



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

Case Reference : **LC – 2023 – 000321-325, 332, 348, 365, 642-643, 697 and 699-701**

**Properties
(Abbreviated
Site Name)** : **Ewefields Farm (321), Lubbards Lodge (322),
Hexton (323), Newchurch (324),
Higher Hawksland (325), Ampthill (332),
Sandbach (348), Blackwell Grange (365),
Moreton-In-Marsh (642), Ayot Green (643),
Carn Entral (697), Hollow Farm (699),
Mildenhall (700) and Carshalton (701)**

Claimant : **On Tower UK Limited**

Representative : **Gowling WLG (UK) LLP**

Respondent : **AP Wireless II (UK) Limited and others**

Representatives : **Eversheds Sutherland (International) LLP &
Freeths LLP**

Application : **Electronic Communications Code**

Hearing : **28th March 2025 at Centre City Tower,
Birmingham**

Date of Order : **10th April 2025**

ORDER - COSTS

PURSUANT to the Decision of the Tribunal dated 5th August 2024

AND PURSUANT to the Minute of Order of Johnson J dated 17th December 2024 striking out the reference in Lubbards Lodge (322)

AND PURSUANT to the Judgements of Fancourt J dated 18th December 2024 and 5th February 2025 allowing the Respondent's appeal in respect of Ampthill (332)

AND UPON hearing Justin Kitson KC and Imogen Dodds for the Claimant and Toby Watkin KC for the Respondent

IT IS ORDERED THAT

Litigation Costs FTT Rule 13(1)(d) and para. 96 of the Code

1. The Claimant shall pay the First Respondent's (AP Wireless II (UK) Limited) costs of LC-2023-322 (Lubbard's Lodge) and LC-2023-332 (Ampthill), such costs to be the subject of detailed assessment on the standard basis if not agreed.
2. The Claimant shall within 28 days of the date of this order make an interim payment of £44,000 in respect of LC-2023-322 (Lubbard's Lodge) and £44,000 in respect of LC-2023-332 (Ampthill).
3. The First Respondent shall pay 75% of the Claimants costs of the remaining 12 references, such costs to be the subject of detailed assessment on the standard basis if not agreed save as provided for in paragraphs 4 and 5.
4. In respect of the costs attributable to reference Sandbach (348), if
 - 4.1. The appeal of Preliminary Issue 1 is finally determined in the Claimant's favour; and
 - 4.2. The appeal of Preliminary Issue 2 (as concerns Sandbach) is finally determined in the Claimant's favour, then:

The First Respondent shall pay 75% of the Claimants costs of the reference, such costs to be the subject of detailed assessment on the standard basis if not agreed.

Otherwise, the Claimant shall pay the Respondent's costs attributable to that reference (on the standard basis), to be the subject of detailed assessment in the County Court if not agreed between the parties.

5. In respect of the costs attributable to reference 365 (Blackwell Grange), if the appeal of Preliminary Issue 2 (as concerns Blackwell Grange) is finally determined in the Claimant's favour, then:

The First Respondent shall pay 75% of the Claimants costs of the references, such costs to be the subject of detailed assessment on the standard basis if not agreed.

Otherwise, the Claimant shall pay the Respondent's costs attributable to that reference (on the standard basis), to be the subject of detailed assessment in the County Court if not agreed between the parties.

6. The First Respondent shall within 28 days of the date of this order make an interim payment of £250,000.
7. All references shall be transferred to the County Court for detailed assessment pursuant to FTT Rules 13(7)(c) and 6(3)(n)(ii).

Transactional Costs para. 84 of the Code

8. The Claimant shall within 28 days of the date of this order pay the First Respondent's reasonable legal expenses of all 14 references in the total sum of £98,000 together with VAT thereon to the extent not recoverable by the First Respondent.

Judge D Jackson
Mr N Wint FRICS
Mr RP Cammidge FRICS

REASONS

1. These 14 references (set out in detail in the Schedule below) were heard together, pursuant to an order under FTT Rule 6(3)(b), over 10 days, 1st July to 12th July 2024, in Birmingham. The Tribunal issued a final Decision on 5th August 2024 accompanied by a Schedule of Disputed Terms.
2. Pursuant to Paragraph 34(6) of the Electronic Communications Code the Tribunal ordered termination of the existing code agreements relating to the existing code rights and ordered the Claimant and the First Respondent, AP Wireless II (UK) Limited, to enter into new agreements which confer code rights on the Claimant.
3. On appeal to the Upper Tribunal references in respect of LC-2023-322 (Lubbard's Lodge) and LC-2023-332 (Amphill) were struck out. The Respondent's further appeals to the Court of Appeal in LC-2023-000348 (Sandbach) and LC-2023-000365 (Blackwell Grange) remain to be determined.
4. The Claimant seeks costs in the sum of £526,596 for the remaining 12 references. The Respondent seeks litigation costs in the sum of £2,174,000 and transactional costs of £210,556.

Litigation Costs FTT Rule 13(1)(d) and para. 96 of the Code

5. The Upper Tribunal having decided that the Tribunal has no jurisdiction in respect of Lubbard's Lodge and Ampthill the First Respondent should have its costs before the FTT to the extent that those costs are not provided for in the Orders of the Upper Tribunal. Mr Watkin helpfully confirmed at the hearing that the Respondent was no longer seeking costs on an indemnity basis. There is nothing which takes the circumstances of either case out of the norm and standard basis of assessment is appropriate. In Lubbard's Lodge the Respondent claims £114,605 and in Ampthill the Respondent claims £194,972. Clearly reasonableness and proportionality of Respondent's costs will be a matter for the Costs Judge. However, we express our concern at the level of the Respondent's costs and base our interim payment on the average per reference costs incurred by the Claimant £44,000.
6. Rule 13(1)(d) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 provides that the Tribunal may make an order in respect of costs "*in proceedings under Schedule 3A to the Communications Act 2003 (the Electronic Communications Code) including proceedings that have been transferred from the Upper Tribunal*". Rule 13(7)(c) provides that the amount of costs to be paid under an order may be determined by "*detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court*". We direct detailed assessment by the County Court and accordingly these references are transferred to the County Court under FTT 6(3)(n)(ii). Under Rule 13(9) "*the Tribunal may order an amount to be paid on account before the costs or expenses are assessed*".
7. Paragraph 96 of the Electronic Communications Code provides for the award of costs by the Tribunal:

"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".
8. The Claimant was substantially successful. It has secured renewal in 12 of the 14 references. The Claimant was broadly successful on the majority of the terms of the new agreements. The Claimant has benefited from the "no network" valuation assumption contained within the Code and has secured substantial annual rent savings over the 10 year term of the new agreements.
9. The issues for determination by the Tribunal can be broken down into 3 areas:
 - Terms
 - Consideration
 - Interim arrangements
10. The Claimant was, overall, the successful party in respect of terms. The Claimant obtained a long term agreement for 10 years. The Respondent's contention for lease terms in some cases as short as 3 years (9 references) or even 18 months (3 references) was unrealistic. However the Respondent was successful in obtaining a redevelopment break after 5 years. The Respondent's argument that the Claimant

should not object to planning applications the Respondent may wish to make at adjoining sites was rejected despite the Respondent seeking to rely on expert planning evidence and the oral submissions of specialist counsel on this point. The Respondent sought, unsuccessfully, to relitigate **Jervis v Harris** clause and parking rights both of which had been previously rejected by the Upper Tribunal in **New Zealand Farm** and **Audley House** respectively. The Claimant obtained tree lopping rights despite arguments that the statutory notices were defective in that respect. The Respondent was wholly unsuccessful in respect of power down and interference. The Claimant obtained rights over adjoining land. However the Respondent was successful in limiting those rights to installation by statutory undertakers or within a limited area “edged blue”. The Respondent was also successful in maintaining equipment caps, the Claimant conceding that it would obtain any necessary consents from landlords. The Respondent has been successful in limiting sharing to ECA and not the site.

11. In respect of consideration all references concerned unexceptional rural sites. The starting point was a rental value of £750 p.a. based on “no network assumption” in accordance with **Affinity Water** guidelines. The Claimant’s expert valuer conceded an RPI increase to £955 p.a. The Respondent comfortably beat that figure. At trial the Tribunal awarded £1750 p.a. for 10 of the sites with an increased figure of £2000 for two of the sites and £2500 for a further two sites. The Respondents expert argued for four new categories to be added to Affinity Water: A – Remote Rural – £1500, B – Remote rural close to buildings – £2400 , C – Urban Fringe – £3,500 and D – Commercial and Industrial – £4000. The Respondent failed to make out its case on B, C and D and to that extent was unsuccessful on its own case. The Respondent was also unsuccessful in respect of expert planning evidence. Despite incurring the considerable costs of planning consultants (and the use of specialist planning counsel at trial) the Respondent failed to succeed on any of its alternative uses. Most were rejected by the Respondent’s own valuer. Wind turbines were abandoned shortly before trial as unviable. Only glamping remained which the Tribunal rejected for the same reasons as LTS in **EE v Service**. Ultimately the Respondent was successful due to a piece of unlooked for good fortune. The decision of the Upper Tribunal in **Vache Farm** was issued after trial and the figure of £1750 p.a., which was adopted by the Tribunal, exceeded the figure contended for by the Respondent’s Valuer. Accordingly whilst the Respondent was successful on the issue of consideration that success must be heavily qualified.
12. The Claimant was wholly successful on the third issue – interim arrangements. The Claimant was successful in backdating interim rent and the removal of pay-away.
13. The parties are commercial rivals in the telecoms sector. Both have deep pockets. It is fair to say that litigation has been conducted with a degree of suspicion on both sides. Regrettably neither party appears to have heeded the words of the Upper Tribunal in **University of Arts**: “to give due respect to the professionalism of both parties”. Whilst both parties raise issues of conduct, we are not persuaded that either party should be penalised. In simple terms the conduct of both amounts to no more than ‘six of one, half a dozen of the other’.
14. We have considered whether or not to make an issue based costs order. We are satisfied that a percentage/proportion of overall costs order will produce a fairer result especially in the circumstances of the present references where success has been heavily qualified on some issues. The First Respondent should pay 75% of the

Claimant's costs to reflect the relative success of the parties and otherwise reflect the justice of the case.

15. The appropriate interim payment is £250,000.

Transactional Costs para. 84 of the Code

16. Paragraph 84(2)(a) of the Code 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)”

17. We keep 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”.

18. The Respondent has prepared a Schedule of Transactional Costs signed by solicitors on 20th September 2024. The costs claimed by Eversheds Sutherland (International) LLP, who represented the Respondent in 8 of the references are £74,953. The costs claimed by Freeths LLP, who represented in 6 of the references are £111,603. The total is £186,556 + VAT. A further £2,000 for each of the remaining 12 references is sought to cover the costs of completing those agreements (£24,000). Accordingly total transactional costs claimed by the Respondent amount to £210,556.
19. The Claimant's first objection is that transactional costs claimed includes a substantial amount of time recorded by 8 fee earners who are litigators rather than members of the transactional team. We are not persuaded that the mere fact that fee earners are described as “litigators” means that costs are not recoverable. We have considered Respondent's Schedule of Transactional Costs and having regard to the description of work carried out we do not make any deduction for litigation costs erroneously claimed as transactional costs.
20. The second objection is that the claim is excessive having regard to previous decisions of both the FTT and Upper Tribunal. We are not persuaded that comparison of that sort is helpful nor are we persuaded that there is a “going rate” for transactional costs. Each case will turn on its own facts.
21. The Claimant's third objection is that costs are higher than they should have been due to the Respondent's decision to instruct two firms of solicitors and the use of 13 fee earners. We find that there has been considerable duplication. The Schedule is littered with references to fee earners having “discussions/calls/debrief/catchup” either amongst themselves or between Eversheds and Freeths.

22. The Tribunal's Directions of 20th December 2023 were clear:

“a single travelling draft of the Code agreement proposed by the Claimant in Word format [...], and any specific provisions or amendments to the standard wording are sought for individual Sites shall be set out in the schedule annexed to the draft.”

We find it was not reasonable for the Respondent to use the services of two firms of solicitors in negotiating a single travelling draft.

23. We now turn to the Claimants fourth objection. Throughout the conduct of this case the Respondent has been wedded to the concept of “site specifics”. By the date of trial the Schedule of Disputed Terms ran to 141 items. However there were in fact very few site specific terms at all. The Schedule is extremely repetitious. Items such as term, access, conduits, tree lopping, interference, equipment caps were needlessly repeated for each site. The only difference was that some sites featured Superior Landlord's Property and/or Landlord's Adjoining Property and/or Third Party Property. Coping with those three scenarios was not challenging and was ultimately dealt with by 'boilerplate' wording. We find that the Respondent did not act reasonably in pursuing site specific drafting in circumstances where it was simply not necessary to do so. The aim of ordering a single travelling draft was to save costs. The Respondent has not taken steps to achieve that aim. [We would draw the party's attention to para. 55 of our Decision of 5th August 2024 and the benefits of “standardisation” as endorsed by the Upper Tribunal in **New Zealand Farm.**]

24. The fifth and final objection raised by the Claimant concerns the disparity between costs claimed by Eversheds and Freeths:

Eversheds – 8 references, £74,953; 277.6 hours

Freeths – 6 references, £111,603.50; 407.6 hours.

The first point to make is that the average hourly rate for both firms is roughly the same; a little over £270. Both firms charge the same hourly rate for undertaking consideration of a single travelling draft with site specific schedules. They are both acting for the same client in the same proceedings. However the time/costs per reference are markedly different:

Eversheds – 34.7 hours, £9,369 per reference

Freeths - 67.9 hours, £18,600 per reference

The conclusion is clear. Freeths have taken almost exactly twice as long and charged twice as much.

25. We deal with Eversheds costs first. The average hourly rate of £270 per hour is clearly reasonable. Even if the Claimants could argue that Eversheds could have considered each site in half the time, say 20 hours, such work would have been carried out exclusively by a senior solicitor charging at least twice the hourly rate.

26. Freeths claim fails by comparison to Eversheds. We find that claiming twice as much as Eversheds for substantially the same work is not reasonable. We can only attribute the difference to duplication and the other matters raised by the Claimant. We

therefore reduce the amount claimed by Freeths to £9369 per reference i.e. the amount charged by Eversheds.

27. In **Affinity Water** (para. 88) the Upper Tribunal reduced costs of £7,499 to £6,000 to reflect “some duplication”. We are satisfied that the Respondent’s costs are not reasonable firstly because of duplication in the use of two firms of solicitors and secondly duplication of work on similar terms across sites rather than concentrating on a single travelling draft with ‘boilerplate’ wording to reflect superior landlord, adjoining property etc. The reduction in **Affinity Water** was 20%. The duplication in the present references is substantial and we make a 30% reduction.

28. The total amount, based on Eversheds costs, for 14 references is £131,166. We apply a 30% reduction ($£131,166 - £39,350 = £91,816$). Furthermore we are not persuaded that entering into the 12 new agreements on the terms ordered by the Tribunal will result in a further £24,000 of costs. We find that reasonable legal expenses for doing so amounts to no more than £6,000. That further sum results in a total figure of £97,816, say, £98,000.

29. We determine reasonable legal expenses to be £98,000 in total for all 14 references.

SCHEDULE

LC – 2023 – 000321

Telecommunications site at Ewefields Farm, Chesterton, Warwick CV33 9LQ (**Ewefields**)

LC – 2023 – 000322

Land at Burlington Gardens, Hullbridge, Hockley SS5 6BD (**Lubbards Lodge**)

LC – 2023 – 000323

Land to south of Mill Lane, Hexton, Hitchin SG5 3JH (**Hexton**)

LC – 2023 – 000324

Land at Lower Lynbrook Farm, Newchurch, Hoar Cross, Burton-on-Trent DE13 8RL (**Newchurch**)

LC – 2023 – 000325

Higher Hawksland Farmhouse, St Issey, Wadebridge PL27 7RG (**Higher Hawksland**)

LC – 2023 – 000332

Manor Farm, Millbrook Road, Houghton Conquest, Bedford MK45 3JL (**Ampthill**)

LC – 2023 – 000348

Meadowley and Fields Farm, 150A and 150B Congleton Road, Sandbach CW11 4TE (**Sandbach**)

LC – 2023 – 000365

Telecommunications Site at Blackwell Grange Golf Club, Darlington DL3 8QL (**Blackwell Grange**)

LC – 2023 – 000642

Electronic Communications Station, Sezincote Woodland Plantation, Moreton-in-Marsh GL59 9AW (**Morton-in-Marsh**)

LC – 2023 – 000643

Telecommunications Mast Site, north of 4 Ayot Green, Ayot St Peter's, Welwyn AL6 9AB
(Ayot Green)

LC – 2023 – 000697

Land at Carn Entral Farm, Brea, Camborne, Cornwall TR14 9AH **(Carn Entral)**

LC – 2023 – 000699

Land at Hollow Farm, Shuttlewood, Chesterfield S44 6NX **(Hollow Farm)**

LC – 2023 – 000700

Land to west of Mildenhall Drove, Kenny Hill, Bury St. Edmunds, Suffolk IP28 8YP
(Mildenhall)

LC – 2023 – 000701

Land to south of Little Woodcote Lane, Carshalton, Surrey SM5 4BY **(Carshalton)**