered "Respondent's Transactional Costs Incurred" signed by a partner at Eversheds Sutherland (International) LLP who are the Respondent's solicitors. Annexed is a "Breakdown of non-litigation costs incurred by the Respondent for advising and negotiating in relation to the new MSV agreement". The amount claimed is £12,183.50 exclusive of VAT. That sum does not include historical costs incurred before proceedings were issued. Those historic costs relating to earlier notices and earlier arrangements for access have been agreed by consent between the parties in the sum of £11,038.50 plus VAT.

6. The Claimant position is that transactional costs since issue should not exceed the sum of £5,000 (in addition to agreed historic costs).

Relevant Provisions of the Code

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"

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),"

9. Paragraph 26(4)(e) provides that the provisions of Paragraphs 25 and 84 apply in relation to an order under paragraph 26 and an agreement imposed by it as they apply in relation to an order under paragraph 20 and an agreement imposed by it.

Transaction Costs – Upper Tribunal

10. 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"*

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

    "A site provider is entitled to seek advice on the lease and recover the reasonable cost of doing so."

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

12. 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."

13. Finally we 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"

Deliberation

14. Following on from what was said in **St Martins** we are not persuaded by Mr Tipler's argument that we should use sums awarded in other cases as a benchmark. There may well be a dissonance between the amount claimed here and sums awarded in more complex and strenuously fought Paragraph 20 references. However each case will depend on its own particular circumstances and we are not persuaded that there is a norm or range, departure from which takes the present claim outside what are reasonable expenses.

15. Ms Schofield was able to take instructions from her instructing solicitors during the remote hearing and was able to assist the Tribunal with details of the work undertaken on behalf of the Claimant. Four fee earners were engaged:

    - Thekla Fellas – supervising partner - £580 per hour
    - Heather Brown – transactional team - £300 per hour
    - Hannah Abu Harb – planning team - £415 per hour
    - Vishal Babu – coordination - £375 per hour

16. Mr Tipler argued that rates should not exceed £375 per hour. In fact only the partner and the planning team exceed that figure. Advising under the Code is potentially complex and the Respondent was entitled to instruct specialist solicitors. We find hourly rates to be reasonable.

17. The supervising partner spent 3.5 hours in relation to this transaction. The transactional lawyer spent 7.7 hours. The agreement in its final form was relatively brief running to a total of 6 pages. The amendments to the original draft were relatively modest relating primarily to definition of the property, hours of access, increase in insurance and confidentiality. However Central Cross is a 14 storey building on Tottenham Court Road. It is clearly a valuable piece of real estate and the time taken by the partner and transactional lawyer are entirely reasonable.

18. The "coordination" lawyer is the primary client contact and liaised with both the planning team and the litigation team. The total number of hours taken in relation to coordination was 8.3. However work done on 9/12/22, 13/12/22 and 14/12/22, totalling 4.7 hours, relates to providing and collating planning information. Accordingly we deduct that amount from the total time in coordination of 8.3 hours and find 3.6 hours to be reasonable.

19. We now turn to advice on planning matters. The time taken by the planning team was 11.4 hours (£4731) together with 4.7 hours (£1763) providing and collating planning information. Accordingly a total of 16.1 hours (£6494) was spent dealing with planning issues.

20. Mr Tipler argues that planning costs are not recoverable under Paragraphs 25 and 84 of the Code. Rights sought under the proposed MSV relate to survey and not installation. Advice on planning for a hypothetical installation falls outside Paragraph 25. We agree with Ms Schofield that planning is a relevant consideration. Even when considering whether there is a good arguable case under paragraph 26 public benefit still falls for consideration under the paragraph 21 test. There cannot be any public benefit where there is no likelihood of planning permission being granted. In addition when considering least possible loss or damage under Paragraph 23 any survey rights granted must be contingent on there being a reasonable prospect of planning permission being granted. Accordingly we find that advice on planning matters is within the scope of Paragraph 25 compensation.

21. Planning permission for the installation has been refused on three occasions – 4th February 2020, 1st April 2021 and 4th November 2021. However following the coming into force of the Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2022 the planning landscape changed. Part 16 of Schedule 6 to the Town and Country Planning (General Permitted Development) (England) Order 2015 has been amended. The proposed rooftop installation at Central Cross now constitutes permitted development and the Claimant no longer needs to obtain planning permission. The Claimants notified the Local Planning Authority of their intention to commence permitted development on 7th June 2022. The Local Planning Authority has not sought to impose conditions.

22. In her Skeleton Argument Ms Schofield submits that as the Respondent has filed a statement, verified by a statement of truth, explaining how the sum claimed has been incurred and demonstrating that litigation costs have been excluded: "That it is submitted, is sufficient to demonstrate the sums are reasonable". We keep firmly in mind that the Respondent should not be left out of pocket. The Respondent is entitled to recoup its reasonable legal expenses – *"all of them"*. Clearly the Respondent should not be expected to negotiate from a position of ignorance However we find that 16.1 hours to advise on planning issues is simply not reasonable. As Ms Schofield very fairly told us that specialist planning advice will not be necessary in every case. In the vast majority of cases a site provider will simply ask its advisors and be told that planning permission is not required. Ms Schofield argues that against a background of three previous failed applications and a significant recent change in the law the Respondent might reasonably want to get more extensive advice.

23. The Respondent has quite properly instructed specialist solicitors. It does not reasonably take a specialist planning lawyer and coordinator 16.1 hours to advise on the amendments to General Permitted Development and to make enquiries to establish that the Local Planning Authority has decided not to impose conditions. The time taken in advising on planning is in stark contrast to the reasonable time taken by the transactional lawyer to advise on the agreement. We determine that whilst it was reasonable to take planning advice, the advice actually given was went far beyond the bounds of what was reasonable. All that was required was an explanation of General Permitted Development and to obtain confirmation that no conditions were imposed by the Local Planning Authority. We allow 4 hours as compensation for reasonable legal expenses in relation to taking specialist planning advice.

24. We find reasonable legal expenses are the aggregate of:

- Supervising Partner – 3.5 hours at £580 per hour = £2030
- Transactional advice – 7.7 hours at £300 per hour = £2310
- Coordination – 3.6 hours at £375 per hour = £1350
- Planning – 4 hours at £415 per hour = £1660

Total £7350

Decision

25. Pursuant to Paragraph 84(2)(a) of the Code the Tribunal orders the Claimants to pay to the Respondent the sum of £7350 plus VAT being reasonable legal expenses in relation to the Early Access Agreement for Survey Purposes imposed upon the parties by paragraph 1 of the Order of the Tribunal dated 23rd January 2023.

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.