UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2022] UKUT 152 (LC) UTLC Case Number: LC-2021-240 and LC-2021-309
Royal Courts of Justice

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE – CODE RIGHTS – responsibility of the site provider for the safety of the site and apparatus – access – sharing – upgrading – numerous disputed terms - consideration

A NOTICE OF REFERENCE UNDER SCHEDULE 3A TO THE COMMUNICATIONS ACT 2003

BETWEEN:

ON TOWER UK LIMITED

Claimant

-and-

AP WIRELESS II (UK) LIMITED

Respondent

Re: (LC-2021-240) Land at Audley House, Northbridge Road, Berkhamsted, Hertfordshire, HP4 1EH
(LC-2021-309) Site 1, Unit 5, Rutherglen Centre, Baglan, Nr Neath, SA13 7BR and The Acres, Bythorn, Huntingdon, Cambridgeshire PE28 0QJ

Judge Elizabeth Cooke and Mark Higgin FRICS

Heard on: 25-27 April 2022 and 19 May 2022

Decision Date: 17 June 2022

Jonathan Seitler QC and Emer Murphy for the claimant, instructed by Gowling WLG (UK) LLP
Wayne Clark, Fern Schofield and Mike Atkins for the respondent, instructed by Eversheds Sutherland (International) Limited

The following cases are referred to in this decision:

Austin Rover Group Limited v HM Inspector of Factories [1990] 1 AC 619
Cornerstone Telecommunications Infrastructure Ltd v Fothringham LTS/ECC/2020/007
Cornerstone Telecommunications Infrastructure Ltd v London and Quadrant Housing Trust [2020] UKUT 282 (LC)
Cornerstone Telecommunications Infrastructure Ltd v Marks & Spencer plc LTS/ECC/2019/0034
EE Limited and Hutchison 3G UK Limited v Affinity Water Limited [2022] UKUT 8 (LC)
EE Ltd and another v The Mayor and Burgesses of the London Borough of Islington [2019] UKUT 53 (LC)
EE Ltd and Hutchison 3G UK Ltd v R Morriss, DH Tayler and Pippingford Estate Co
EE Limited v Stephenson [2021] UKUT 167
O'May v City of London Real Property Co Ltd [1983] 2 AC 726
On Tower Limited v JH and FW Green Limited [2020] UKUT 348 (LC) ("*Dale Park*")
R v Associated Octel Co Limited [1994] 4 All ER 1051
R v Tangerine Confectionery Limited and Veolia ES (UK) Limited [2011] EWCA Crim 2015
Vodafone Ltd v Hanover Capital Ltd [2020] EW Misc 18 (CC)

Introduction

1. What responsibility do owners and occupiers of land have for the safe operation of electronic communications sites which they are legally obliged to have on their land?

2. As a general principle landowners have no more responsibility for the safety of the antennae on their roof, or the mast in the corner of their car park, than they have for the electricity pylons that march across their fields or for the public sewer that runs beneath their home. Landowners are obliged to suffer the presence of equipment and conduits on their land for the benefit of us all, but the safety of that equipment and the management of any risk that it poses for the public remains the responsibility of those who operate it. This determination of two references under Schedule 3 to the Communications Act 2003 (known as the Electronic Communications Code) in relation to three different telecommunications sites provides the opportunity for the Tribunal both to state that general principle, and to explore the question whether it might give way to other considerations where the landowner is itself in the business of telecommunications.

3. The claimant, On Tower UK Limited ("On Tower"), is a wholesale infrastructure provider. It owns sites and equipment (such as masts, conduits and cabinets) all over the UK and has licence agreements with providers of mobile phone networks which enables them to use the equipment; typically two or more operators will have their antennae on a single mast owned by On Tower. The two references before the Tribunal relate to three telecommunication sites to which we refer as "Audley House", "Port Talbot" and "Huntingdon". All three are small sites at ground level in industrial areas, with a mast and cabinets, which have been operated by On Tower for some years under leases whose contractual terms have expired.

4. The respondent, AP Wireless (II) UK Limited ("APW"), is part of a multi-national group of companies whose business is to invest in land and let it for use as telecommunications sites. Some of its land in the UK is freehold. Much of it is leasehold, in circumstances where it has taken a lease of a site already let to an operator (by which we mean either a provider of a mobile network or an infrastructure provider) under a "Code agreement", granted pursuant either to Schedule 3 to the Communications Act 2003, known as the Electronic Communications Code or "the Code", or to its statutory predecessor ("the old Code"). APW's leases are in each case longer than the Code agreement, so that APW is bound by the Code agreement and becomes a "site provider" (paragraph 30 of the Code). If the Code agreement comes to an end, any new agreement will be made between APW and the operator. That is the position on each of the three sites with which we are here concerned. There is no opposition to the grant of a new 15-year term on each site, but the parties cannot agree the terms of the new leases and therefore references have been made to the Tribunal.

5. The claimant was represented by Jonathan Seitler QC and Emer Murphy of counsel, and the respondent by Wayne Clark, Fern Schofield and Mike Atkins of counsel, to all of whom we are most grateful. The two references were listed together on the basis that they are similar sites. The three days proved to be insufficient, not because three sites were involved but because so many of the terms of the leases were in dispute. It was agreed at the hearing that written representations would be exchanged about the terms, which is why in places we refer to or quote from those representations.

6. In the paragraphs that follow we summarise the relevant legal principles and then set out the factual background for each site. We then explore in principle the issue of responsibility for the safe operation of telecommunications sites, before looking at the detail of the clauses in dispute. Finally we look at the consideration payable for the sites, which was agreed by the valuation experts in the course of the hearing subject to adjustments for certain of the terms.

The legal background

The Code and the imposition of Code rights

7. The Code came into force on 28 December 2017. It defines a number of rights that might be needed in order to operate a telecommunications site, for example to install equipment, to carry out works, to connect to a power supply and so on. It provides that those "Code rights" may only be conferred on an operator – that is, an operator designated under section 106 of the Communications Act 2003 as one to which Code rights may be granted – by agreement with the occupier of land. Where that agreement is not forthcoming, and the operator has given the requisite notice under paragraph 20 and the test in paragraph 21 is satisfied, then the Tribunal may impose upon the operator and the occupier of land an agreement that confers Code rights upon the operator.

8. That agreement will normally be a lease although it may be a licence. It will therefore have a contractual term. Part 5 of the Code, paragraphs 30 to 35, makes provision for what is to happen when that term expires.

Part 5 of the Code and the provisions that apply to the terms of a new Code agreement

9. The effect of paragraph 30 of the Code is that when the contractual term of a Code agreement expires,

> "the code agreement continues so that—
>
> (a) the operator may continue to exercise that right, and
> (b) the site provider continues to be bound by the right."

10. Paragraph 31 enables the site provider nevertheless to bring the code agreement to an end by giving notice; and either party may give notice under paragraph 33 requiring the current agreement to be changed or a new agreement to take effect. Where there is a dispute the matter may be referred to the Tribunal.

11. Paragraph 34 sets out the orders that can be made in such references; paragraph 34(5) enables the Tribunal to order the termination of the existing Code agreement and to order the operator and the site provider to enter into a new agreement that confers Code rights on the operator, on such terms as they agree or on terms ordered by the Tribunal under paragraph 34(10).

12. In the present references, On Tower wants a new agreement for each site, which is not opposed, but the parties cannot agree the terms. Paragraph 34(11) states that paragraphs 23(2) to (8), 24, 25 and 84 apply to an order under paragraphs 34(10) as they do to an order under paragraph 20. Paragraph 23(5) requires:

> "(5) The terms of the agreement must include the terms the court thinks appropriate for ensuring that the least possible loss and damage is caused by the exercise of the code right to persons who—
>
> (a) occupy the land in question,
> (b) own interests in that land, or
> (c) are from time to time on that land."

13. Paragraph 24(3) states that the consideration payable by an operator under an agreement imposed by paragraph 20 (and, as we have just seen, under an agreement which is the subject of an order under paragraph 34(1)) is to be assessed on the assumption :

> "that the right that the transaction relates to does not relate to the provision or use of an electronic communications network."

14. The effect of that assumption is that rents under the Code are in general considerably lower than those payable under its statutory predecessor, because the operator pays the landowner only what the landowner could have got by way of rent of the site for its current use or an alternative use, which in most cases is an insignificant sum, rather than a rent that reflects the value of the site to the operator (as did rents under the old Code).

15. Paragraph 34 also provides as follows:

> "(12) In the case of an order under sub-paragraph (10) the court must also have regard to the terms of the existing code agreement.
>
> (13) In determining which order to make under this paragraph, the court must have regard to all the circumstances of the case, and in particular to—
>
> (a) the operator's business and technical needs,
> (b) the use that the site provider is making of the land to which the existing code agreement relates,
> (c) any duties imposed on the site provider by an enactment, and
> (d) the amount of consideration payable by the operator to the site provider under the existing code agreement."

16. Two of the sites under consideration in the present references have been operated by On Tower under agreements made under the old Code. The transitional provisions in the Digital Economy Act 2017 make provision for them to be continued after their expiry and for Part 5 of the Code to apply to them with modifications. The most important modification is that paragraph 34(13)(d) is not applicable to a subsisting agreement, for obvious reasons because of the change in the basis of consideration in the Code. The agreement relating to Audley House was entered into in 2018, but it expressly provides that its terms were negotiated

before the Code came into force and its rent agreed without regard to the provisions of the Code.

The approach to be taken to disputes about the new terms

17. The Tribunal has now had to consider a number of references relating to the terms of new Code agreements under Part 5. A common theme has been the argument made on behalf of site providers that the terms of new Code agreements should mirror those terms of the old agreement. Comparison has been made with the position on the renewal of business tenancies under the Landlord and Tenant Act 1954 and that principle in *O'May v City of London Real Property Co Ltd* [1983] 2 AC 726 that there is an onus on a tenant seeking different terms to justify the change.

18. It is now well-established that that argument is not correct. Despite the similarity between paragraph 34(12) and section 35 of the Landlord and Tenant Act 1954, the Court of Appeal in *On Tower UK Limited v JH and FW Green Limited* [2020] UKUT 348 (LC) ("*Dale* Park") has confirmed that decisions relating to the latter will not necessarily apply to the former. The purposes of the two provisions are different. The Court of Appeal said at paragraph 49:

> "The weight to be attached to the fact that a term was included in the existing code agreement will in part turn on its consistency with the aims of the Code. If the relevant term cannot be thought to be in conflict with those aims, the case for replicating it in the new agreement may be compelling. Plainly, the position will be different if the term is at variance with the objectives of the Code. In practice, the terms of a code agreement entered into since the introduction of the Code are more likely to accord with its purposes than those of an agreement which pre-dates the Code."

19. The Court of Appeal at paragraph 46 quoted with approval the decision in *EE Limited v Stephenson* [2021] UKUT 167 where the Tribunal (The President, Fancourt J) said:

> "53 … The purpose underlying the Code is to ensure that operators can use and exploit sites more flexibly, quickly and cheaply than had previously been the case, at lower than market rents, in furtherance of the public interest of providing access to a choice of high quality electronic communications networks, while providing a degree of protection to site owners' legitimate interests."

20. In *Dale Park* at paragraph 61 the Tribunal said that in making decisions about the terms of a renewed agreement:

> "… it may be helpful to think in terms of a balancing process between the claimant's requirements and the respondent's concerns, but the Code does not put it like that. Perhaps a better way to look at it is as follows.
>
> 62. First, the Tribunal should consider the term the operator seeks and the reason why it needs the term in question in order to pursue the business for whose purposes

it received its Ofcom direction and in light of the public interest in a choice of high quality telecommunications services.

63. Second, the Tribunal will consider the concerns or objections raised by the respondent and whether in order to minimise loss or damage in accordance with paragraph 23(5) the term should not be imposed, or should be imposed to a limited or qualified extent.

64. If those concerns do not prevent the imposition of the term and do not require its qualification, then the Tribunal will consider whether, in imposing that term, it should also impose further terms to minimise loss or damage."

21. In the present references many terms are sought by the site provider which the operator does not want, and we have to look at whether the effect of those terms upon the claimant's business and the efficiency of its operations are in the public interest. Where it can be seen to have an unhelpful effect upon the claimant's business we then have to consider whether the term sought, or another term to similar effect, is necessary in order to cause "the least possible loss and damage" to the site provider.

The sites and the existing leases

Audley House

22. The Audley House site is on the edge of an office car park on a light industrial estate in Berkhamsted. It is a fenced area measuring 10m x 5.5m; the apparatus on site (and on all three sites) is a tower or mast, antennae, and cabinets. The nearest building is about 7m away on neighbouring land; the West Coast mainline railway runs along one side of the site; the office building served by the car park is about 20m away. The car park is open to the public highway which is about 55m from the site; the lease grants On Tower access to the site with or without vehicles along the accessway which is used by others driving into the car park.

23. In 1999 the then freeholder granted a 20-year lease of the site to a number of operators. The lease gave the operators unlimited access to the site; the freeholder's consent was required for assignment. At some point the lease was assigned to On Tower.

24. In 2017 APW took a 30-year lease of the site together with a 2m-wide strip around the site, for a premium of £57,000, subject to and with the benefit of the 1999-year lease.

25. In 2018 APW granted a new lease of the site to On Tower (then known as Arqiva Services Limited), for a term of less than one year, apparently to regularise its position as tenant in the absence of evidence of consent for the assignment, although no details about the transaction are before the Tribunal. The 2018 lease incorporated the terms of the 1999 lease and stated, as we noted above, that its terms were negotiated under the old Code. The contractual term of the 2018 lease has now expired. In June 2020 On Tower gave APW a notice under paragraph 33 of the Code seeking the termination of the existing agreement and a new lease of the site. The reference was issued in April 2021.

26. Although APW's lease includes a small area outside the site, it is agreed that the new lease will be a lease of whole, so that APW will no longer own unencumbered land at Audley House that is not let to On Tower. The practical effect of that change will be that On Tower has space to park one or two vehicles on the site itself, outside its fencing.

Port Talbot

27. The Port Talbot site is next to a factory in an industrial area about 1.5 miles north west of the town centre. It is accessed through a gated yard used for storage by the freeholder; again On Tower has a lease of the site together with a right to use the access way.

28. In 1989 the freeholder granted a 999-year lease of the site, together with other land. In 2002 the then long-leaseholder granted a 20-year lease of the site to the operator that became known as EE Limited. It gave unlimited access to the site and the surrounding land, with and without vehicles, "subject to any reasonable stipulations of the Owner and in the event that the Owner installs site security or entrance gates [the lessee] shall be provided with a key in order to gain access to the Site".

29. In 2014 APW took a 50-year lease of the site (only) for a premium of £32,000, subject to and with the benefit of the lease to EE Limited.

30. EE Limited's lease was assigned (with consent) to Arqiva Limited, and there was later an assignment (for which consent was not required) to On Tower. It is agreed that the existing lease of the Port Talbot site, granted before the current Code came into force in December 2018, is a "subsisting agreement" to which Part 5 of the Code applies by virtue of the transitional provisions. The contractual term expired in June 2020; a paragraph 33 notice was given in April 2020; the reference was issued in May 2021.

Huntingdon

31. The Huntingdon site is at the rear of a truck haulage and storage yard, surrounded mostly by fields, about 11 miles west of Huntingdon, close to the A14 trunk road. It is a small rectangular site; a few metres away is another mast on a small rectangular site leased to Airwaves.

32. In 2005 the freeholder granted a 15-year lease of the Huntingdon site to T Mobile (UK) Limited; it gave access to the site between 0800 and 1800 Monday to Friday, 0800 to 1300 on Saturdays, with exactly the same proviso about reasonable stipulations and a key as in the Port Talbot lease (above, paragraph 28).

33. In 2013 the freeholder granted to APW a 50-year lease over land comprising the Huntingdon site, the Airwaves site and a small area between and around them both for a premium of £97,500. APW's lease is a small proportion of the freeholder's haulage and storage yard.

34. Through a number of assignments (with consent where needed) On Tower became the lessee under the 2005 lease in 2020. Again this is a subsisting agreement. Its contractual term

expired in October 2020; a paragraph 33 notice was given in October 2020; the reference was issued in May 2021.

35. In the case of Huntingdon, unlike Audley House and Port Talbot, the new lease to be granted to On Tower will be a lease of part of APW's title.

APW's intermediate leases

36. It will be useful for us to say more at this point about the terms of APW's three intermediate leases, because a number of the arguments advanced on APW's behalf rely upon obligations said to be owed by APW to its landlord.

37. The three intermediate leases are in very similar form with nearly identical wording throughout, and therefore presumably in APW's standard form with some variations. In each, the landlord is the freeholder (or in the case of Port Talbot the 999-year lessee), the tenant is APW, and the undertenant is the tenant under the "existing leases", defined to mean the telecommunications lease to which each site is already subject, and we use these terms in the paragraphs below under this heading. In each case the grant is made in consideration of a premium and a peppercorn rent. The term of each intermediate lease is considerably longer than that of the existing lease. The rent payable by the undertenant is expressly assigned to APW. The tenant is granted ancillary rights to access the site "at all times" across the landlord's property from the highway, on foot or with vehicles and to connect to service media and utilities, as well as all the rights granted to the undertenants in the existing lease and "any other rights" over the landlord's property that the tenant needs to enable it to grant future leases, to renew the existing leases or to deal with any applications by the undertenants.

38. There is no restriction on APW's access to any of the three sites. There is no provision for the landlord to be given notice of access to the site, by the tenant or the undertenant. The Audley House and Huntingdon leases provide at clause 3.9:

> "It is agreed that the Tenant shall be responsible for all reasonable access requests to the Property by the Undertenants but the Landlord will use all reasonable endeavours to assist the tenant should it require assistance in granting access to the Undertenants."

39. In each intermediate lease the landlord reserves the right to enter the site in order to repair, inspect etc structural parts of its own property and any service media, on reasonable notice to the tenant.

40. In each case APW is restricted to a permitted use; for Audley House the permitted use is as a telecommunications site, whereas for Port Talbot and Huntingdon the permitted use is stated to be for a telecommunications site or for any use for which planning permission has (if necessary) been granted.

41. In the Audley House lease the tenant is required to insure against public liability arising from the use of equipment on the site; in the Port Talbot and Huntingdon leases the tenant is also required to put in place any insurance that the landlord is required to have pursuant to the underleases; however, we can find no such liability in the existing leases, which all place insurance responsibilities upon the undertenant. None of the intermediate leases imposes any repairing obligation on APW, but APW covenants to enforce the obligations of the undertenant in the existing leases.

42. APW is free to assign the whole or part of its interest under the leases, and to charge its interest, without the landlord's consent. It can underlet the whole or part of the site or share the site, but it must notify the landlord whenever it does so, and each intermediate lease refers to "Future Leases", defined as "any underlease, site share licence, commercial agreement or sharing possession" of all or part of the land. The Audley House and Huntingdon leases provide that if as a result of any sharing or parting with possession it receives "excess revenue" (defined as anything more than the rent then payable under the existing leases, as reviewed in accordance with their provisions) then it must pay 50% of that excess to the landlord.

43. APW has the benefit of a break clause in each of the intermediate leases; the Audley House is terminable on one month's notice, Port Talbot and Huntingdon on three months' notice. In each case it is expressly provided that termination under the break clause does not give rise to any obligation on the part of the landlord to repay the premium.

44. The consequence of the provisions summarised above is that although there are references in all the intermediate leases to the existing and future underleases, so that it appears that the parties expected APW's land to be sub-let, nevertheless APW, or its assignee, is free under each of the intermediate leases to operate a telecommunications site on the land demised in the event that the existing lease to On Tower is terminated and vacant possession given up; on the Port Talbot and Huntingdon sites it could do anything it wishes, subject to planning requirements. Equally thanks to the break clause APW can walk away, reinstating the landlord as the immediate reversioner of On Tower.

The disputed terms: general observations

45. We can now turn to the terms in dispute; and for the rest of this decision we refer to On Tower's existing leases as leases rather than sub-leases except where the context requires otherwise, and to APW's landlord as the superior landlord. It is agreed that APW will let to On Tower the whole of the land demised to it by the intermediate leases of Audley House and Port Talbot, and an agreed area of its title at Huntingdon, which means that the area of the Audley House lease will be greater than that demised by On Tower's existing lease while the other two areas will be unchanged.

46. We heard evidence of fact relevant to the disputed terms from witnesses who are familiar with the business operations of both parties: we heard evidence from Mr Tim Holloway MRICS, Estates Surveyor for On Tower, and Mr Nicholas Brearley MRICS, Landlord Care Manager for On Tower. A witness statement was made by Mr Peter Thacker, Legal Director for APW, but he was unable to attend the hearing and Mr Nicholas Ward, Regional Asset

Director for APW, was cross-examined on Mr Thacker's statement. The Tribunal would like to thank Mr Ward for his assistance.

47. In looking at the disputed terms we bear in mind the protections afforded to the site provider in the Code, and in the leases themselves. Paragraph 25 of the Code enables the Tribunal to order the operator to pay compensation to the site provider for any loss or damage sustained by it as a result of the exercise of Code rights. Paragraph 86 of the Code provides:

> "Except as provided by any provision of Parts 2 to 13 of this code or this Part, a operator is not liable to compensate any person for, and is not subject to any other liability in respect of, any loss or damage caused by the lawful exercise of any rights conferred by or in accordance with any provision of those Parts."

48. Accordingly it is not open to the parties to improve upon the site provider's position by providing contractual liabilities in its favour in addition to paragraph 25 in respect of loss or damage caused by the exercise of the operator's Code rights. The parties have agreed a number of additional provisions for APW's protection, which must be read in the light of paragraph 86. The draft leases contain covenants by On Tower:

    a. To secure all necessary planning consents for works at the sites.

    b. To keep its apparatus in good and safe repair and condition and to keep the site clean and tidy.

    c. To carry out all works in a proper and workmanlike manner, causing as little nuisance as practicable to APW and adjoining occupiers and making good all damage.

    d. To comply with applicable legislation and with the requirements of health and safety regulatory bodies, including ICNRP (the International Commission on Non-Ionising Radiation Protection).

    e. To indemnify APW and the superior landlord against any liability they incur to a third party as a result of anything done by On Tower, up to £10 million.

    f. To insure the sites in respect of third party and public liability in the sum of £10 million.

    g. Not to do anything which may constitute a nuisance or cause injury to APW, the superior landlord or other users in the vicinity of the site, although the exact terms of this covenant are in dispute (see paragraph 192 below).

49. Rights are reserved to APW and to the superior landlord to visit the sites, accompanied by a representative of On Tower, and there is a clause providing for forfeiture for breach of covenant by the tenant.

50. The disputed terms are many, and we have grouped them under the headings "safety and access", "sharing and upgrading", "rights over the superior landlord's land", "further provisions relating to the superior landlord" and finally a miscellaneous group. We preface our discussion of the terms with a consideration in principle of the responsibility of a site provider for the safe operation of a site on its land and of particular considerations that APW says are relevant to it. That issue dominated the argument at the hearing and is central to the nature of the business relationship between the parties; are they to be simply landlord and tenant, or does APW have to have an active role in On Tower's operations because of its responsibilities for health and safety? Our conclusions on that issue colours our discussion of many of the disputed provisions. We go through them group by group, starting in each case with the draft lease for Audley House and then noting any differences in relation to Port Talbot and Huntingdon, which are the subject of a separate draft lease. We have kept to a minimum any reference to the numbering of the clauses in the two draft leases which are before us but which are not published with this judgment; the references we have included are for the parties' own assistance and to assist other readers to understand the structure of the drafts.

Responsibility for safety

The issue in principle

51. It goes without saying that an operator is responsible for the safety of its site. On Tower, and the other operators who use its apparatus, are at risk of both tortious and criminal liability in the event that something goes wrong at their sites. Paragraph 25 of the Code ensures that if the site provider suffers any loss or damage as a result of the presence of the site, the operator must compensate it; moreover On Tower has additional contractual liabilities to APW as set out above (paragraph 48). The clear policy and the undoubted effect of the Code and of the general law is that if something goes wrong as a result of the presence of the site, the operator picks up the tab.

52. But what responsibility does a site provider have for the safety of a telecommunications site on their land? Can they be sued, or be criminally liable, if someone is injured by the equipment on the site or by work done there?

53. If the answer is that they can be sued, or be criminally liable, then it is no comfort to the site provider that the operator is primarily liable. An injured party will sue both if possible; and criminal liability will not be averted by the fact that the operator is also liable. Moreover, if criminal liability is a possibility, that is something for which money cannot compensate the site provider.

54. APW justifies its requirement for a number of clauses in each lease on the basis that it needs to protect itself from the risk of being held liable, and potentially criminally liable, for the safety of the sites. It therefore requires On Tower to provide the details of everything it proposes to do when it has access to the sites, including method statements and risk assessments for every visit and the identity and qualifications of everyone who attends. Its requirements are not all set out in the lease but are part of what has to be provided to APW's access portal, which APW wants On Tower to be obliged to use. For the same reason APW

wants access to the sites to be limited to business hours – its position changed during the hearing to an undefined "reasonable hours" - except in emergency, and to be subject to notice requirements. Only thus, APW says, can it both prevent liability by ensuring safe practice, and only thus can it have the information it needs in order to defend itself if a claim, or a criminal charge, is brought. This has an impact upon the consideration APW seeks; its position is that although it does not make a direct charge for access to the sites, the use of the access portal is a considerable benefit to the tenant which should be reflected in the consideration paid for the rights granted over the site.

55. On Tower resists these requirements, which it says cause delay and expense and are an unnecessary restriction on the access and the operational flexibility that it requires, and an unnecessary duplication of the safety work that it does itself. Much of the cross-examination of Mr Ward focused on the extent to which the way that APW manages access is a benefit to the tenant; the argument for On Tower is that it gets no benefit from the management role that APW claims – indeed, it is an added burden – and therefore even if it has to use the access portal and comply with APW's requirements it should not have to pay for burden of doing so.

56. Some of APW's concerns arise from the nature of its own business. Before examining that, we look first at the issue of responsibility for safety as a matter of principle, in the context of a site provider who has granted to the operator exclusive possession of the site.

57. It is no part of the policy of the Code that such a site provider be responsible, let alone criminally liable, for the safety of a telecommunications site on its land. There was no suggestion of any risk of such liability under the pre-2018 Code. Had there been any fear of such liability on the part of site providers the Law Commission would have heard about it from its consultees, and it did not. Under the present Code the idea that the site provider is to share with the operator the responsibility for the safety of the equipment and operations on the site is even less plausible than it was under the old Code. Not only are most site providers without expertise in relation to telecommunications, but also they now receive consideration calculated on the "no network" assumption, which is markedly less generous than was consideration under the old Code. It would be implausible and unfair that they should be at risk of civil or even criminal liability if someone is injured as a result of, say, tools falling into a drop zone or a mast collapsing.

58. The fear of civil liability for site providers is wholly unrealistic where the Code agreement requires them to give up exclusive possession of the site and gives them no control over what goes on there. In those circumstances liability in negligence or under the Occupier's Liability legislation is not possible. Nor can there be liability for what happens on the way to the site, where the landowner retains possession of the access way, if the Code agreement gives the landowner no say in what the operator does on the land that gives access to the site. If the operator's employee digs up the farm track, the operator and not the landowner is vicariously liable.

59. It is of course open to the parties to agree terms that enable or oblige the site provider to control, manage, or even supervise what the operator does and to have a say for example in

how its contractors operate. But unless the parties do so, or unless the Tribunal imposes such terms, then concerns about civil liability are illusory.

60. For APW it is argued that concern about criminal liability arises from the Health and Safety at Work Act 1974. Duties owed under health and safety legislation are non-delegable. Section 3 provides as follows:

> "(1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.
> (2) It shall be the duty of every self-employed person who conducts an undertaking of a prescribed description to conduct the undertaking in such a way as to ensure, so far as is reasonably practicable, that he and other persons (not being his employees) who may be affected thereby are not thereby exposed to risks to their health or safety."

61. The statute goes on to provide that it is an offence not to discharge that duty. The section is concerned with risk, and therefore can be broken even if no accident has occurred. The risk must be material, which means a risk that any reasonable person would appreciate and take steps to guard against; such risks may not be obvious and so employers must think deliberately about risks that are not obvious (*R v Tangerine Confectionery Limited and Veolia ES (UK) Limited* [2011] EWCA Crim 2015, paragraphs 24, 25 and 36). Where it is proved that the conduct of the employer's undertaking has exposed one or more non-employees to material risk, the employer will be criminally liable unless it can prove, on the balance of probabilities, that it was not reasonably practicable to prevent the risk (*Tangerine* at paragraph 30).

62. The duty is to protect persons affected by the conduct of the undertaking, which in this context means "enterprise" or "business". Clearly for the vast majority of site providers what goes on at a telecommunication site on their land is not part of their undertaking. We return below to the position of APW and other site providers whose business is the provision of sites and equipment for telecommunications. But in general, site providers cannot be liable under this provision.

63. Section 4 of the 1974 Act may be relevant to site providers who have granted exclusive possession of the site but who retain control of access. It creates duties for persons who make non-domestic premises available to others for work:

> "(2) It shall be the duty of each person who has, to any extent, control of premises to which this section applies or of the means of access thereto or egress therefrom or of any plant or substance in such premises to take such measures as it is reasonable for a person in his position to take to ensure, so far as is reasonably practicable, that the premises, all means of access thereto or egress therefrom available for use by persons using the premises, and any plant or substance in the premises or, as the case may be, provided for use there, is or are safe and without risks to health."

64. Again, breach of that duty is a criminal offence. The key concept in section 4 is control. More than one person may be in control of premises or of the means of access to them, and the duty is imposed upon all of them. Liability does not arise out of ownership alone, but the ambit of section 4 is far wider than that of section 3 and any degree of control is sufficient (*Austin Rover Group Limited v HM Inspector of Factories* [1990] 1 AC 619, 634A to 635E. In addition, where a person has responsibility for the maintenance and repair of premises or of the means of access to them, section 4(3) provides that that person is to be treated as having control of the matters to which that obligation extends.

65. Site providers who have granted exclusive possession of a site will often remain in possession of the access to the site, such as a farm track, or a lift or staircase giving access to a rooftop. With or without the Code agreement, such a landowner is in control of that means of access and has a duty is to ensure that the "means of access [to the premises] or egress therefrom" is safe so far as is reasonably practicable. But the extent of the duty depends upon the site provider's ability to make the means of access safe; where a site provider is not entitled to any say in what the operator does while it is using the access to approach the site it will not be reasonably practicable for it to prevent the operator from doing something that makes the access unsafe. The duty under section 4 arises from control; it is not the case that the need to control arises from the possibility that there is a duty.

The issue in the present references: does the nature of APW's business, or the terms of the intermediate leases, make a difference?

66. For APW it is argued that it must manage access to the three sites and check method statements and risk assessments and the identity and qualifications of the personnel involved in order to avoid liability. The reasons given relate first to the nature of APW's undertaking, and second to the requirements or expectations of the superior landlord.

67. The nature of APW's undertaking is relevant because liability under section 3 of the 1974 Act arises from the way a person conducts their undertaking. We agree that APW is, as Mr Clark puts it, a professional site provider for the purposes of electronic communications networks. Mr Clark goes on to say that APW "carries out a management function including managing access to its portfolio of sites," and no doubt that that is true in relation to some of the sites it lets, where the terms of its agreement with the operator give it a management role. But the question is whether the terms imposed by the Tribunal must give it the ability to carry out that management function because the nature of its undertaking means that it is at risk of criminal liability for the safety of the sites.

68. Mr Clark's argument was that the operation of the sites that are the subject of this reference is part of APW's undertaking, and that it cannot absolve itself of its duties under section 3 of the 1974 Act by passing them over to On Tower. Mr Clark cited *R v Associated Octel Co Limited* [1994] 4 All ER 1051.

69. In *Associated Octel* the defendant, Octel, operated a chemical plant. It used contractors to repair the lining of a tank; the contractor's employee was cleaning it with acetone when an electric light bulb above the tank broke. The acetone vapour caught fire and the employee was badly burned. Octel was prosecuted for breach of section 3 of the 1974 Act. It was held

that the fact that the work was done by a contractor was irrelevant. The work was part of Octel's undertaking. It was therefore responsible for the safety of the work done in the factory that it operated; it had to take reasonably practical steps to avoid risk to the contractor's employees from the physical state of the premises and from the adequacy of the arrangements made with the contractors about how they did their work.

70. The key to that decision is the fact that Octel was operating the chemical plant. It therefore had duties under section 3, which it could not get out of by passing them to a contractor.

71. Lord Hoffmann, with whom the other members of the House of Lords agreed, remarked that where for example an employer sent the office curtains to the dry cleaners, that did not make the dry cleaning part of its undertaking. Reverting to the facts before us, where APW is itself operating a telecommunications site, or where it has leased a site to another operator and is – by virtue of the terms of the Code agreement – involved in the arrangements made there for safety then it may well have duties under section 3 subject to the defence of reasonable practicability. But if it has no right to be on the site and no right to control what happens there then the operation of the site is not part of its undertaking and the duty under section 3 does not arise.

72. Put another way: the fact that APW's undertaking does include the management of some telecommunications sites does not mean that the operation of every site of which it is the site provider is part of its undertaking.

73. Mr Clark's argument therefore puts the cart before the horse. The fact that APW manages some of the sites that it has let does not mean that it is responsible for the safety of all the sites it lets. Where the Code agreement does not permit APW to manage or control the site then the operation of that site cannot be said to be part of APW's undertaking, and it has no duty under section 3 of the 1974 Act in relation to such sites. Mr Clark suggests that if On Tower's mast fell and injured somebody, "HSE might ask APW what steps it took as the site provider to reduce the health and safety risk the injured person was exposed to." So it might. But if the answer was "none, because we have no right to do anything on site or to do anything about what happens on site" then that is a complete answer to the question. The Tribunal is entitled and obliged to assume that the Health and Safety Executive would respond rationally to such a situation.

74. Analogous reasoning applies to the duty under section 4 relating to the access to a site. The duty arises from control, and the extent of the duty if it does arise depends upon what it is practicable to do there. What APW or any other site provider can (and therefore should) do depends upon the terms of the Code agreement. One of APW's arguments is that On Tower itself is a site provider, and in relation to the sites that it lets it exercises a management function and supervises the safety of the operations carried on there. Therefore it is said that APW should do the same. But what On Tower or any other operator does by agreement with its lessees is a very different matter from what the Tribunal will impose.

75. Mr Atkins argues that the site provider's liability will depend, among other factors, upon the scope of its undertaking (section 3) and the extent of its control (section 4), and says:

> "These are questions of fact to be determined on a case-specific basis. The HSE, as the enforcing authority, would be entitled to take into account not only the strict terms of any contractual or lease arrangements, but also the way in which the parties operate in practice. There is no way to know in advance of a criminal investigation or other enforcement action what view HSE might take in relation to the scope of the undertaking or control."

76. We agree that HSE would of course take into account what the parties actually do in practice. If a site provider is given control, whether by a consensual Code agreement or by the parties' own operating practices, then a duty will arise commensurate with that control. If the Tribunal imposes terms that give the site provider no role in the operation of a site and no control of the access to it, but the parties themselves agree that the site provider shall check the method statements and risk assessments, then of course a duty may arise. But that is not the point. The question is whether the Tribunal should impose terms that enable the site provider to control access and to check safety, on the basis that HSE will expect or even assume that that is what the site provider does on all its sites because it does so on some of its sites. The argument is perilously close to saying that such terms have to be imposed because HSE will get it wrong. It would be irrational to impose terms on that basis.

77. Mr Atkins adds that "In the event of exposure to risk on site, it would be for the HSE to consider whether it was at least partly attributable to the way in which the Respondent has carried on its activities (for example, by granting the lease, or granting it on particular terms…)". That is, again, beside the point in this case where the terms will be those required by the Tribunal rather than being APW's choice. Mr Atkins was unable to point to any prosecution of a site provider in the context of a telecommunications lease.

78. We have of course yet to set out our decisions on the various terms of the drafts leases that will determine the extent to which the new agreements are to give APW any involvement in or control of what goes on at these three sites. There may or may not be reasons for a site provider to have an involvement in the management of a site. In the absence of any such reasons the site provider will not be required or enabled by the Tribunal to manage or control operations on the site, because that duplicates the operator's work, causing it delay and expense and thereby going against the objectives of the Code, and also because it potentially exposes the site provider to liability. It is not the case that the site provider has to be given an involvement or a degree of control in order to protect it from liability; that is the wrong way around. We have to start from the other end of the problem by asking what involvement APW has to have in the site or in the access to it.

79. That brings us to the second reason why it is said that APW has to control the safety of the site and of access to it. It is said that the superior landlord in each case requires APW to control access and to manage the sites and that one of the reasons why it granted the intermediate leases was in order to pass this task to APW.

80. If that were the case then it would still be necessary for us to consider to what extent it was right to impose on On Tower the control that the superior landlord wanted APW to exercise, bearing in mind the need to cause the least possible loss and damage to the superior landlord and to APW, as well as On Tower's operational requirements.

81. The difficulty for APW's argument, however, is that a perusal of the intermediate leases reveals that APW has no responsibility to the superior landlord either to guarantee the safety of the sites or to manage or restrict access to them. Management and supervision of the site is not mentioned in the intermediate leases. APW is to enforce the covenants in the existing leases, but there is no requirement to check or to guarantee compliance with those covenants. That is the case despite the fact that the superior landlord is relinquishing its direct relationship with On Tower and will have no privity of contract or estate with any future sub-tenant of APW. There is no covenant that the site will be operated safely, nor any indemnity given by APW to the superior landlord.

82. As to access, APW is given unrestricted access to each site. True, two of the leases say that APW "shall be responsible for all reasonable access requests to the Property by the Undertenants" (see paragraph 38 above); but that does not require APW to restrict access. In any event none of the existing leases requires On Tower to make a request before going on to the site. As to future leases, APW is given unrestricted access and is left free to confer the same right on its own lessees.

83. Mr Clark argues that the reason why APW is given unrestricted access is so that it can control access by On Tower. But the intermediate leases do not require APW to exercise that control. Each would enable APW itself, or its assignee, to carry on business in the site if On Tower left, operating a telecommunications site at Audley House or a business of its choice (subject only to planning requirements) at Port Talbot or Huntingdon, without any restriction on its access.

84. If these were sites where access needed to be restricted, checked, logged or otherwise controlled, whether because of the nature of the business carried on there by the superior landlord, because of residential occupiers, or because of the vulnerability of other persons on the surrounding land, then the intermediate leases would contain provision about that and we would have to assess whether it was right to reflect any or all of such provision in the new leases. But the intermediate leases reveal no concern at all about access to the sites, whether by an undertenant, a future undertenant, or by APW or any successor in title to APW (as to which, as we noted, the superior landlord has no control at all since APW can assign or charge its interest without consent). There is no evidence that the superior landlord has imposed any responsibility upon APW to control the safety of the sites or the access to them. If it had, we would then have to consider whether those responsibilities should be reflected in the Code agreement; but it has not and therefore APW's relationship with the superior landlord is not a reason for the Tribunal to impose terms that make APW responsible for safety at the sites.

Terms relating to safety and access

85. In the light of the discussion above we can now consider the specific terms of the new leases that are in dispute. We deal with safety and access under one main heading, because APW's wish to manage access to the site is to a large extent justified by its wish to be in control of the safety of operations there, while much of On Tower's objection to having to comply with APW's access policy and to use its access portal is an objection to having APW approving or managing On Tower's operations.

86. It is therefore convenient to begin by looking at the access policy and the access portal.

The access policy and the access portal

87. APW seeks to impose a number of requirements around access to the three sites. Much of the argument and cross-examination at the hearing was about APW's requirement that On Tower be obliged to comply with APW's access policy, which APW seeks to have defined in and annexed to the leases. The access policy is a 21-page document which begins by setting out APW's mission, which is to "Boost the drive for improved connectivity by providing and maintaining efficient and effective services in conjunction with running a global portfolio of infrastructure assets", and the purpose of the policy which is "to set out the strategy for effective maintenance and provision of safe access to our portfolio of sites". The policy goes on to define different types of access and different levels of information required in order for permits to be issued. It says "Permits will not be issued until we are satisfied with the work activities, personnel and processes involved." In all cases risk assessments and method statements are to be provided to APW.

88. The policy requires operators to use APW's access portal in order to get permission for access. The access portal is an on-line system for the submission and granting of access requests. We were shown a very helpful video in which we were taken through the portal's requirements which must all be satisfied before access is given. The applicant is taken through multiple screens all requiring a number of items of information. They include the identity of the persons attending, the make, model and registration of their vehicle, the start and end time of the proposed visit, their training certificates, as well as method statements and risk assessments for whatever is to be done. It is not a quick process. On Tower maintains its own access portal for its contractors to use; APW argues that it would therefore be easy for On Tower to transfer all that information to APW's own portal. That would of course take time; data has to be entered afresh, and documents uploaded to On Tower's portal would have to be downloaded and uploaded afresh to APW. It is by no means the work of a moment.

89. There is some dispute as to whether other operators find the portal helpful; we make no finding about that. The fact remains that the evidence in this case, which we accept, is that On Tower finds it onerous and does not wish to use it. We have to consider whether there is any reason why the new leases should impose any restriction at all on On Tower's access to any of the sites.

90. APW manages a great many sites, and we accept that for sites where it manages access and is entitled or obliged to ensure safety the requirement for the operators to use the portal is helpful to APW. On Tower by contrast has its own arrangements for access by its contractors in which it gathers all the information necessary for the safety of the visit. Transferring that information to APW's portal is time-consuming. Mr Holloway gave evidence that On Tower did use the portal until March 2021and Mr Brearley confirmed that there had been a number of occasions when a visit was abortive or when there was no response to the request but that since they stopped using the portal there had been far fewer problems. It was agreed that the attendance log, derived from On Tower's own system, did not set out exactly what the problem was on each occasion, and we make no finding as to the cause of the problems

logged nor as to the time taken for the portal to process the request. But we accept that On Tower has good operational reasons for not wanting to use the portal in the context of the existing lease that does not require it to do so, and does not want that requirement in the new lease.

91. The access policy comprises a number of requirements which are then reflected in what has to be entered on the portal. At the heart of the policy is APW's requirement for the information it needs in order to approve the safety of what is going to be done on site, in particular the risk assessments and method statements, as well as the training certificates of individuals, their identities, and the details of their vehicles. APW says it needs this in order to ensure safety at the site, and to protect itself. On Tower says that it is unnecessary for APW to duplicate the safety assessments that it does itself. It does not wish to spend time providing information for APW to duplicate the work that it does itself and is highly qualified to do. To do so causes expense and raises the price of services, and that is contrary to the provisions of the Code.

92. We accept On Tower's arguments on this point. So far as On Tower's own employees are concerned, as well as people on the surrounding land and the general public, On Tower and its customers are responsible for site safety. APW is not unless the terms ordered by the Tribunal make it so. It is not at risk of criminal liability unless the terms ordered by the Tribunal put it at risk. In order to meet On Tower's operational requirement, and to cause the least possible loss and damage to APW and the superior landlords in each case, the Tribunal determines that the leases will not include the requirements for On Tower to comply with the access policy or to use the access portal. Accordingly the definitions of "Access Policy" and "Access Portal" are to be deleted, as are other references to them (in particular the proviso whereby APW's covenant not to obstruct the tenant's access is conditional upon the tenant complying with the access policy), and all requirements in the draft leases for On Tower to provide risk assessments and method statements.

Permitted hours of access

93. There are two other issues about access that require resolution. One is the hours of access, and the other is whether APW should have notice of access.

94. As to the hours of access, the "Permitted hours" are defined in each lease to be between 0900 and 1700 on Mondays to Fridays, "save in the event of Emergency Works and/or if there is a technical need to do so, which must be approved by the Landlord in advance" (Schedule 1, part 1, paragraph 1.1). On the final day of the hearing Mr Clark indicated that these hours are no longer insisted upon and that APW would be content for the leases to permit On Tower to have access to the sites at "reasonable hours." That term is not defined; Mr Clark expressed the view that early evening work, to finish maintenance work commenced in the afternoon, would be acceptable but that work in the early hours of the morning would not. A reference to undefined "reasonable hours" seems to us to hold unlimited potential for dispute.

95. The existing leases grant On Tower unrestricted access to the Audley House and Port Talbot; access to the Huntingdon site is permitted between 0800 and 1800 Monday to Friday, 0800

to 1300 on Saturdays. The intermediate leases impose no restrictions on the hours when APW or its assignee can access the sites; accordingly it is clear that the superior landlord does not require notice of access to the sites. By "access" in this context we mean access as granted in the draft leases, with and without vehicles along the accessways shaded on the draft plans; access to other surrounding land of the superior landlord is considered separately below.

96. APW of course has no presence on any of the sites, although its lease extends to a small area of surrounding land at Huntingdon because of the other site there; we have no evidence about the terms of its involvement, if any, in that site but it is in the same position as any other neighbour so far as that site is concerned, as is Airwaves, the operator there. If the new leases allow access to the sites at unlimited hours it is not possible to understand how that will have any adverse effect upon APW, in light of the fact that we have determined that APW has no responsibility for safety at the site.

97. It may have an effect upon the superior landlord. But the superior landlord in granting APW access to the sites at unlimited hours (even at Huntingdon where On Tower's access is presently restricted to business hours) has shown itself to be entirely unconcerned about the hours of access. No evidence has been given to show why unrestricted hours might cause any difficulty to the superior landlord. Mr Clark argues that APW has been given unrestricted access so that it can control access by its tenant, but there is no evidence that this is the case. APW or its assignee can operate a telecommunications site at any of the three sites, or any business permitted by the planning legislation at Port Talbot and Huntingdon, with access at all hours so clearly this is not a concern of the superior landlord.

98. On Tower by contrast does not wish to have its operations hampered by restrictions on the hours at which it can operate at the sites.

99. Accordingly we determine that access should be permitted at all hours on all three sites, in the absence of any evidence that that will cause any loss or damage to APW or to the superior landlord. The definition of the permitted hours in the draft leases is to be deleted, as are all other references to the permitted hours. The leases are to include the provision sought by On Tower for APW to provide On Tower with a key if the sites are secured by locked gates.

Notice of access

100. A further vexed question is whether and to what extent APW requires to be given notice of access to the sites by On Tower. APW's amendments to the draft leases define and require compliance with APW's "Access Protocol", which stipulates that On Tower must give 24 hours' notice of access to the site; the unchallenged evidence for On Tower is that in practice it takes more than 24 hours to get a response via the Access Portal. We have decided that On Tower is not required to use the Access Portal and therefore does not need permission for access; so the issue is now simply whether APW is nevertheless entitled to have notice of access.

101. The existing leases do not require notice of access; APW's intermediate leases do not require it to give notice of access to the superior landlord.

102. We see no purpose in requiring On Tower to give notice of access to the sites, where APW has no presence and cannot be inconvenienced, and is not required to inform the superior landlord of access and so cannot be put in breach of any obligation to the superior landlord. There was some discussion at the hearing as to whether different provision needed to be made at Huntingdon in light of the presence of the other site; but since there is ample space for vehicles at that site and no difficulties have been experienced with access in the past we take the view that no special provisions are necessary.

103. Mr Clark asked that if the Tribunal did not accede to the terms that APW requires in relation to notice of access, then the Code agreements should include provision for On Tower to provide its own access records to APW in the event that APW is subject to or threatened with legal action. It is likely to On Tower would do so, or would be required in the course of litigation, to do so in any event and we agree that the leases should include such an obligation.

The Access Protocol

104. Schedule 1 part 1 of the draft leases sets out the rights granted to the tenant; it goes on to provide that the rights are granted subject to a number of matters, of which two are agreed, namely On Tower's not knowingly interfering with any third party rights over the site and On Tower's compliance with any restrictions or conditions in the superior lease. Another proviso is that the tenant shall provide risk and safety method statements, which we have already said is to be deleted.

105. APW wants to add a further condition, namely compliance with APW's "Access Protocol". The Access Protocol is defined as follows:

> "(a) a minimum of 24 hours' notice given by the Tenant to the Landlord (save in the case of Emergency Works) where such notice shall be given as is reasonably practicable in the circumstances, or Major Works, where not less than 7 working days' notice shall be given by the Tenant to the Landlord);
>
> (b) complying with the Landlord's and Superior Landlord's reasonable safety and security procedures, these having been notified to the Tenant; and
>
> (c) otherwise in accordance with the Access Policy."

106. The protocol therefore comprises a requirement to give notice for access, a requirement that the tenant comply with unspecified reasonable safety and security procedures and a duplication of the requirement to follow the Access Policy.

107. We have already dealt with the Access Policy and decided that On Tower does not have to comply with it, so paragraph (c) above is to be deleted. So is paragraph (a) relating to the giving of notice of access.

108. Paragraph (b) relates to unspecified safety requirements, and is also to be deleted. We have already decided that APW is not responsible for the safety of these sites. Nor is the superior landlord. The inclusion of this term so far as the superior landlord is concerned risks giving it responsibility for safety at the sites and potentially exposes it to civil and criminal liability as discussed above. No doubt where the superior landlord becomes aware of safety issues at the site – for example when it plans to undertake work itself – it will inform either or both of APW and On Tower; if On Tower is made aware of such issues it will be responsible for the safety of its own operations in the context of the information given to it. If it operates unsafely it will be liable under the agreed terms of the leases, it will have to pay compensation under paragraph 25, and it will be at risk of criminal liability under the 1974 Act. Neither APW nor the superior landlords need the additional protection sought by the inclusion of this clause.

109. Accordingly the definition of the Access Protocol and all other references to it in the draft lease are to be deleted.

The provision of ICNRP diagrams and certificates

110. We noted above (paragraph 48) the agreed obligations in the leases for On Tower to comply with legislation including the requirements of ICNRP (the International Commission on Non-Ionizing Radiation Protection). To that provision APW seeks to add further requirements, repeating the obligation to comply with recommendations made by ICNRP, and imposing requirements to provide APW on completion of the lease with ICNRP compliance certificates for the sites, and to supply copies of the occupational and public exclusion zones when these change. These are significant changes from the existing leases, where there are no similar provisions, and there are no corresponding requirements in the intermediate leases.

111. We accept, of course, that the ICNRP exclusion zones are of potential concern to the superior landlord and to any other neighbours whose buildings or activities may in the future fall within them (none do at present). But that is On Tower's responsibility. It is unnecessary to make it also the responsibility of the site provider. Mr Holloway confirmed in his witness statement that On Tower will provide copies of the exclusion zones to APW upon request; it is for APW to consider carefully whether and why it would make that request in the light of what we have said about its role and responsibilities on these sites. Mr Clark says that APW liaises with the superior landlord about the ICNRP zones; it is free to do so if it chooses but the intermediate leases do not make it responsible for doing so, and nor will the Tribunal.

112. We take the view that On Tower's responsibilities in the agreed clause to abide by legislation and regulations, including the requirements of ICNRP, are sufficient. For the reasons already given there is no reason why APW should be obliged or entitled to check or manage that compliance or to take on responsibility for ensuring compliance. That would simply be a duplication of On Tower's own work and responsibility. APW is not under any duties to the public or to the superior landlord that require it to do this, and is not at risk of criminal liability unless the Tribunal's order puts it in a position to control what On Tower does. Accordingly APW's additional provisions about ICNRP certificates and zones are to be deleted.

Sharing and upgrading

The legal principles

113. Paragraph 17 of the Code provides as follows:

> "(1) An operator ("the main operator") who has entered into an agreement under Part 2 of this code may, if the conditions in sub-paragraphs (2) and (3) are met—
>
> > (a) upgrade the electronic communications apparatus to which the agreement relates, or
> > (b) share the use of such electronic communications apparatus with another operator.
>
> (2) The first condition is that any changes as a result of the upgrading or sharing to the electronic communications apparatus to which the agreement relates have no adverse impact, or no more than a minimal adverse impact, on its appearance.
>
> (3) The second condition is that the upgrading or sharing imposes no additional burden on the other party to the agreement.
>
> (4) For the purposes of sub-paragraph (3) an additional burden includes anything that—
>
> > (a) has an additional adverse effect on the other party's enjoyment of the land, or
> > (b) causes additional loss, damage or expense to that party.
>
> (5) Any agreement under Part 2 of this code is void to the extent that—
>
> > (a) it prevents or limits the upgrading or sharing, in a case where the conditions in sub-paragraphs (2) and (3) are met, of the electronic communications apparatus to which the agreement relates, or
> >
> > (b) it makes upgrading or sharing of such apparatus subject to conditions to be met by the operator (including a condition requiring the payment of money)."

114. As the Tribunal explained in *Dale Park*, at paragraphs 18 to 26, paragraph 17 of the Code derives from a recommendation of the Law Commission in its report *The Electronic Communications Code* (Law Com no 336, 2013). That report recommended that consideration for Code rights should continue to be paid at a rate that reflected the value of those rights to the operator. The ability of a site provider to control sharing and upgrading was a valuable right under the old Code, because it enabled provision for additional payment to the site provider. Sharing was particularly important because provisions for "payaway",

as it was called, were often imposed whereby the operator had to pay to the site provider a proportion of the licence fee paid by the sharers. The recommendation from which paragraph 17 is derived would have enabled that practice to continue, while guaranteeing the operator a minimum level of sharing and upgrading for which it would not have to pay.

115. That rationale for paragraph 17 has now disappeared, with the change in the basis of consideration. And as the Tribunal observed in *Dale Park* (paragraph 25), while the minimum level of upgrading and sharing in paragraph 17 is a useful starting point there is no need for the operator to produce any particularly compelling evidence for wider or unlimited rights, and such rights should not be regarded as unusual. That approach was approved by the Court of Appeal at [2021] EWCA Civ 1858, paragraphs 54 to 66. The claimant in that reference and in this, On Tower, is a wholesale infrastructure provider whose business depends upon the ability to share its equipment and to upgrade it where necessary to meet its customers' needs. Some of the witnesses for the respondent in *Dale Park* lived within yards of the mast and expressed concerns about loss of amenity, and possible disturbance from noise, as a result of unspecified future upgrades and the presence of sharers on site and on the access to it; their interests were found to be adequately protected by other provisions of the agreement, including those preventing the operator from causing a nuisance, and the operator's business needs were found to justify unlimited rights to share and upgrade its electronic communications apparatus.

The terms in issue in the three draft leases

116. On each site On Tower seeks unlimited rights to upgrade its equipment, and to share the occupation and use of the sites and the Code rights "with providers of electronic communications networks for the purposes of the provision by them of their networks."

The terms in the current leases

117. As to upgrading, there is no limitation in the subsisting Port Talbot lease on adding to the equipment on site or on upgrading it; at Huntingdon there is no express restriction on upgrading but the landlord's consent (not to be unreasonably withheld) is required for any addition to the equipment on site. The 2018 lease of Audley House prevents the addition of aerials and antennae without consent, qualified as at Huntingdon, and confers the right to upgrade in terms corresponding to the rights in paragraph 17 of the Code, save that the upgrading of apparatus belonging to EE Limited or Hutchison 3G UK Limited (the operators who were using the site when the 2018 lease was entered into) is unlimited.

118. As to sharing, the 2018 lease of Audley House gives On Tower the right to share to the extent (broadly) permitted by paragraph 17, save that unlimited sharing is permitted so far as EE Limited and Hutchison 3G UK Limited are concerned. The pre-Code leases for Port Talbot and Huntingdon allow sharing subject to the landlord's consent and subject to a 30% payaway (which would be void under the new Code insofar as it applies to the rights conferred by paragraph 17).

119. It is important to be aware also of the relevant terms of APW's intermediate leases.

120. There is no express restriction on upgrading equipment in any of the intermediate leases. The definition of the permitted use includes the "replacement, improvement … of Equipment" (broadly defined to include both electronic and non-electronic communications apparatus installed by the undertenant pursuant to the rights contained in the existing or any future leases); the Port Talbot lease also gives APW the right to attach equipment to "any exterior surface of the Estate" (meaning the superior landlord's surrounding property), subject to the superior landlord's qualified consent. Alterations and additions to the sites at Audley House and Huntingdon need the superior landlord's qualified consent, but not at Port Talbot.

121. As to sharing, in each intermediate lease APW can "share or part with possession or occupation of the whole or any part or parts of the Property" subject (as we noted above at paragraph 42) to notifying the superior landlord; there is no consent requirement (clauses 13 of the Audley House and Huntingdon leases, 14 of the Port Talbot lease); there are "payaway" provisions in the Audley House and Port Talbot leases (paragraph 118 above).

The issues in dispute (1): should the right to share and upgrade be restricted to paragraph 17 rights?

122. As to both sharing and upgrading, APW seeks to restrict On Tower's rights to the sharing and upgrading permitted by paragraph 17 of the Code, so as to have no more than a minimal adverse impact on the appearance of the site and to impose no additional burden on the landlord (whether by restricting its enjoyment of the property or causing it any additional loss or expense).

123. This is obviously unwelcome to On Tower for the same reasons as it was in *Dale Park.* Sharing is its business, and upgrading its equipment is a necessary part of the service it offers to its customers. APW is obviously entirely unaffected by the appearance of the equipment as it has no presence of its own on the sites.

124. For APW, Mr Clark says that it is necessary to restrict On Tower to the paragraph 17 rights in order to protect the superior landlord on each site. Mr Thacker in his statement expressed concern that no details had been given about any proposed upgrade, and said that an upgrade could damage the superior landlord's property. Mr Clark observes that electronic communications equipment is inherently ugly; for anything to look so bad that it falls outside the provisions of paragraph 17 it would have to be pretty extreme. The superior landlord needs to be protected from that, and in that sense paragraph 17 is generous and On Tower is unlikely to need rights that go beyond it.

125. The fact that no details of potential upgrades have been provided is unsurprising, because technology moves on quickly and On Tower understandably cannot say what it will need even just a few years hence. The aesthetic qualities of telecommunications equipment are a matter of opinion, but it is clear in the present case that they are unimportant. Each site is in an industrial area. Each is quite small, which limits the size and the height of new equipment. APW itself will be unaffected by its visual impact in any event.

126. As to additional burdens caused by sharing or upgrading, again there should be none for APW which has no presence on the site. It is difficult to imagine how the superior landlord, or indeed any other neighbour, could be troubled by upgraded or additional electronic communications equipment, save for the impact of, for example, the actual work of removing the current mast and putting in a new one in order to support 5G, as Mr Holloway said is likely. It is of course possible that sharers might cause damage to the superior landlord's surrounding property, whether or not the restrictions sought by APW are imposed; liability for that damage will fall both upon the sharer and upon On Tower. Insofar as APW's intermediate leases require the landlord's qualified consent for any new or additional equipment on any of the sites, APW will not be in breach of this condition by virtue of upgrading carried out by On Tower exercising rights granted to it by the order of the Tribunal.

127. We note that in the *Dale Park* case there was evidence from individuals who were going to be immediately aware of changes to the site, and they were nevertheless found to be adequately protected by the other provisions of the agreement. In the present references no evidence of any actual concern by any individual, or of the superior landlord, has been produced and the nature of the sites means that visual impact is unimportant.

128. The concerns expressed about the extent of the rights to share and upgrade are not realistic; On Tower's need for unlimited sharing and upgrading rights is obvious and integral to its business. Accordingly the rights to share and upgrade equipment on each site are not to be limited by the terms of paragraph 17 of the Code.

(2) Should sharing be restricted to Code operators?

129. Next, the respondent seeks to restrict the right to share so that On Tower can share only with Code operators (that is, operators who have had the Code applied to them by section 106 of the Communications Act 2003). That is what is conferred by paragraph 17 and the respondent says that the right should go no further. On Tower's customers include some non-Code operators and it wants to be able to share without the restriction proposed by APW.

130. APW's intermediate leases impose no restriction at all on the identity of those who share or even take future sub-leases of the sites. At Port Talbot and Huntingdon the site is not even restricted to use for telecommunications. So there is clearly no concern on the part of the superior landlords as to the identity of sharers or whether they are regulated by the Code.

131. APW's concern is that the additional right that On Tower seeks would allow organisations on site that are not regulated by the Code and that APW might therefore become bound by business tenancies protected by the Landlord and Tenant Act 1954 so that when On Tower leaves APW may be unable to rid itself of its subtenants. On Tower's response is that its sharing agreements confer licences not tenancies and so will not attract the protection of the 1954 Act; in any event, it is obliged to give vacant possession on leaving the site and therefore APW will have a remedy in the unlikely event that its customers do not leave.

132. We take the view that On Tower's obligation to give vacant possession when it leaves, and its liability to APW if it does not, is an answer to the concern about the possibility of sub-tenants not leaving.

133. Mr Clark also argued that if On Tower were allowed to share with non-Code operators then it would not be restricted to Code rents, and would thus obtain a commercial advantage by the back door. We do not understand why On Tower's ability to charge consideration that is not restricted by paragraph 24 of the Code is any concern of APW's, but in any event On Tower can charge consideration outside the Code in any case for the use of its equipment. This is because Code rights are rights in relation to land (paragraph 2 of the Code) and "land", in the definitions in paragraph 108 of the Code, "does not include electronic communications apparatus". So why APW is troubled by On Tower's ability to take non-Code consideration from non-Code operators is not understood.

134. Accordingly we conclude that On Tower's right to share should not be limited to sharers who are Code operators.

(3) Should On Tower have the right to share its equipment but not the site itself?

135. The third issue is whether On Tower should have the right only to share its equipment, as paragraph 17 provides, or also to share the site itself in each case. This is not a point on which the Tribunal has heard argument before and it does not seem to have been perceived as a problem by site providers in previous references; the right to share in *Dale Park* was for On Tower to share the site, and that aspect of sharing was not in dispute.

136. For On Tower it is said that of course in order to share its equipment it has to allow its sharers to come on to the site. We do not think that that necessarily means that other businesses have to share possession of the site, but clearly they will have to be permitted to enter, if only occasionally. Mr Clark points out that each of the leases already provides that "rights exercisable by the Tenant shall be construed as being exercisable by the Tenant and all persons authorised by them" and that therefore On Tower can permit those who share the equipment to access and enter the site as necessary. Mr Seitler QC responds that this right does not enable it to allow an operator to place a cabinet on the land within the site. There is clearly some room for argument about that, and accordingly we take the view that the additional right sought by On Tower should be granted, in view of the nature of its business needs, unless the respondent's concerns are justified.

137. Mr Clark says that there are two concerns. First, a right to share the site may lead to damage being caused by On Tower's customers with whom APW is not in a contractual relationship. We do not understand why this arises from the ability to share the site any more than it arises from the ability to share equipment or indeed to authorise any of On Tower's staff or customers to access and enter the site, nor why On Tower's liability under the indemnity provision in the draft leases and its obligations to pay compensation under paragraph 25 of the Code do not protect APW.

138. Second, there is a concern that if On Tower can share land as well as equipment then APW may be bound by Code rights created by it. The point here is that, as we said above, Code

rights relate to land and not to equipment. Mr Thacker in his evidence expressed concern that if On Tower shares the sites, it could create Code rights which will prejudice APW's ability to obtain vacant possession at the end of the term. That is not correct, since APW's interest is not derived from On Tower's and paragraph 10 of the Code will not operate to make APW bound by any Code rights that On Tower creates. Mr Clark argues that On Tower's drafting could be construed as APW's agreement to be bound by Code rights; we see no reason why that would be the case. If this is a real concern it can be assuaged by the inclusion of an express proviso that APW does not agree to be bound by any Code rights conferred by On Tower upon any other person.

139. Accordingly we reject the respondent's arguments on this point and On Tower is to be permitted to share the sites as well as its equipment, with the addition of the proviso just mentioned.

Rights over the superior landlord's land

140. We move now to a group of terms sought by On Tower that give it rights over APW's or the superior landlord's surrounding land. APW will have no surrounding land at Audley House and Port Talbot, and a very small area at Huntingdon. It is worth repeating that each of APW's intermediate leases give it the right to access the site with or without vehicles over the superior landlord's surrounding land, to install electricity cables and connect to service media, "all rights mutatis mutandis as have been granted [over the superior landlord's property] to the Undertenants" and

> "Any other rights in under and over the Estate which are at the date hereof needed or may after the date hereof be needed to enable the Tenant to grant the Future Leases and to renew the Existing Leases or to deal with any applications by the Undertenants in respect of the Existing Leases and Future Leases."

141. Those are very broad provisions. The superior landlord has granted to APW all the rights that are "needed" for it to deal with the existing leases and to grant future sub-leases. The breadth of such an array of rights, whose extent is not yet known, also makes it somewhat imprecise. On Tower accepts that if it requires any rights that APW cannot grant it will need to negotiate with the superior landlord.

The right to park on the access to the sites

142. On Tower seeks the right to park on the access to the sites, and to load, unload and turn vehicles on it. It cannot park inside any of the sites at present (but will be able to park within the demised area at Audley House because of the extent of the demise in the new lease). Obviously it needs to be able to load and unload as close to the sites as possible. APW does not wish to grant an express right to park because it may disturb other users of nearby land, and may obstruct others' access. APW says it has to have control of the access because it is potentially criminally liable under the 1974 Act if it fails to ensure that the means of access is safe and without risk to health; as discussed above, the potential for liability arises from control, and it is not the case that control has to be given in order to avoid liability.

143. There is no express right to park outside the demise in any of the existing leases, although they all include the right to access the sites with or without vehicles. Likewise the intermediate leases contain no express right to park.

144. Mr Seitler QC advanced a number of arguments to the effect that On Tower is likely to have acquired the right to park on the access areas already by implication. We do not have sufficient evidence to determine whether or not that is the case; such rights if they have been created already by implication would be appurtenant to the existing leases and would expire with them although of course if they were part of the existing leases by implication then they would fall within the scope of paragraph 34(12). However, we think the position can be simply analysed without the need to refer to existing rights.

145. What is perfectly obvious is that On Tower and its customers need to have the right not only to drive up to the sites but also to stop their vehicles, to get out and enter the site, and on some occasions to load or unload. APW has no presence on the site and cannot possibly be caused any loss or damage by the grant of the rights to do so. Unless the Tribunal confers upon APW the right to control what On Tower does on the access APW is not responsible for what On Tower does there and need have no concerns about liability for example for unsafe loading or for the obstruction of others on the surrounding land.

146. Accordingly we take the view that the leases should give On Tower the right to park on the "Access" (as defined in the leases) to the sites insofar as APW is able to grant that right. On Tower's wording in paragraph 1.1 of Schedule 1 Part 1 ("together with the right to park load unload and turn vehicles thereon") shall stand. Obviously in the event that any of the superior landlords takes the view that APW is not able to grant that right, On Tower will have to negotiate with, and if necessary issue a reference against, the superior landlord.

147. On Tower is content for the leases to include a covenant by it not to obstruct anyone else's use of the access in each case, and the leases shall include such a provision.

148. It is convenient to mention here that APW wants the leases to contain a provision that nothing in the lease confers any right over any neighbouring property, that nothing is to be taken to show that On Tower has any right over neighbouring property, and that section 62 of the Law of Property Act 1925 does not apply to the lease. Section 62 relates to the implication of easements on the grant of a new lease as a result of the parties' practice before the grant of the lease.

149. This is a reasonable provision for the protection or at least the reassurance of APW and the superior landlord; it protects them from unforeseen rights arising in the future, and we see no reason why APW should not have that protection. Mr Seitler QC argues that the exclusion of section 62 is inconsistent with the Code's purpose of facilitating infrastructure deployment and maintenance and that to remove section 62 puts On Tower at risk, but we see no reason why On Tower should be entitled to rights that are not expressed in the terms of the lease when they have been negotiated and litigated in such exhaustive detail. The relevant provision – currently paragraph 5 of Schedule 1 Part 1 - shall stand.

Access to the superior landlord's property

150. The draft leases (Schedule 1, Part 1, paragraph 1.2) also allow access to the superior landlord's property (meaning land which is outside the sites and outside the defined access to the sites), for the purpose of carrying out work on the site. APW seeks an amendment to provide that this is only for "Major Works", defined to mean "intrusive ground works, ground re-instatement or the use of plant machinery to access, remove or deliver the installation (or any part thereof)"; and APW require seven days' notice of such works except for "Emergency Works", defined as quite restrictively as (we summarise) works required to ensure continuity of service following an event that could not have been anticipated.

151. On Tower now concedes that it will give 48 hours' notice of requiring access to the superior landlord's property except in cases of "emergency or operational urgency". It resists the restriction of such access to "Major Works" and it resists any definition of "Emergency Works".

152. The existing leases all give On Tower the right to access the superior landlord's land, with no requirement to give notice save that 12 hours' notice is required for access out of hours at Huntingdon, for the purpose of carrying out maintenance, adjustment, repair, replacement or renewal of the apparatus. APW's intermediate leases grant it the same rights, and enable it to grant the same rights in future leases. So the terms sought by APW would represent a significant restriction, both in terms of the notice required and in terms of the purposes of access to the superior landlord's land. APW says that the definition of Emergency Works and Major Works is needed for clarity, and that seven days' notice is needed for it to liaise with the superior landlord and other neighbours such as the occupants of the office at Audley House. It is said that more than 48 hours' notice is needed because it might be that the access required coincided with the superior landlord's plans for example to do work in the car park.

153. As to the superior landlord, the terms of the existing leases show that the superior landlord did not anticipate any difficulty with the tenant having access to the surrounding land where necessary; those leases do not reserve to the superior landlord any right to prevent access for the purposes of its own works, and nor do the intermediate leases. There is no evidence that On Tower's use of its existing rights has ever given cause for concern to the superior landlord or to anyone else. Again this is an instance of APW seeking to create for itself a role, of which the necessity is not apparent. Mr Clark argues that APW's "managerial role" is particularly important in this context: "to have APW (with the benefit of its industry experience) to deal with these kinds of access requests is one of the reasons landowners choose to let their sites to APW." Leaving aside the fact that On Tower is hardly without industry experience itself, the fact remains that the superior landlord has let the land to APW on terms that enable it, and its unknown assignee who may have nothing to do with the telecommunications industry, to access the superior landlord's land on the terms of the existing leases to On Tower. It is not the case that access has to be set up by prior arrangement in the way that APW argues.

154. We take the view that there is no reason why On Tower's rights to access the superior landlord's land at each site should be cut down in the new leases either by a requirement to give seven days' notice or by definitions restricting the purposes for which access may be taken. Nor is there any reason to define the emergencies that might give rise to a need for On Tower to access the surrounding land without notice. The only one of the sites where this might conceivably cause inconvenience is Audley House, and those who work in the

offices will be considerably more troubled by the disappearance of their phone signal than by an additional vehicle in the car park.

155. APW also seeks to provide that On Tower's access to the superior landlord's land is confined to land "immediately adjoining" the sites. It points out that access for example to the office building at Audley House should not be permitted. We do not want to provoke dispute by the inclusion of the words suggested, but we see no reason why On Tower would need or should be entitled to have access to a building, and indeed Mr Seitler QC says that it is inconceivable that such access would be needed in connection with work at the site. Accordingly paragraph 1.3 of Schedule 1 Part 1 shall be as drafted by On Tower, excluding the words that APW wishes to add, but with the addition of the words "other than buildings" after "the Superior Landlord's Property".

The right to place a generator on the superior landlord's land

156. It is usual in telecommunications leases to provide for the operator to be able to use a generator on site if the mains electricity fails. Dispute usually focuses on possible disturbance from noise. The risk of that on these three sites is minimal; none is near to residential property, and the people working in the office building at Audley House are more likely to be disturbed by noise from the adjacent railway than by a generator (and indeed by the interruption of a mobile phone signal in the absence of power). There is no evidence that the use of a generator has caused difficulties at these sites in the past.

157. The existing leases of Audley House and Port Talbot say nothing about a generator and accordingly there is nothing to prevent On Tower using a generator on either site. At Huntingdon the tenant can install a generator on the site with the landlord's prior qualified consent.

158. The draft leases set out expressly On Tower's right to place a generator on the site (despite the fact that there is no need to make explicit provision for a tenant to bring a chattel on to the demised premises) and provide that fuel shall be safely and securely stored. APW wants that to be subject to its right to approve the generator, consent not to be unreasonably withheld, with a further proviso that it shall be deemed to be reasonable for APW to refuse consent if the proposed generator would cause "more than minimal noise or disturbance" to APW or other adjoining or neighbouring parties. APW also wants a proviso that the tenant shall use "all reasonable endeavours" to get the electrical supply reinstated and to remove the generator forthwith once it is restored.

159. The need for On Tower and its customers to be able to use a generator when necessary is obvious. When the need arises it will probably happen suddenly and the need to seek approval would delay the restoration of power and of mobile phone signal; why APW would be better able to assess the suitability of the generator than would On Tower or its customers is not understood. We have to consider whether the restrictions that APW seeks are necessary to prevent or minimise loss or damage to it. Yet there is no risk of disturbance to APW itself from a generator, since APW has no presence at Audley House or Port Talbot outside the sites and will only visit Huntingdon in connection either with On Tower's site or with the other mast. It has no obligation to the superior landlord to approve generators (there

being no mention of them in the intermediate leases); its obligation is to enforce the covenants in the under-leases, which it is not prevented from doing by the absence of a requirement for it to approve a generator. We see no purpose in a provision for approval of a generator on any of the three sites and the provision for such approval is to be deleted.

160. So is the requirement for On Tower to use all reasonable endeavours to reinstate the electricity supply. It is going to do that in any event, and there is no need for a covenant in the lease to ensure it does so.

161. At Huntingdon On Tower also seeks the right to place a generator on the adjoining land of APW and of the superior landlord. Again this is agreed in principle, but APW wants that to be permitted only with its prior written consent, for the generator to be in a "suitable location", and for the location to be subject to its prior qualified consent except in case of an emergency or "operational urgency".

162. The existing lease at Huntingdon enables On Tower to install a temporary back-up generator on the superior landlord's property in a position to be agreed.

163. We see no purpose in having an explicit requirement for a "suitable location"; if On Tower places a generator in an unsuitable location it will be liable for any loss or damage caused. Nor do we see any purpose in a requirement for APW to approve the location of a generator as On Tower is at least as able to assess where the generator should go as is APW.

164. Should the right to place a generator on the surrounding land of APW or the superior landlord be subject to APW's prior written consent, and if so should there be an exception for cases of "emergency or operational urgency"? APW objects to that exception because the need to operate a generator arises from failure of a mains power supply, and except in those rare cases where warning is given of such a failure it is likely to be at the very least an "operational urgency"; so the requirement for written consent would have little effect.

165. We bear in mind that the site at Huntingdon is a haulage yard; Mr Clark argues that a generator outside APW's demise is likely to interfere with the superior landlord's operations. But we have heard no evidence about that. It is far more likely that no-one is going to mind having a generator occupy a small space for a short time. As to the other site there, if one needs to use a generator it is likely that the other will too, and as a matter of common sense we have confidence that the engineers on the ground will co-operate to make things work.

166. Accordingly the provision requiring APW's consent for the placing of a generator on its or the superior landlord's land at Huntingdon is to be deleted.

The right to lay conduits on the superior landlord's land

167. There has been a complex dispute about the extent to which On Tower shall have the right to install, connect to, and renew conduits on the superior landlord's land. The parties' position has changed with each fresh written submission. As will be expected from what has gone before, dispute has focussed on the extent of the right and the extent of APW's ability

to have notice of and to consent to its exercise. The existing leases allow On Tower to lay conduits under the superior landlord's property subject to prior qualified approval. The intermediate leases give APW the right to install conduits in the superior landlord's property subject to its qualified consent.

168. It appears that the parties have now agreed the definition of "conduits", save that On Tower wants to add wording to ensure that the conduits referred to include those used for electricity rather than just for electronic communications. We agree that the extra wording suggested by On Tower to this effect may be added for the avoidance of doubt.

169. It is also agreed that the right to install conduits or to grant to a statutory undertaker the right to do so is to be subject to APW's qualified consent. Dispute appears now to remain only about whether consent should be required for On Tower to inspect, maintain, repair, alter and renew the conduits once laid, and to re-route and upgrade the conduits.

170. This is one of the few areas where the superior landlord in each case has given an indication of wanting an element of control, by the provisions for qualified consent in the existing and intermediate leases. The installation or re-routing of conduits (however defined) on the superior landlord's property is an intrusion and the superior landlord, through APW, should have a voice in it. And this is a matter where APW itself needs the superior landlord's consent and so there is an obvious need for liaison once On Tower has given notice of what it needs to do. Accordingly for re-routing and upgrading conduits On Tower is to obtain APW's qualified consent and is to give seven days' notice. On the other hand, APW's and the superior landlord's involvement in the inspection and maintenance etc of the conduits is unnecessary (save that of course as already determined On Tower will give 48 hours' notice of its entering the superior landlord's property) and so the requirement for consent will not apply to those operations.

Further provisions relating to the superior landlord

The reservation of rights to the superior landlord and to APW

171. The draft leases reserve for the superior landlord a number of rights, for example to the use of conduits and service media on, under or through the Property, to shelter and support, to redevelop adjacent land, to move the access way and to enter the site in the company of On Tower's representative in inspect, repair, etc or to re-route and replace conduits serving the superior landlord's property. We refer to these as general reservations, being the reservations which it is agreed that the superior landlord shall have. There appear to be three issues between the parties.

172. First, APW requires the same reservations to be made in its favour as are made for the superior landlord, even though it owns no land except the sites themselves at Audley House and Port Talbot; On Tower by contrast sets out separate rights for the superior landlord and the landlord. The latter at Audley House and Port Talbot are limited to the right on reasonable notice to enter the site at a mutually convenient time, accompanied by On Tower's representative, for the purpose of good estate management or any other purpose connected with the lease or the reservations. For Huntingdon, On Tower's drafting includes additional

rights, similar to those of the superior landlord, because APW's intermediate lease includes the additional surrounding land and the adjacent site.

173. None of the existing agreements reserve rights for the superior landlord over the sites. APW's intermediate leases reserve various rights to the superior landlord with a proviso that they are not to interfere with the rights granted under the existing or future under-leases.

174. So far as Audley House and Port Talbot are concerned Mr Clark argues that if On Tower is entitled to future-proof the leases by including rights to upgrade the equipment then APW should also be permitted future-proofing by the reservation of rights in case it acquires adjoining land in the future.

175. We see no reason for a site provider to have the benefit of reserved rights in favour of land that it does not own and has demonstrated no plans to own in the future; we are not aware that the Tribunal has imposed such a term in any other reference. We do not understand why such a term would be needed in order to prevent loss or damage to the site provider. Such reserved rights might be useful to it in future unforeseen circumstances but that is not what we have to provide for. As Mr Seitler QC says, the possibility of APW acquiring adjoining land at any of the sites is speculation (in contrast with On Tower's known need to have the right to upgrade its equipment). Accordingly so far as Port Talbot and Audley House are concerned the general reservations shall be for the superior landlord only, and APW shall have the benefit of the separate reservation that On Tower is content for it to have. The same goes for Huntingdon, where the reservations in favour of APW are much more extensive in any event.

176. The second point of dispute is that APW's drafting includes two sub-paragraphs reserving the right for itself and the superior landlord (1) to enter the site to repair etc or divert service media or to install new conduits or service media, and (2) to undertake site inspections for the purposes of taking EMF (electric and magnetic fields) readings.

177. So far as that first right is concerned, it duplicates what is already set out in the general reservations and is to be deleted. As to the second, it is not understood why it is needed in addition to the rights, which On Tower's drafting would give separately to both the landlord and the superior landlord, to enter the site for the purpose of good estate management or any other purpose connected with the lease. Again it is to be deleted.

178. The third dispute is whether the right, which both APW and the superior landlord have, to enter the property for the purposes of good estate management on notice to On Tower, to be exercisable without notice in case of emergency. Imagine a mast on fire. It is, as Mr Seitler QC points out, highly unlikely that APW would be present at any of the sites in an emergency so serious that it could not make a quick call to On Tower; if it was, the call it would make would be to the emergency services. However great APW's expertise in the safety and management of telecommunications sites, the possibility of its being present at any of the sites in circumstances where both (1) the emergency was so great that On Tower could not be contacted and (2) APW itself had to hand the means of dealing with the emergency, is negligible. If those circumstances did arise and the emergency required intervention to save life, it is difficult to imagine that APW would be liable for the trespass.

The provision is not to be included so far as APW is concerned, because it is not necessary to prevent or mitigate loss or damage to APW.

179. The chances of such a reservation being a safe or useful one for the superior landlord to have are even more vanishingly remote, and the provision is not to be included so far as the superior landlord is concerned.

The limitation of liabilities arising from the exercise of reservations

180. APW seeks the inclusion of a clause limiting its and the superior landlord's liability to the tenant or any person using the equipment on the sites for any loss or damage arising from the exercise of reservations in the lease, except for physical damage to the installation or the site, anything as to which the law prevents the exclusion of liability, any claim in negligence or any breach of the provisions of the lease.

181. So the exclusion clause is itself quite limited; a number of potential liabilities, notably for negligence on the part of APW and its employees and contractors, are not excluded. As Mr Seitler QC observes, the exceptions are so broad that it is difficult to see where the exclusion of liability would actually take effect. There is no corresponding provision in the existing leases or the intermediate leases.

182. Mr Clark says that there is logic behind the exclusion; if the sites were not let, APW would have been able to exercise the rights that it now has by way of reservation, without fear of liability. That does not seem particularly logical to us; if the sites were not let it is unlikely that APW would have acquired them, and if the sites were not let then the potential for damage and injury from interference with On Tower's equipment would not arise.

183. APW has expertise in telecommunications sites and equipment; when it exercises the reservations it does so as a knowledgeable professional and it is difficult to see why its liability should be excluded, particularly in such an uncertain manner. The superior landlord has not sought such an exclusion in the agreements it has made. The clause is to be deleted.

The cost of enforcing the Superior Landlord's covenants

184. The draft leases contain a covenant by APW to pay the rent reserved by and perform the covenants in the intermediate lease, and to use all reasonable endeavours to enforce the superior landlord's covenants in that lease. APW says that if it is to use "all reasonable endeavours" to do so, that may involve expenditure and therefore enforcement should be at On Tower's cost; by contrast if what is required is "reasonable endeavours" then it does not require that proviso.

185. For On Tower it is argued that provision for "all reasonable endeavours" is appropriate because of the need for proper efforts to be made to enforce the superior landlord's covenants in cases where for example access is being obstructed, and we agree. The issue is whether On Tower should have to pay for that. On Tower says that it should not, since APW has taken on the intermediate lease and the right to receive rent from the sub-tenant, and

therefore should take on the burdens that go with that. On Tower does not wish to have to pay both to enforce covenants against APW and to enforce them against the superior landlord. For APW Mr Clark observes that the need for the clause is because under the new lease On Tower will have no direct contractual relationship with the superior landlord; the need to use APW to enforce the superior landlord's covenants is not a reason to require APW to bear the costs of enforcing them.

186. We do not accept APW's arguments here. It took on the intermediate leases without any provision for anyone else to bear its costs of enforcing the covenants. It has actively chosen to be the landlord of a Code operator, it took the intermediate leases subject to the operator's rights, and it is well aware of the operator's business needs. We take the view that the grant of the new lease is not a reason for APW to acquire an additional right to have On Tower pay for the costs of enforcing the superior landlord's covenants in the intermediate leases.

187. Accordingly the requirement for "all reasonable endeavours" is to stand, and the requirement for On Tower to pay is to be deleted.

Miscellaneous provisions in the new leases

188. None of the remaining provisions raises any profound issues of principle. We determine them relatively briefly on the basis that it is disproportionate to do otherwise.

The terms on which the tenant's rights are granted.

189. We have already referred to Schedule 1 part 1, which sets out the rights granted to the tenant, and to the provision that those rights are granted subject to certain conditions which we discussed at paragraph 104 above. Two further paragraphs are proposed by APW and resisted by On Tower.

190. The first is a proviso that the tenant shall exercise the rights only for the permitted use and in accordance with "any reasonable regulations" made by the landlord. The leases already contain a user clause and there is no need to duplicate that requirement; and the Tribunal will not give APW licence to introduce unspecified "reasonable requirements" in the future. The clause is to be deleted.

191. The second requires the tenant to cause as little inconvenience and damage to the site and to the landlord's and superior landlord's property as possible to make it good as soon as reasonably practicable, and to "provide safety method statements and timescales for the Installation which must be agreed by the landlord prior to any of the works being commenced." The reference to safety methods and risk assessments is to be deleted for the reasons already given; the rest of the clause is a pointless duplication of the tenant's express covenants (set out at paragraph 48 above) and of the safeguards provided in the Code itself. The clause is to be deleted.

Nuisance

192. The draft leases include a covenant by the tenant:

> "not to permit or do any act or bring onto the Property anything which may constitute a legal nuisance or which may cause injury to the Landlord, Superior Landlord or other users in the vicinity of the Property or cause damage to the Superior Landlord's Property provided that the proper and lawful use of the property in accordance with the terms of this lease for an in connection with the Permitted Use shall be deemed not to be a nuisance."

193. The underlined wording is required by On Tower. It is argued that if On Tower is held liable under this clause for anything done in the exercise of its Code rights, that would be a derogation from APW's grant. For APW it is argued that there would be no derogation since without the proviso APW is not giving On Tower the right to exercise its Code rights in a way that causes a nuisance. We express no view as to whether that is correct.

194. APW is also concerned that the inclusion of the proviso might cause it to incur liability under the intermediate leases for causing or permitting a nuisance. That is manifestly wrong; APW cannot be liable for permitting something by virtue of having a clause imposed upon it by the Tribunal.

195. APW says that in adding that proviso On Tower is taking back with one hand what it is giving with the other. On Tower ought to be liable for all nuisance caused whether or not it is caused in the exercise of its rights under the leases. The answer to that point is that of course On Tower is so liable, under paragraph 25 of the Code and under other express provisions of the draft agreements. The debate about the function of this clause arises from a misunderstanding; the usefulness of the clause is in enabling APW to pursue On Tower in contract for any nuisance that it causes outside of the exercise of its Code rights; any nuisance caused by the exercise of the Code rights is amply provided for in paragraph 25 of the Code and cannot be extended because of the provision of paragraph 86 of the Code.

196. Accordingly the proviso is to be included, but we re-word it as follows so as to make it clear that the proviso is simply excluding from the scope of the clause any nuisance caused by the exercise of the Code rights, without excluding liability altogether:

> "… provided that the proper and lawful use of the property in accordance with the terms of this lease for and in connection with the Permitted Use shall not give rise to liability under this clause."

Provision of planning applications

197. It is agreed that the leases shall require the tenant to secure any planning consents it needs in relation to the sites. In addition, APW wants the leases to require On Tower to notify it of any planning applications it makes in relation to the sites, and On Tower resists that amendment on the basis that it is an onerous requirement. There is no such provision in the existing leases and no requirement in the intermediate leases for APW to inform the superior landlord about planning applications made by the undertenant. APW's ability to apply for planning permission is subject to the qualified consent of the superior landlord.

198. It is difficult to see why such an additional requirement should be imposed. Mr Clark argues that APW, like any landowner, wants to know what is being done on its land. So it may, but of course planning applications are publicly available, and the planning authority will publicise the application where it is required to do so.

199. Mr Clark further argues that the intermediate leases provide not only that APW must get the superior landlord's consent to any application it makes for planning permission, but also provide that "Any obligation in this lease not to do something includes an obligation not to agree or suffer that thing to be done and an obligation to use best endeavours to prevent that thing being done by another person"; he argues that if On Tower were to apply for planning permission without telling APW, APW could find itself in breach of its covenant not to suffer someone else applying for planning permission without the superior landlord's consent.

200. We disagree with that analysis. APW's obligation not to apply for planning permission without the superior landlord's qualified consent cannot be construed as an obligation not to permit anyone else to do so either. It cannot, for example, be an obligation to prevent a neighbour or a prospective purchaser from doing so, because such an obligation would be impossible to perform and is an implausible construction of the "not to agree or suffer" obligation. It cannot be an obligation to prevent On Tower under the existing leases from applying for planning permission without the superior landlord's consent, because the intermediate leases are granted subject to the terms of the existing leases, which impose no such requirement. If the "not to agree or suffer" obligation is read as an obligation not to agree to a future sub-tenant applying for planning permission without the superior landlord's consent (and we do not think it can be, but if it is), then such an obligation would not be broken when APW knew nothing about the application, nor would a breach be remedied by APW getting a copy of the application after it had been made as its proposed wording provides.

201. APW will not be caused loss or damage by the absence of a provision for On Tower to give it copies of planning applications that On Tower makes in relation to the sites, and the provision to that effect is to be deleted.

Control of proceedings

202. The draft agreements provide for On Tower to indemnify APW and the superior landlord against any liability of theirs to a third party arising from On Tower's exercise of its rights under the agreement. On Tower's wording gives it the right to defend any claim against APW or the superior landlord at On Tower's cost and to settle any proceedings subject to APW's prior qualified consent.

203. APW's preferred drafting deletes the right for On Tower to take control of proceedings, and provides that APW shall not settle any claim without On Tower's qualified consent.

204. The Tribunal in its decision in *University of the Arts* at paragraph 235 stated that it is not appropriate for the site provider to have sole control of proceedings where the operator is giving a substantial indemnity. On Tower's wording should stand, as should APW's, so that

On Tower can take control of proceedings if it wishes to do so, but neither party can settle a claim without the other's qualified consent.

Break clauses

205. The leases are to be granted for a 15-year term. It is agreed that they shall define the "break date" as the seventh anniversary of the commencement of the term, and the provisions for termination of the agreement, set out later in the lease, give the tenant the right to bring the lease to an end at any time on or after the break date on giving 12 months' notice. The agreement of the seven year break date absorbs most of the disagreement around the termination provision; the remaining areas of dispute are as follows.

206. First, the termination clause also enables the tenant to terminate the lease where damage to the equipment on the site (not arising from the act or omission of On Tower itself) makes the exercise of its Code rights impossible. APW seeks a proviso that On Tower should first use its reasonable endeavours to reinstate the site or allow APW to do so at its cost. Such a provision is an unreasonable limitation on On Tower's right to make its own decisions about its own equipment in the light of its own customer's needs. The right to break in these circumstances is exercisable on twelve months' notice, which can only be given if the damaged equipment has not been reinstated for 12 months. So APW will have two years to deal with the situation. The proviso that it seeks to add is not to be included in the agreements.

207. Next, the termination clause also allows the tenant to give 12 months' notice of termination if the exercise of the Code rights is impossible because of damage to or destruction of the access; APW seeks to include a proviso that the right to break in these circumstances arises only if the access has not been reinstated by the end of the notice period. The difficulty with that proviso is that the access might be unusable for eleven months of the notice period, during which time On Tower will have arranged for a substitute site, cleared the site of its customers and so on; if the access is then reinstated On Tower will be placed in an impossible position. APW's worry that On Tower might break the lease because the access was unusable for one day is unrealistic; a short interruption could not be said to render the exercise of the Code rights impossible. The proviso sought by APW is impracticable and inimical to the aims of the Code and it is not to be included in the agreements.

208. Third, the tenant's right to break is required by APW to have no effect if "the Tenant has not handed back the Property with vacant possession". The difficulty with this clause is that it is perfectly legitimate for the tenant to use the break clause not in order to leave the site but in order to secure a fresh agreement under Part 5 of the Code. The court in *Vodafone Capital Limited v Hanover Capital Limited* [202] EW Misc 18 (CC) at paragraphs 50 to 52, and in *EE Limited v Hutchison 3G Limited v Morriss* [2022] EW Misc 1 (CC) at paragraph 44 recognised that a proviso such as the one sought in these references would prevent the use of the break clause for that purpose and is not acceptable. If On Tower does break the lease and leave the site then of course APW is entitled to vacant possession and has remedies if that is not given. Accordingly the proviso sought by APW is not to be included.

209. Finally, APW seeks the right to break the lease on or after the seven year break date on giving 18 months' notice, if it seeks to redevelop all or part of the site, or neighbouring land belonging to the superior landlord or to APW itself; APW of course owns a small area around the sites at Huntingdon, and it is pointed out that it might acquire more land at the other two sites.

210. On Tower resists this on the basis that there is no evidence that APW might want to redevelop, and on the basis that such a break would be contrary to the aims of the Code and would discourage investment in telecommunications sites. However, there is no indication in the Code that site providers are to be prevented from developing their land, or from exercising contractual rights to terminate agreements where they want to redevelop; and there is nothing to prevent them having such contractual rights. What the Code does do is to prevent the contractual termination from bringing Code rights to an end, so that even if APW does seek to redevelop its land or the nearby land it will still have to establish its right to recover possession by meeting the requirements of paragraph 31(4)(c) ("that the site providers intends to redevelop all or part of the land to which the code agreement relates, or any neighbouring land, and could not reasonably do so unless the code agreement comes to an end"). The break clause sought by APW is to be included, because the combination of the contractual right to break and the provisions of paragraph 31(4)(c) ensures that both parties' interests are protected.

Disputes

211. APW seeks to include in the leases a clause providing that "all questions and differences whatsoever" are to be determined by a single arbitrator to be appointed in default of agreement by the President of the RICS. There is a proviso that "nothing in this clause shall prevent either party from making an application … to the Tribunal under any provision of the Electronic Communications Code or to any other court for relief."

212. On Tower does not want this clause to be included. It is concerned about the potential delay in the appointment of an arbitrator, and Mr Seitler QC expresses the view that the proviso permitting access to the Tribunal or to the courts may not be wide enough. An arbitrator appointed by the RICS may not have the requisite legal knowledge to decide a dispute, and recent experience elsewhere (according to Mr Brearley) has shown that access to the courts may be needed.

213. There is no dispute resolution clause in the Audley House lease; there are arbitration clauses in the Port Talbot and Audley House leases and an expert determination clause in APW's intermediate leases.

214. In our view the proviso to the clause is so wide that it would allow access to the courts in any event. This is of course important because either party may need an injunction or other urgent relief which cannot be managed by arbitration. The width of the proviso ("… or to any court for relief") is such that the arbitration clause has no teeth; either party can always apply to the Tribunal or the court as appropriate. Equally the parties can appoint an arbitrator if they agree to do so. There is therefore no point in the inclusion of the clause and it is to be deleted.

Rent review

215. It is agreed that there shall be a rent review every five years in each lease.

216. APW wants the review to be upwards only, and to the highest of the current rent, the open market rent for the site, or an index-linked rent based on the RPI. On Tower wants the review to be upwards or downwards and based only on the RPI.

217. On Tower makes the point that a review to open market rent is likely to be time-consuming and not worth the trouble in the context of Code rents, and we agree. But Mr Clark points out that APW should get a true open market rent in the event that On Tower were to cease to be a Code operator, and we see the force in that submission even though it is an unlikely eventuality.

218. Rent reviews will be upwards only as is usual in a commercial context, and will be the higher of the current rent and the rent reviewed in accordance with the RPI. If On Tower ceases to be a Code operator then the reviewed rent will be the higher of the current rent, the RPI-indexed rent, and the open market rent.

Consideration

The legal principles

219. Paragraph 24(1) provides that the consideration is to be "the market value of the relevant person's agreement to confer … the code right", and paragraph 24(2) goes on to define that value as:

> "(2) … the amount that, at the date the market value is assessed, a willing buyer would pay a willing seller for the agreement—
>
> (a) in a transaction at arm's length,
>
> (b) on the basis that the buyer and seller were acting prudently and with full knowledge of the transaction, and
>
> (c) on the basis that the transaction was subject to the other provisions of the agreement imposed by the order under paragraph 20.
>
> (3) The market value must be assessed on these assumptions—
>
> (a) that the right that the transaction relates to does not relate to the provision or use of an electronic communications network;
>
> (b) that paragraphs 16 and 17 (assignment, and upgrading and sharing) do not apply to the right or any apparatus to which it could apply;
>
> (c) that the right in all other respects corresponds to the code right;

(d) that there is more than one site which the buyer could use for the purpose for which the buyer seeks the right.

220. In EE Limited and Hutchison 3G UK Limited v Affinity Water Limited [2022] UKUT 8 (LC) the Tribunal explained at [35] why there are dangers in the use of comparable transactions in determining consideration:

> "Lettings on Code terms in which the rights being conferred on the tenant do not relate to the provision or use of an electronic communications network are unknown in reality. Consensual Code agreements are invariably entered into so that a site can be used in connection with an operator's network; they are routinely accompanied by capital payments which are often concealed from view, protected by confidentiality agreements and, when they are disclosed, difficult to analyse; they do not carry statutory compensation rights and rarely include a comprehensive contractual alternative."

221. For that reason the Tribunal has adopted the three-stage valuation approach considered by the County Court in *Vodafone v Hanover Capital* [2020] EW Misc 18 (CC), despite the availability of transactional evidence. The first stage is to determine the current or highest alternative use value of the site. Stages 2 and 3 were explained by the Tribunal in *Affinity Water* at [39] as follows:

> "The heart of the dispute lay in stages 2 and 3 of the assessment which are intended to reflect the additional benefits over and above the right of occupation, which will be conferred on the tenant by the agreement and which it would otherwise have to provide for itself, and any adverse effect on the site provider, over and above any effects which would be a consequence of the use of the site for the purpose reflected at stage one. The theory underlying these stages is that they reflect all of the matters which would be in the minds of parties negotiating a rent which did not take account of the economic value to the tenant of the activity it intended to conduct on the site. They attempt to measure what paragraph 24(1) of the Code calls "the market value of the relevant person's agreement to confer … the Code right" while respecting the statutory no-network assumption in paragraph 24(3)(a)."

222. There was some discussion at the hearing, in answer to a question posed by the Tribunal, as to whether the assessment of benefits and burdens in stages 2 and 3 is appropriate where the site has a valuable alternative use, and we confirm – as is clear from the words just quoted – that the three stages are indeed cumulative and should all be undertaken even where (as is the case for Audley House, as we shall see) the value of the alternative use is considerably higher than that seen in other decisions where the *Hanover* approach has been used. The idea is that the site provider gets the current or higher alternative use value and also a sum to reflect the benefits to the tenant (over and above those conferred by the existing or alternative use) and the burdens undertaken by the landlord (beyond those involved in the existing or alternative use) as a result of the activity envisaged under the lease, such as the installation of a very tall structure and the likelihood of frequent visits, insofar as those benefits and burdens would not be caused by the alternative use.

223. The Tribunal has now made a number of decisions on that basis, and in *Affinity Water* it set them out in tabular form. In all of these cases the site had no higher alternative use value and the stage 1 component of the assessment was a nominal, current use value. With the addition of the outcome of the *Affinity Water* case itself, and in descending order of value, that table now looks like this:

Decision	Type of property/location	Annual consideration
CTIL v London and Quadrant Housing Trust	City, residential rooftop	£5,000
CTIL v Marks & Spencer plc (Lands Tribunal for Scotland)	City, department store/offices	£3,850
Affinity Water Limited	Suburban residential, water tower	£3,300
Dale Park	Rural, adjacent to housing	£1,200
CTIL v Fothringham (Lands Tribunal for Scotland)	Rural, no nearby housing	£600 (£1,500 in year of installation)

224. In *Affinity Water* the Tribunal said at [34]:

> "These decisions provide guidance not only on an approach to valuing sites on the artificial assumptions required by paragraph 24, but more broadly on the levels of consideration which parties can expect the Tribunal to determine in other cases. Without taking account of any special features or particular sensitivities which a particular location may exhibit, we would be surprised if the value of Code rights fell significantly outside the ranges indicated by previous decisions concerning sites with similar characteristics."

225. And at [83]:

> " We would suggest that the pattern, or tone, is now becoming clear enough that it should rarely be necessary when presenting evidence to the Tribunal in future for parties to adopt the much more detailed *Hanover Capital* approach to valuation."

226. Those comments, and the Tribunal's warning about the dangers of using consensual transactions as comparables, provide guidance on the approach that is likely to be of assistance to the Tribunal. Absent special features (such as a valuable alternative use), it is unlikely that the Tribunal will assess consideration at a level that is not consistent with the

range of values seen in the table above. The Tribunal is unlikely to be assisted by analysis of comparables, save for the value of alternative uses where that is in dispute. The *Hanover* approach may be useful as a cross-check in negotiations, but the Tribunal will not be assisted by micro-analysis of the cost of benefits and burdens measured in tens of pounds which (as was also pointed out in *Affinity Water* at [41]) is not how negotiations work in practice.

227. The valuers in these references wrote their reports before the publication of the *Affinity Water* decision, and therefore relied upon the type of material – extensive analysis of comparables and exhaustive costings of benefits and burdens – that the Tribunal has now explained are unnecessary and unhelpful. The valuers in their initial reports were some thousands of pounds apart, and were no closer in their supplemental reports after *Affinity Water* had been published. At the hearing they were reminded of the Tribunal's comments in *Affinity Water*; at the Tribunal's invitation they had further discussions and agreed the consideration payable for all three sites.

Alternative use value and restrictions in the site provider's title

228. Consideration will always include the value of the current use of the site or of any higher alternative use value. All the sites represented in the table above had a nominal or very low use value. Other sites, and Audley House is one of them, will have a higher value which may make the eventual consideration look out of kilter with the table, but consistency will be seen if that additional value is kept in mind.

229. Whether high or low, alternative use value is always going to be relevant. This is the use for which the site provider could let the site. If the site provider is itself a leaseholder whose lease restricts the use to which the site could be put – for example, for agricultural use only – then that will be relevant to the determination of the alternative use value. In such a case it is not possible to assume that the site could be let as an industrial unit or for storage or parking.

230. In the present references there is obviously no difficulty in assuming a letting for an alternative use for Port Talbot and Huntingdon, where there is no real restriction on the use for which APW can let the site. But in Audley House the permitted use of the site in APW's intermediate lease is:

> "for the transmission and reception of any and all wireless communication signals and the construction, maintenance, repair, replacement, improvement, operation and removal of Equipment, and any related activities and uses including those necessary for the Tenant to comply with its obligations under the Existing Leases".

231. Paragraph 24 of the Code requires the assumption "that the transaction … does not relate to the provision or use of an electronic communications network"; but on that assumption and in light of the restriction on use in APW's headlease the site has no alternative use value.

232. Should consideration be assessed on that basis? The Tribunal should make only those assumptions, in departure from reality, that are set out in the Code; but sometimes it is

inevitable that we have to go further. Lewison LJ said in *Harbinger Capital Partners v Caldwell* [2013] EWCA Civ 492, at [26]:

> "A departure from reality must either be expressly required or must be an inevitable consequence of what has been expressly required."

233. It is not the policy of the Code that site providers should get no value at all for their land, and paragraph 24 operates on the premise that the site provider really could let the site for some use other than for telecommunications. No express provision is made in paragraph 24 for a restriction on the site provider's use such as that in the Audley House intermediate lease; and while we would have had no difficulty in dealing with a restriction that prevented some but not all other uses, we think that it is an inevitable consequence of the exercise prescribed by paragraph 24 that the complete prohibition of sub-letting by APW for uses other than as a telecommunications site should be ignored for the purposes of determining consideration. Absent that prohibition the site could be let for parking, and the valuers reached agreement on that basis.

The valuation evidence: general approach

234. Because consideration was agreed in the course of the hearing we are not going to set out the evidence at any length.

235. Valuation evidence was provided by Mr Colin Cottage BSc (Hons) MRICS IRRV (Hons) for On Tower and by Mr Paul Williams MRICS for APW. Mr Cottage is the Managing Director of Compensation at Ardent and Mr Williams is Head of Telecommunications at Carter Jonas. Both have substantial experience in providing valuations for telecommunications purposes.

236. As we said above, the experts wrote their reports prior to the Tribunal's decision in *Affinity Water*. They produced supplemental reports with the benefit of that decision, but considered that these three sites were so different from those recorded in the table that further analysis based on the *Hanover* methodology was needed. Both experts relied on comparable transactions, not only relating to consensual transactions but even, in Mr Williams' case, to leases bearing the caveat that they were negotiated after the Code came into force but on the principles of the old Code. The Tribunal has said on more than one occasion that such comparables are useless.

Audley House

237. In his original report Mr Cottage's three-stage *Hanover* valuation of Audley House was as follows:

Step 1	£Nil
Step 2	£600 per annum
Step 3	£100 per annum
Total	£700 per annum

238. Mr Cottage valued the alternative use as nil on the basis of the restriction in the intermediate lease, which we discussed above. In step 2 he adopted the £600 per annum from the *Dale Park* decision which related to the right to keep a mast, retain an electricity supply and the provision of a rolling break clause. For step 3 the figure of £100 per annum reflected the administration costs the respondent would incur if it properly mitigated its costs, there being no material requirement for it to become involved in providing access.

239. Following the publication of the Affinity Water decision Mr Cottage revised his approach to Step 3. He noted that in that decision the experts agreed a sum of £1,500 per annum to take account of the burdens on the site provider as a result of having to provide access to a site within a secure compound. He maintained his figure of £100 per annum if access remained unrestricted. If under the terms of the lease the landlord monitored access to the site, he assessed that cost to the site provider at £500 per annum, yielding a revised figure of £1,100 per annum. He said that he would reduce that to £1,050 if there were a break clause exercisable annually after five years rather than a rolling break.

240. Mr Williams on the other hand, adopted a different three-stage approach. He had undertaken a detailed analysis of comparable transactional evidence from which he concluded that it would be appropriate to use the annual equivalent of a one-off payment for disturbance of £4,000 and an early access/completion payment of £10,500. Spread over 15 years at 5% the annual equivalent amounted to £1,400 per annum.

241. Next Mr Williams added £1,000 representing the annual payment using stages 1-3 of *Hanover* and assuming a nominal alternative use value. However, he took the view that Audley House had a more valuable alternative use as car parking; 4 spaces at £550 per annum yielded an additional value of £2,200 per annum. The total rent was therefore £4,600 per annum. He undertook a final check by considering the *Affinity* Water table and observed that without the alternative use value the resultant £2,450 per annum would compare reasonably with the sites in the table.

Port Talbot and Huntingdon

242. As to Port Talbot and Huntingdon, the experts produced only their initial reports and did not re-examine their valuation after the *Affinity Water* decision in a supplemental report as they had done for Audley House. Mr Cottage again adopted the *Hanover* approach. At Port Talbot his stage 1 value was based on open storage at £4.00 per m^2, yielding £373 which he adjusted to £500 per annum on the basis that most of the storage comparables were larger sites. He valued Huntingdon at £7.50 per m^2 , which he again adjusted in light of the size of the site from £422 per annum to £600 per annum.

243. Mr Cottage valued the stage 2 benefits at £150 and £250 per annum respectively; he saw no reason why a tenant would pay more under the second stage to use the access portal to gain access to the site, describing it as ‘an unwelcome layer of administration and bureaucracy'.

244. The stage 3 burdens were quantified at £750 per annum for both sites to reflect the cost to the landlord of managing site access. Mr Cottage attributed no value to unrestricted rights to share, occasional use of a generator or loss of amenity caused by the mast.

245. Finally Mr Cottage said that the rent should be increased by 5%, with a minimum of £100 per annum, to reflect the value to the tenant of a rolling break clause.

246. Mr Williams also adopted the *Hanover* approach, arriving at stage 1 values of £1,500 and £1,000 per annum for Port Talbot and Huntingdon respectively based on storage values in the locality of each site. At stage 2 and in common with Mr Cottage his starting point was the £600 per annum that the Tribunal found appropriate in *Dale Park*. However, the approaches diverged from that point. Mr Williams perceived the respondent's access portal to offer significant benefits to the claimant in the avoidance of conflict, abortive costs and deterioration of any existing relationship. He thought that On Tower would make 20 to 30 visits to the site over the course of a year and that £50 per visit was a reasonable sum to adopt to cover the cost of the service provided to the tenant; assuming therefore 25 visits he arrived at an annual sum of £1,250.

247. Turning to stage 3 Mr Williams took *Dale Park* as his starting point for assessing the impact of the burdens on the landlord. Under this heading he included wear and tear on the access, deployment, refueling and recovery of a generator, and the degree of co-ordination, planning and management required for upgrades. Mr Williams was mindful of the decision in *London and Quadrant* where a stage 3 sum of £2,500 represented the burden of management over restricted areas together with unrestricted upgrades and sharing; he concluded that the burden of such activities would be less at ground rather than roof level and so adopted a figure of £1,500 per annum for both sites.

The agreed consideration

248. By the date of the hearing the position of the two experts was as follows:

Location	**Mr Cottage** **Consideration £ pa**	**Mr Williams** **Consideration £ pa**
Audley House	£700 (original report) £1,100 (supplemental report)	£4,800 (original report) £4,600 (supplemental report)
Port Talbot	£1,500	£4,250
Huntingdon	£1,700	£3,750

249. At the hearing the Tribunal encouraged the experts to reconsider their use of consensual code lettings and of the *Hanover* approach in light of its comments in *Affinity Water*, and to explore the possibility of agreeing values. They did so, and on the third day of the hearing returned to the Tribunal having agreed the following alternative positions depending on whether or not the Tribunal was going to require On Tower to use APW's access portal but in either case assuming that access would be available 24 hours a day, 7 days a week.

Location	**Annual consideration if On Tower notifies APW of access by email**	**Agreed adjustment (per annum) if the APW access portal is used**
Audley House	£1,300 + alternative use value	-£250
Port Talbot	£2,050	-£250
Huntingdon	£2,100	-£250

250. At this point in the hearing of course the Tribunal had not made the determination set out above (at paragraph 233) about the alternative use value for Audley House; it was agreed that it was either nil, or £2,200 on the basis of four parking spaces.

251. In addition, the experts agreed that if the leases should contain a tenant's break after 5 years (on 12 months' notice) the consideration would be adjusted upwards by 5% subject to a minimum of £100 per annum.

252. The surprise in the above figures was the agreement that the imposition upon On Tower of a requirement to use the Access Portal would lead to a reduction in rent, despite APW's position up to that point that it was a valuable benefit to the tenant. We asked Mr Clark and Mr Seitler QC if their clients accepted and stood by the figures agreed by the valuers and they said they did.

253. The experts were nevertheless cross-examined briefly about adjustments that might be made in light of the various terms that remained undetermined; in the event we do not need to say anything about that. Mr Cottage confirmed that in reaching the agreed sums he had had regard to the *Hanover* methodology. He said that in coming to a figure of £1,300 per annum for Audley House, the Step 2 value was £600 and Step 3 was £700. As far as Port Talbot and Huntingdon were concerned, the alternative use was £800 in both cases and the remaining value covered both Steps 2 and 3. He did not break down the figures any further. Mr Williams did not offer any additional insight in to how the values had been arrived at.

254. The consideration for the three sites is agreed. The deduction for use of the Access Portal is not relevant; and we make no addition for the break clause since it was agreed to be exercisable after seven years rather than five and because a landlord's break clause is also to be included.

255. Accordingly the annual consideration for Audley House is £3,500, for Port Talbot £2,050 and for Huntingdon £2,100.

Further observations

256. These figures cannot be added to the *Affinity Water* table because they are agreed rather than having been determined by the Tribunal. Nevertheless, as Mr Cottage's explanation indicates, they were arrived at by the same methodology as were the figures in the table, namely through the *Hanover* three-stage approach, and they may therefore be helpful to parties in future negotiations since (once the value of the alternative use for Audley House is taken out) they are consistent with the figures in the table.

257. As we said above, we do not believe that either the parties or the Tribunal will be assisted in future by evidence of consensual transactions for use as comparables, nor by argument about the small sums that might feature in a *Hanover* calculation. In most cases the table will remain a good indication of the level of consideration which would be agreed in the open market for sites with comparable characteristics let on the paragraph 24 assumptions, and it will not be difficult – as the valuers in these references eventually found – to fit new types of sites into that scale. To be blunt, it should be obvious that a ground level site in a car park or a haulage yard is going to command a higher rent than a rural site but less than a rooftop site or the top of a water tower. Valuation evidence, if it is needed at all in future references, ought to become a great deal simpler in light of the guidance that the Tribunal has now given.

Transaction costs

258. Paragraph 84 of the Code entitles APW to its reasonable legal and valuation expenses outside of its litigation costs. APW has claimed legal costs in the sum of £6,276 excluding VAT for Audley House and £6,472 excluding VAT for Port Talbot and Huntingdon together.

259. On Tower objects to paying any of these costs at all on the basis that the claims and associated costs schedules were submitted to the Tribunal and served on On Tower on 23 April 2022, the Sunday before commencement of the hearing on 25 April. We are not moved by this complaint. On Tower was well aware that a claim would be made and will have been unsurprised by receiving it; its representatives did not have to make any submissions in response until after the hearing and then had several days in which to produce very brief submissions. On Tower has not been disadvantaged by the late submission of costs.

260. On Tower also objects to the level of fees claimed. It is concerned that transaction costs may eclipse rents, and that the costs allowed by the Tribunal will be relied upon to inflate expenses sought in consensual transactions. It is also concerned that too many fee earners are shown (in the costs schedules) to have been involved in the transactions, including some

litigators, and that therefore there may be duplication of work and the accidental inclusion of litigation expenses.

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. We do not think that the costs claimed are likely to have been inaccurate (there is no reason to think for example that they include litigation costs, since the vast majority of the costs claimed relate to a single fee-earner who is not a litigator). Nor do we think that the costs are unreasonable in light of the number of issues involved. We allow the transaction costs as claimed.

Judge Elizabeth Cooke Mark Higgin FRICS

17 June 2022

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.