[2022] EW Misc 1 (CC)

Case No: G00MY251

IN THE MAYORS AND CITY OF LONDON COUNTY COURT

Sitting at the Royal Courts of Justice

Date: 07/01/2022

Before:

Martin Rodger QC, Deputy Chamber President, Upper Tribunal (Lands Chamber)
(sitting as a Judge of the County Court)

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Between :

EE LIMITED (1)
HUTCHISON 3G UK LIMITED (2)

Claimants

- and –

RICHARD MORRISSS (1)
DAVID HOLROYD TAYLER (2)
PIPPINGFORD ESTATE CO. LIMITED (3)

Defendants

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Ms Stephanie Tozer QC (instructed by **Winckworth Sherwood LLP**) for the Claimants
Mr Jonathan Wills (instructed by **Bryan Cave Leighton Paisner LLP**) for the Defendants

Hearing dates: 14, 15, 16 September and 16 November 2021

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JUDGMENT

Judge Rodger QC:

1. This is the Court's judgment following the trial of an unopposed claim under the Landlord and Tenant Act 1954 for a new tenancy of a telecommunications site on a private estate in the Ashdown Forest. The Court is required to determine the terms of the new tenancy and the rent payable under it.

2. The claimants, EE Limited and Hutchison 3G UK Ltd, are the operators of separate telecommunications networks who cooperate with each other in the acquisition and occupation of mast sites. Since 28 September 2017, subject to transitional provisions, the occupation of land for the purpose of their networks has been governed by the new Electronic Communications Code made under the Communications Act 2003 (the Code).

3. The first and second defendants, Mr Morriss and Mr Tayler, are trustees of a family trust. In that capacity they hold the freehold of Pippingford Park Estate, in Nutley, East Sussex, which has been in the ownership of Mr Morriss' family for more than 100 years. Mr Morriss is also the manager of the Estate.

4. The third Defendant, the Pippingford Estate Co. Limited, is the entity through which the commercial activities of the Estate are conducted.

5. At trial the claimants were represented by Ms Stephanie Tozer QC and the defendants by Mr Jonathan Wills. Evidence was given by Mr Noel Lester, a regional property surveyor at MBNL, the claimants' agents, and Mr Steven Sladdin (as expert) for the claimants, and by Mr Morriss and Mr Ian Thornton-Kemsley (as expert) for the defendants. I thank them all for their assistance.

6. It is common for telecommunications sites to be occupied under tenancies governed by the 1954 Act. As the law is currently understood (pending its imminent consideration by the Supreme Court) tenancies of such sites must be renewed under the 1954 Act but any new tenancy granted on a renewal will be subject to the Code and will not be one to which the 1954 Act applies (for a fuller explanation see *Cornerstone Telecommunications Infrastructure Ltd v Ashloch Ltd* [2021] EWCA Civ 90). The claimants can thus achieve a transition to a new Code agreement, but only by first exercising their rights under the 1954 Act.

7. The rent payable on the grant of a new tenancy in these circumstances and the considerations which apply to its determination are matters of wider importance to telecommunications operators and site providers. It was for that reason that arrangements were made for this trial to be conducted by a Judge of the Upper Tribunal, Lands Chamber with experience of telecommunications disputes.

The Estate and the Site

8. The Pippingford Park Estate is a small mixed rural estate situated about 10 miles south west of Tunbridge Wells. It generates income from conventional woodland management and agriculture as well as from a great variety of commercial and sporting activities; parts of the Estate are used for fishing, horse livery, hosting music festivals and sporting events; the former manor house and

converted farm buildings are let as commercial offices. Since the Second World War large areas of the Estate have been let to the Ministry of Defence and these are used frequently by Army reserve units and cadets for military training. A helicopter landing site is used by the RAF and other services for exercises, including some conducted at night.

9. One of the less conventional uses of the Estate is as a venue for "hostile environment training" for the staff of Government departments, private security companies, journalists and others wishing to experience a simulated hostile situation in preparation for postings abroad. For up to four days a week, different training providers run exercises creating mock border crossings, vehicle checkpoints and encampments. Pyrotechnic charges are used to simulate roadside bombs and blank-firing weapons are discharged to add authenticity to mock hostage situations. These are profitable activities which contribute significantly to the Estate's income.

10. The land which is the subject of these proceedings is situated in a wooded part of the Estate regularly used for hostile environment training. It comprises an area of approximately 130 square metres which has been let by the Estate Company as a telecommunications site since 1996 (the Site). Equipment cabinets and a 30m lattice mast stand on a concrete base within a small fenced compound on the Site. Access to the area is available directly from the A22 through a gate which is kept locked. Once through the gate, the Site is about 75m from the boundary of the Estate and is reached along a tarmacked road then by a short stretch of unmade track. Although the claimants' only rights of access to the Site are over this route, employees and contractors have sometimes been known to use the main entrance to the Estate, a little further along the A22, and have then regularly lost their way when trying to locate the Site.

11. The Site was first let under a tenancy granted in August 1996 to Orange Personal Communication Services Ltd, and planning permission for the telecommunications mast was granted the following year. The most recent tenancy was by a lease for a term of 10 years granted by the Estate Company to Orange in 2004. Orange subsequently merged with T-Mobile to become what is now the first claimant, EE, and in 2012 the lease was assigned by EE to itself and the second claimant, Hutchison 3G UK. Following the expiry of the contractual term on 1 August 2014 the claimants have been holding over under the tenancy continued by the 1954 Act.

12. The current tenancy contains no restriction on the tenant's entitlement to share the use of the mast. In addition to the claimants' apparatus, the mast also hosts apparatus belonging to two other operators, Telefonica and Airwave. In the year to April 2021 the claimants' gross income from these sharing arrangements was £21,790. The 2004 lease included a "pay-away" clause under which half of the income from sharers is paid to the Estate Company in addition to an annual rent of £7,757 a year. Both the pay-away and the annual rent remain payable while the claimants' tenancy is subject to statutory continuation under the 1954 Act but the "pay-away" cannot be included in the new agreement (because paragraph 17(5) of the Code renders void any agreement for the payment of money as a condition of an operator sharing electronic communications apparatus).

The competent landlord

13. There was originally some confusion over the identity of the competent landlord (the person by whom the new tenancy to which the claimants are entitled must be granted). Shortly before the commencement of the trial, the parties realised that the first and second defendants, on whom the claimants had served notice under section 26 of the Act seeking a new tenancy, were not the competent landlords and that the notice was therefore of no effect. The parties agreed that the competent landlord was the Estate Company which then applied to be joined as an additional defendant having first served a notice of its own under section 25 of the Act. Both parties were content to proceed on the basis that the Court's jurisdiction to determine the terms of the new tenancy derived from the service of the Estate Company's section 25 notice on 26 August 2021. At the start of the trial I indicated that I was happy to make an order joining the company as third defendant to the proceedings.

14. Despite the parties' deft arrangements to regularise the proceedings, the wheels once again threatened to come off at the start of the second day of the trial. Oral evidence given by Mr Morriss had suggested that the Ministry of Defence might hold an unregistered lease of the part of the Estate in which the Site and the access to it are located, which would mean that it, and not the Estate Company, would be the competent landlord. Ms Tozer QC applied for an adjournment of the trial so that the true position could be investigated. I refused that application and directed that the evidence should be completed, but I allowed a period of two months for the MOD's status to be clarified before the parties would make their closing submissions.

15. In the event, shortly before the resumed hearing the MOD executed a deed confirming that it has no interest in the Site and agreeing to be bound by the rights of access in the new lease to be granted to the claimants by the Estate Company. Despite some continuing uncertainty about the MOD's status in relation to other parts of the Estate, the parties are in agreement that the Estate Company alone, and not the MOD, is the competent landlord of the only areas which are relevant to the claim.

The issues

16. The parties agree that the only means by which the claimants can obtain a new tenancy is by exercising their rights under the 1954 Act. The new tenancy will be one to which the Code will apply but the 1954 Act will not.

17. The defendants do not oppose the grant of a new lease to be granted by the Estate Company for a term of 10 years commencing three months after the final determination of these proceedings. Many of the terms of that lease are agreed but a number remain in dispute. Before it is possible to determine the rent payable under the new tenancy it is first necessary to settle the disputed terms.

18. The dispute over the terms of the new tenancy falls within section 35 of the 1954 Act. In determining those terms, the Court is required to have regard to the terms of the current tenancy and to all relevant circumstances. The burden of persuading the Court to depart from the terms originally agreed falls on the

party proposing the change (*O'May v City of London Real Property Company Ltd* [1983] AC 726).

19. The rent payable under the new tenancy is to be determined under section 34 of the 1954 Act. It will be such as may be determined by the Court to be the rent at which, having regard to the terms of the new tenancy, the Site might reasonably be expected to be let in the open market by a willing landlord disregarding the matters in section 34(1), including any effect on rent of the fact that the claimants or any predecessor in title have been in occupation of the Site, and any effect on rent of any improvement of the type described in section 34(2).

20. The statutory basis of assessment of rent under section 34 of the 1954 Act is very different from a determination under paragraph 24 of the Code, which contains highly favourable valuation assumptions for the benefit of operators, but the principles of valuation under the Code are indirectly relevant to a determination under the 1954 Act.

21. The influence which the procedures and valuation assumptions in the Code would be likely to have on parties negotiating in the open market (which is the hypothesis required by section 34(1), 1954 Act) were considered by the Court in *Vodafone Ltd v Hanover Capital Ltd* [2020] EW Misc 18 (CC) at [52] and [73]. The Court assumed that Code valuation principles, and in particular the "no-network" assumption in paragraph 24, would provide the framework for the hypothetical parties' negotiations in the open market, and that the same principles ought therefore to be kept firmly in mind when determining a rent under section 34. In this case Mr Wills has challenged the assumption underlying that approach and it will be necessary to consider once again whether it applies in this case.

22. Although there was originally some disagreement about the physical condition which the Site should be assumed to be in when it is (notionally) offered for letting in the open market, by the conclusion of the argument a consensus had been achieved. In order to give effect to the statutory assumption that the new letting is in the open market it is necessary to assume that the Claimants have vacated the Site. The mast, the fence enclosing the Site and the other apparatus on it are tenant's fixtures which the Claimants would be obliged by the terms of the current tenancy to remove when that tenancy comes to an end. The Site should therefore be assumed to have been cleared of the Claimants' apparatus by the date the new tenancy is granted.

23. The only remaining doubt has been about the concrete base on which the mast and other apparatus stand, and whether it should be assumed to have been removed by the claimants or to remain part of the Site when it is offered for letting in the open market. On that question I accept the evidence of Mr Lester that Orange is very unlikely to have erected its mast on a 50-year-old concrete base left over from a wartime installation but would have provided its own base on substantial new foundations. Those must be assumed to have been removed together with the base in compliance with the claimants' contractual obligations. There is no evidence that there was a concrete base on the Site before the original lease (although a number of such bases are found in this part of the

Estate) and it should therefore be assumed that when it is offered to the market the surface of the Site is a bare woodland floor.

The disputed terms

24. The terms which the parties have been unable to agree concern six separate topics. Some are small points, others of greater commercial significance. The most important concern the right to install additional equipment, contractual compensation, access, and the form of a break clause to be included in the new lease.

Equipment rights

25. The claimants wish the terms of the new lease to provide maximum flexibility in concerning the installation and upgrading of equipment on the Site. The parties agree that the claimants should have rights to install and upgrade equipment which do not include the default limitations imposed by paragraph 17 of the Code (which permit upgrading only if it will impose "no more than a minimal adverse impact" on the appearance of the apparatus, and impose "no additional burden" on the site provider). To make these rights effective, the claimants also propose a non-exhaustive definition of the term "equipment" and resist the defendants' suggested introduction of a requirement that any new apparatus brought on to the Site after the date of grant must first be approved by them. To meet the defendants' concerns that the installation of a taller mast might interfere with the use of the Estate for helicopter training the claimants concede that any increase in mast height should be subject to the consent of the defendants which should not be unreasonably withheld or delayed.

26. Mr Wills explained that the defendants' objection to an entirely unrestricted definition of equipment, which in turn would give the tenants the right to install whatever apparatus they chose, was because of the consequences for access to the Site. If there was no limit on the equipment which could be installed there would be no restriction on the number of operators with whom the mast could be shared (since sharing itself cannot be restricted), and that would result in more traffic to the Site and more interference with the defendants' business.

27. The extent of upgrading rights under the current tenancy is unclear and the original definition of "equipment" bears the hallmarks of a messy compromise: the definition is apparently expansive ("any combination of antennae [etc] as required from time to time") but then adds, perhaps as an afterthought, "as set out in the attached drawings". Whether that formulation was intended to tie the apparatus to what was recorded on the original drawings or to permit whatever additions might be required from time to time is far from clear.

28. Uncertainty over the rights originally conferred means that the statutory direction to have regard to the terms of the current tenancy does not provide much assistance. I am nevertheless satisfied that the new tenancy should include unrestricted equipment rights (subject only to the qualified restriction on increasing the height of the mast). There is no need for an acknowledgement that equipment may be installed in stages, or for a requirement that new equipment should be positioned within the Site in a location agreed between the

parties. Concerns about access should be dealt with by means of the access protocol and the claimants' need periodically to upgrade its (and any sharers') apparatus should not be allowed to create opportunities for dispute or ransom. The defendants' legitimate concern about interference with helicopter flights can be catered for by an express limitation, and there is no need for any further restriction.

Contractual compensation

29. The defendants propose the introduction of a new provision giving them the right to apply to the Upper Tribunal for compensation during the term of the new tenancy in the event of any diminution in the value of the Estate or any increase in value which cannot be realised, in each case because of the presence of the tenant's apparatus. The draft clause also provides for compensation to be payable under section 10, Compulsory Purchase Act 1965 (which provides for compensation for injurious affection to neighbouring land) as if that section applied in relation to injury caused by the exercise of Code rights. The defendants also propose a separate clause providing compensation whenever access is taken to the site without proper notice and generally for nuisance or disruption caused by the use of the Site.

30. The genesis of these clauses is found in paragraph 25 of the Code which gives the Tribunal wide powers to order the payment of compensation for any loss or damage that has been sustained or will be sustained by the site provider or other relevant person as a result of the exercise of the rights conferred by an order made under paragraph 20 of the Code. Such compensation may be provided for when the order under paragraph 20 is made or at any time afterwards, on the application of the relevant person. Critically, it is clear from paragraph 25(1) that this statutory right to claim compensation for loss and damage is available only where an agreement is imposed on the parties by a Court or Tribunal in proceedings under paragraph 20. It follows that it will not be available to the defendants in respect of any loss or damage they sustain as a result of the exercise of the Code rights which the claimants will become entitled to in these proceedings under the 1954 Act. In that respect the defendants will not be in a unique position because statutory compensation under paragraph 25 is also not available where parties enter into a voluntary agreement to confer Code rights. Almost all new Code agreements are consensual, and are not imposed by the Tribunal, so site providers entitled to statutory compensation are a tiny minority.

31. In the absence of a specific contractual scheme of compensation, the statutory right under paragraph 25 is the only right to compensation available to a site provider. Paragraph 86 of the Code provides specifically that, except as provided by the Code, an operator exercising rights conferred by the Code has no liability for loss and damage caused. Paragraph 25 is as yet untested and its interaction with the provisions of the Code governing consideration are unclear. It is a paradox that a site provider may be entitled both to the annual value of the package of rights conferred on the operator (assessed on the statutory assumptions), and to compensation for loss and damage resulting from the lawful exercise of those rights. One would ordinarily expect all of the consequences of the transaction (including the risk of unanticipated consequences) to be taken into account by the parties when agreeing a rent.

32. Mr Wills pointed out, as tactfully as he could, that in *Hanover Capital* the Court had incorrectly assumed, at [55], that statutory compensation may be available to a landlord where Code rights are granted as a result of proceedings under the 1954 Act. I agree that that possibility is not available because the Tribunal may only order compensation under paragraph 25 where it has imposed an agreement under paragraph 20.

33. Mr Wills submitted that it was a matter of essential fairness that the landlord should have the right to make an application for compensation and, since it was not available under the statute, provision ought to be made for it by contract. I do not agree.

34. There is nothing in the current tenancy which would entitle the defendants to claim compensation during the term for loss attributable to the exercise of the rights conferred on the tenant. Nor has Parliament seen fit to provide a right to compensation for site providers who voluntarily enter into new Code agreements. At least in valuation theory the consideration agreed in the market for consensual Code agreements will include the monetary value of the risks associated with the grant of the rights. Where a new tenancy is entered into following proceedings under the 1954 Act the rent will be determined having regard to market evidence and will therefore take account of the market's assessment of the value of assuming those risks. There is no evidence before me that consensual Code agreements negotiated in the market include contractual compensation provisions. Had there been such evidence I am sure it would have been drawn to my attention. The exceptional cases in which compensation is available occur where an agreement is imposed by the Upper Tribunal. Market practice is not necessarily determinative when it comes to the fashioning of terms under section 35, but nor is it irrelevant, especially where the introduction of an unusual term would create an additional valuation issue (rent is determined under the 1954 Act on the hypothesis of a consensual arrangement, mirroring the norm rather than the exception). Rather than attempting to replicate paragraph 25 in contractual form, with all its uncertainties and opportunities for disagreement between the parties, the better course seems to me to be to ensure so far as possible that the rent payable under the new tenancy is rooted in the market evidence. That will place the defendants on the same footing as almost all other site providers and will be consistent with the current tenancy. I see nothing unfair in that and any suggested unfairness is the consequence of decisions made by Parliament when it enacted the Code. If, in future, there is evidence that contractual compensation schemes are being incorporated into agreements in the market, it may be necessary to revisit this issue.

Access

35. The current tenancy gives the tenant the right to obtain access to the Site at all times over the shortest route from the A22, and the right to access other parts of the Estate on reasonable notice where necessary for the exercise of the rights conferred. The tenant agreed to comply with such reasonable safety and security procedures as might be required by the Estate Company or the Ministry of Defence.

36. In practice, because of the other activities which go on around the Estate and in the vicinity of the Site, the Estate Company has required the claimants to give notice of their visits. It has not been suggested that that requirement is been unreasonable or inconsistent with the current tenancy. Unrestricted access to the Site is incompatible with the use of the Estate for activities occasionally involving explosives, while the realistic delivery of immersive security training is incompatible with contractors stumbling upon a mock hijacking. For many years Mr Morriss managed access requests informally and without much difficulty, but his evidence, which I accept, is that recently problems have been experienced more frequently. He told me that in the last year one in every three visits to the Site by contractors was unannounced, and he gave examples of numerous occasions when visitors had interrupted training exercises or been found wandering parts of the Estate where they had no right to be, having entered by the main entrance rather than by the designated route. These incidents have caused difficulties for Mr Morriss in managing relations with other users of the Estate and have been an administrative burden.

37. The parties have therefore agreed that the new lease should include a formalised access policy and that the claimants' rights of access should be subject to compliance with that policy. They disagree over the contents of the access policy. Many of their disagreements are over trivial points of drafting of no practical significance, but some are more substantial.

38. The controversial features of the access policy, and my conclusions, balancing the business needs of both parties, are these. Five days' notice of non-emergency access should be given, rather than seven; no good reason has been given why the longer period proposed by the defendants is necessary. If, for any of the reasons specified in the policy, it is not convenient for access to be provided on the date requested the site provider is to propose an alternative date which must be within 7 days of the date of refusal (rather than 14 days). If, once access has been arranged, it is necessary for the site provider to cancel the visit to enable a subsequent booking to be accepted, an alternative date must be provided within 7 days. The parties have agreed that requests for access will be made by the tenant and the document should record that the site provider is not required to respond to requests received from contractors or other third parties. No payment is to be required for access requests. Details should be provided of the company for whom access is required, together with a named contact person, but the tenant should not be required to name each individual who will be accessing the Site.

Indemnity

39. The current tenancy includes an uncapped indemnity against third party claims. The claimants proposed an alternative formulation based on the term imposed by the Upper Tribunal in *CTIL v University of the Arts London* [2020] UKUT 248 (LC) which includes a cap on the amount of the indemnity which the claimants say should be £10 million. Despite the new clause being twice as long as the original I was told of no other practical difference between it and the clause originally agreed. Ms Tozer QC submitted that a cap was appropriate and that £10 million was a reasonable level at which to fix it, not least because

Mr Morriss had confirmed that the Estate's own public liability insurance provided cover up to that level.

40. The level of insurance cover which Mr Morriss has arranged for his own business does not seem to me to be relevant to the amount of the indemnity which should be included in the new lease. Nor do I see why a clause substantially agreed between different parties in the *University of the Arts* case should trump the form originally agreed between these parties. In that case the Upper Tribunal resolved disputes over the terms of an agreement for Code rights exercisable over the roof of a shopping centre in Central London. Such an agreement would carry with it statutory rights of compensation which will not be applicable in this case. In my judgment no sufficient justification has been provided for amending the indemnity in the current tenancy and it will remain in its original form as requested by the defendants.

Non-interference

41. The current tenancy includes a covenant by the landlord that it will not knowingly interfere with the tenant's telecommunications equipment or knowingly allow any other person to interfere or tamper with it. The claimants want this obligation to be supplemented by a prohibition on obstructing the Site or doing anything which may cause interference with the operation of their equipment. The defendants object both to the inclusion of the original non-interference covenant (without supplying any explanation) and the additions to it proposed by the claimants.

42. I can see no reason to omit the original form of the covenant but nor do I consider that it should be supplemented in the manner proposed by the claimants. There is a difference between a prohibition on interference with the claimants' equipment, and a prohibition on interfering with the operation of that equipment, which involves the receipt and transmission of signals across the whole of the Estate. The law already implies an obligation on a landlord not to use its retained land in such a way as to make the demised premises materially less fit for the purpose for which they were demised. The claimants' clause goes further than that and would prohibit any use of the Estate which interfered to any extent with the operation of their equipment. Given the variety of activities which are carried out on the Estate that seems to me to be an inappropriate extension of the terms originally agreed. Similarly, given that the demise is located in an area used for military training and conflict simulation which may occasionally prevent the claimants from having access to the Site at all, a prohibition on allowing other persons to obstruct the Site would not be consistent with the parties' expectations.

43. The non-interference clause will therefore be in the same terms as clause 6.2.1 of the current tenancy.

Break clause

44. The current tenancy includes a break clause which allowed the tenant to terminate the tenancy on three months written notice given at any time if the

Site has ceased to be suitable for the operation of its telecommunications equipment.

45. It is agreed that the term of the new tenancy should be one of 10 years and that there should be a break clause entitling the tenant to bring that term to an end after five years.

46. The claimants wish additionally to have the right to terminate the tenancy at any time after the fifth anniversary of the term on giving not less than three months' notice, without the obligation to give vacant possession of the Site. The defendants are content for the tenancy to include a break clause exercisable at any time after the fifth anniversary if the Site becomes unsuitable for telecommunications apparatus. But they object to any "rolling" break clause and wish additionally for the claimants' right to terminate the tenancy (whenever it may be exercised) to be conditional on giving vacant possession of the Site at the expiry of the notice period.

47. Mr Lester explained the claimants' thinking. It was unclear whether the Site would continue to meet the claimants' future operational needs as technology changes; in particular, the introduction of 5G might require the installation of stronger or taller masts which may not be possible in this location, protected as it is by restrictive environmental and planning designations. Hence the claimants' desire for a rolling break clause. As for the claimants' opposition to a vacant possession condition, they wished to be able to terminate the new tenancy obtained under the 1954 Act but to retain the opportunity to claim a new agreement under the Code. That was principally to guard against the possibility that the rent which I am about to determine under section 34 might be significantly higher than a rent which the claimants think they could negotiate or obtain from the Upper Tribunal under paragraph 24 of the Code. It was also to provide an alternative route to securing the full benefits of the Code (particularly in relation to upgrading) if those were not available under terms fashioned by the Court.

48. Mr Wills submitted that it would not be fair or reasonable to permit the claimants to terminate a tenancy which they had requested and which they agree should be of 10 years duration, simply to enable them to take advantage of the more favourable valuation regime provided by the Code. The claimants wanted, in effect, to have a minimum term of five years with the opportunity to continue it for up to a further five years if it suits them. No such provision was included in the current lease or its predecessor and there was no good reason to allow it. Nor was it reasonable for the defendants to be left in the uncertain position of not knowing during the last five years of the term whether their income from the Site was secure or could be cut off at three months' notice.

49. A similar issue arose in *Hanover Capital*. The operator's reasons for seeking maximum flexibility (in that case the right to terminate on six months' notice at any time) were effectively the same as those explained by Mr Lester (see [36]-[37]). The Court ordered a break on six months' notice exercisable after five years and on each subsequent anniversary of the term. The evidence before the Court on that occasion suggested that unconditional rolling break clauses were often included in new code agreements (though usually only after a fixed initial

period). Ms Tozer QC drew attention to three recent transactions in the market in all of which unconditional rolling breaks had been agreed.

50. The solution which found favour in *Hanover Capital* seems to me to be the appropriate and reasonable approach to adopt in this case, giving weight to the claimants' desire for operational flexibility and to the defendants' interest in certainty and the avoidance of unnecessary and disproportionate expense in legal proceedings. As in *Hanover Capital* I give little weight to the claimants' supposed commercial interest in terminating the lease in order to secure a more favourable rent; I agree with Mr Wills that it is an unattractive stance, but more importantly I think it unlikely in practice that the claimants would exercise such a right for the suggested reason. Whatever rent I determine the sums involved are not large and any notional benefit of securing the opportunity to negotiate a reduction would probably be extinguished by the administrative inconvenience and professional fees involved. I am more influenced by the possibility that technological changes may render the site unsuitable or that upgrades may not be capable of being accommodated within the terms of the new lease without giving rise to a significant dispute or a ransom situation.

51. Since an important part of the justification for a rolling break clause is to enable the terms governing the claimants' occupation to keep pace with the development of telecommunications apparatus, it would not be appropriate to introduce a requirement that they must give vacant possession if they exercise the right of early termination. The defendants' wish to impose such a condition is intended to discourage the use of the break as a means of securing a more favourable rent, and I have already explained why in practice I think it is improbable that the claimants would seek to adopt that tactic.

52. The lease will therefore include an unconditional break clause exercisable on three months' notice expiring on the fifth and subsequent anniversaries of the term.

Rent Review

53. The parties agree that the new tenancy should include rent reviews at three yearly intervals, as in the current lease. The basis of the review is not agreed. Under the current lease the rent is reviewed by reference to the increase in the retail prices index. The claimants seek a review at three yearly intervals pegged to increases in the consumer prices index, which is likely to produce lower increases than RPI. The defendants originally proposed a hybrid form of review which would have seen the rent increased to the greater of the commencement rent adjusted by RPI or the open market value of the site assessed on a no-network basis. That complicated alternative was subsequently dropped by them, leaving only the RPI/CPI issue to be resolved.

54. It was agreed that section 35(1), 1954 Act (and therefore the specific requirement to have regard to the terms of the current tenancy) does not apply to any change to terms relating to rent review, and that any such change must be considered instead under section 34(3) which allows the Court, if it thinks fit, to include a provision for varying the rent it determines.

55. Ms Tozer QC relied on a publication by the Office for National Statistics to explain the technical differences between RPI and CPI and suggested that CPI was the better measure of inflation. But neither index is designed to measure variations in the value of land. It was not suggested that the choice of index made any difference to the amount of rent payable at the commencement of the term. The parties made a choice in 2004 when the original lease was granted and the evidence shows that other parties entering into transactions in the market frequently adopt RPI as their index of choice. In the absence of any persuasive reason for changing the original basis of review I determine that rent under the new tenancy will be reviewed at three yearly intervals in line with increases in RPI.

Rent

56. The parties are far apart on the appropriate rent for the new tenancy. In their original application to the Court the claimants proposed a rent of £300 a year. A joint statement filed by the expert witnesses shortly before the hearing recorded that the claimants' expert, Mr Sladdin, was of the view that the appropriate rent was £950 while the defendants' expert, Mr Thornton-Kemsley, thought that the correct figure would £12,000.

The basis of assessment

57. The rent payable under the new tenancy, determined under section 34 of the 1954 Act, is to be a market rent subject to the statutory disregards. As the Court explained in *Hanover Capital,* the new tenancy will be one to which the Code applies, and it will confer Code rights on the tenant. There is no reason to ignore the true nature of the tenancy when determining the rent and no requirement to assume that the Site will not be used for the purpose of an electronic communications network. In that critical respect an assessment of rent under section 34 is quite unlike a determination of consideration under paragraph 24 of the Code which must be carried out on the "no-network" assumption.

58. Fortunately, lettings of sites for the provision of electronic communications networks on terms which will be subject to the Code are now quite common, and the Court has evidence of the rents at which transactions take place. In principle, because of the absence of artificial valuation assumptions, evidence of rents agreed in the market is the best evidence on which to base a rent determined under section 34. There may be reason to make adjustments to the evidence, but it provides a reliable starting point.

59. In *Hanover Capital* the absence of evidence of rents agreed in the market for new telecommunications sites led the Court to consider a structured approach, taking account of the factors which it assumed would be in the minds of willing parties negotiating a rent for a new letting under the Code (paragraph 89). In the event, the rent set by the Court did not follow that structured approach because it considered, on the evidence, that there would be competition for the site which would push the rent above the "value to the owner" level which the structured approach sought to identify.

60. The same structured approach has been adopted by the Upper Tribunal and by the Lands Tribunal for Scotland when determining the consideration payable under new agreements imposed under the Code (in a modified form, omitting stages applicable to rents determined under the 1954 Act) (see, for example, *Cornerstone Telecommunications Infrastructure Ltd v London & Quadrant Housing Trust* [2020] UKUT 0282 (LC), at paragraph 94).

61. At paragraphs 48 to 52 of *Hanover Capital* the Court discussed the section 34 valuation hypothesis and the characteristics of the parties assumed to be negotiating in the open market for a tenancy of the subject site on the basis that it was vacant and to let. At paragraph 52 it described some of the factors which would be in the minds of those hypothetical prudent and knowledgeable parties and which would influence their behaviour in the negotiations:

> "The parties would know that if a notice [under paragraphs 20 or 26 of the Code] was served and the landlord did not agree to the operator's terms, the operator would have the right to refer their dispute to the Upper Tribunal. The reference might take up to a year or more to be concluded after a decision was taken to serve a notice. Its outcome would not be certain, …. If the hypothetical tenant (or whoever had given the notice) wanted to get on to the site early, it could apply for interim rights under paragraph 26 of the Code, which would be likely to be granted. Once a notice was given, the process would become increasingly costly for both parties until they reached agreement or a new lease was imposed on them by the Tribunal. The consideration which the Tribunal would include in the hypothetical agreement (the rent) would depend on the evidence which the parties adduced, as would any additional compensation which the hypothetical tenant would be required to pay to the hypothetical landlord. These sums would be ascertained, in default of agreement, under paragraphs 24 and 25 of the Code."

62. The same right to resort to the Upper Tribunal and eventually to obtain a determination by it of the consideration payable under an imposed Code agreement are known to real parties negotiating new Code agreements (at least where the site provider is knowledgeable or professionally advised). The effect of negotiating in the shadow of the Code can therefore be expected to be reflected in the rents agreed between parties in reality (evidence I have heard in other cases confirms this). If sufficient evidence of those rents is available there should be no need to resort to other valuation approaches.

63. On behalf of the defendants Mr Wills submitted that it was not permissible to take account of the possibility that the operator might seek to obtain a new Code agreement by any means other than by negotiation. The suggestion in *Hanover Capital* that the hypothetical parties would negotiate a rent influenced by the right of the operator to give notice under paragraph 20 of the Code and to apply to the Tribunal for the imposition of a Code agreement at a consideration determined in accordance with paragraph 24 was, he suggested, wrong in principle and contrary to the decision of Lewison J in *Marklands Limited v Virgin Retail* [2004] 2 EGLR 43.

64. *Marklands* was a rent review case concerning a large retail unit on three floors. The landlord argued before an arbitrator that the rent should take account of the landlord's ability, in the hypothetical negotiations with the tenant, to suggest that he might choose to divide the unit into smaller component parts and to let those parts separately. The arbitrator's award did not take that possibility into account and the landlord appealed to the High Court. Lewison J held that the only alternatives to the hypothetical letting which can be taken into account are those within the framework of the hypothetical transaction i.e. a letting of the whole to a single occupier. At paragraph 20 of his judgment Lewison J explained why that approach was necessary:

> " … the landlord is willing to enter into the transaction laid down by the lease, and does not have to be persuaded into doing so by being compensated for giving up more profitable transactions that he might have done instead. In my judgment if the landlord is allowed to rely on the possibility of entering into wholly different transactions at least two possible problems will ensue. First, there will be a real danger that the tenant will be made to pay a rent appropriate to a more valuable lease than the one by which he is in fact bound. Second, the range of alternatives would greatly increase the scope of the hypothetical factual enquiry. I conclude, therefore, that the arbitrator made no error of law in not considering whether the landlord had alternatives outside the transactional framework laid down by the lease."

65. I do not think *Marklands* has any relevance to this case. The rent to be determined under section 34 is a rent for the whole Site which takes account of all relevant features of the real world, except to the extent that the valuation hypothesis requires otherwise. That rent is to be arrived at having regard only to those matters which would influence parties negotiating a letting of the whole Site, and uninfluenced by any other way in which the Site could be let. Section 34 does not require that the existence of the Code be ignored, or that the parties must be assumed to be ignorant of its provisions. They will reach agreement, but in the course of their negotiations they will both be aware of the valuation approach which would be taken if the consideration was to be determined by the Tribunal under paragraph 24. That does not involve the threat of a transaction outside the framework of the putative letting and carries with it no danger that the tenant will have to pay the rent appropriate to a more valuable tenancy, nor does it increase the range of the relevant evidence. It involves no more than assuming that the parties will make full use of their respective bargaining positions. As Donaldson J put it in *F.R. Evans (Leeds) Ltd v English Electric Co. Ltd* (1977) 38 P. & C.R. 185, at 191: "The negotiations are assumed to be friendly and fair, but, subject to that qualification, would be conducted in the light of all the bargaining advantages and disadvantages which existed on [the valuation date]."

Preliminaries

66. Before coming to the evidence there are a number of general points which can usefully be made.

67. First, it is common ground that it is necessary, when making use of transactional evidence, to consider whether agreed rents include an incentive payment to induce willingness in an otherwise unwilling site provider (discussed in *Hanover Capital* at paragraphs 56 to 63).

68. Secondly, in this sector it is almost invariably the case that agreed rents will have been arrived at "off market" in circumstances where the operator has selected a site in which it is interested and has approached the owner with a proposal to let it. It will usually be the case that the site owner had no previous interest in, or intention of, letting the site and did not offer it for letting on the open market. It will therefore be necessary to consider whether any adjustment is required to rents agreed in the real world to take account of the assumption that the hypothetical letting is one which takes place in the open market in which the property is offered to all who might be interested in it (discussed in *Hanover Capital* at paragraphs 64 to 71).

69. Thirdly, much of the transactional evidence is of the renewal of leases of existing sites; but a renewal is a poor comparator for a new letting of a bare site between parties negotiating at arm's length in the open market and such evidence must be therefore viewed with circumspection. When parties negotiate for the renewal of a lease of an existing site they are already in a relationship of landlord and tenant, and the site is already equipped. In most cases, while the negotiation continues, the site provider will be entitled to receive a rent under the parties' previous agreement which will have been set during the currency of the old Code (uninfluenced by the no-network assumption). That passing rent will almost certainly be considerably higher than the rent the parties eventually agree for their new letting in the shadow of the new Code. None of these features of a renewal negotiation is mirrored in the section 34 valuation hypothesis, and it would be very difficult to make a reliable assessment of the influence they are likely to have on the outcome of the negotiation. Because the parties are moving from one statutory environment to another, telecommunications lease renewals, to a much greater extent than lease renewals of other types of property, are poor comparables for section 34 valuations. Weight ought not to be put on them if sufficient evidence of lettings of new sites is available. The same point was made by the Court in *Hanover Capital* at paragraph 77.

70. Fourthly, when employing evidence of lettings of new sites for the purpose of a section 34 valuation, it is essential to be aware of all of the features of the comparable transaction which may have influenced the rent agreed. That is a basic principle of valuation by the comparative method, but it is one which the claimants dogmatically resisted earlier in these proceedings. It has been an article of faith for the claimants that capital sums paid by them to site providers as part of the terms of lettings of new sites, or on the renewal of leases of existing sites, must be treated as "inducements" and left entirely out of consideration. They insist that only the sum identified by the parties in a new letting as consideration assessed in accordance with the provisions of the Code can be used as a guide to rental value and that all other payments, no matter how substantial, must be treated as the price of purchasing the willingness of otherwise unwilling site providers.

71. Adherence to this dogma led the claimants to withhold full details of their own transactions from the defendants (and possibly even from their own expert witness – despite being aware of the practice of making capital payments Mr Sladdin did not include them in the comparable material he initially identified as relevant and could not recall when he had been given access to the full details of those transactions; the information about capital payments which he did include in his report were later agreed by him to be wrong, significantly understating the sums paid). It took an order of the Court before details of capital sums paid by the claimants on new lettings were disclosed. When disclosed, those payments cast many of the transactions on which Mr Sladdin had originally relied in a rather different light. New lettings which he had understood involved site payments of £250 a year had been accompanied by a capital payment of £15,000 on completion. Whether or not the claimants are right about those payments being inducements which ought in principle to be ignored (a matter to which I will return) it is indefensible for them to keep the details of such transactions from the experts and from the Court. What the payments represent is a question of fact for the Court, and what account is to be taken of them is a question of valuation judgment for the experts; neither question falls to be pre-determined by one of the parties.

72. Finally, submissions were made about the objectivity of the expert witnesses in this case (in particular, about Mr Sladdin's objectivity). Two particular features of the telecommunications scene have to be kept in mind when considering that type of submission. First, the valuation of telecommunications sites is an abstruse sub-specialism in the world of property valuation in which there are few participants with the expertise and confidence to give evidence to Courts or Tribunals. Secondly, at least since the introduction of the new Code, relations between site providers and operators have become polarised and highly adversarial, with the result that professionals acting in this field, especially those giving evidence, operate almost exclusively for one side or the other. That presents real risks to the independence and objectivity of experts, as they can easily become advocates for the interests of the party instructing them. The Court is aware of those risks and can take them into account when evaluating an expert's evidence. The experts in this case are both extremely well qualified and experienced and I have no doubt that the evidence they gave represented their true and honest opinions.

Valuations

73. Mr Sladdin provided evidence in support of a rent of £950 a year. His view was that the rent should be based on the six stage structured approach employed in *Hanover Capital* because an operator considering taking a tenancy of the Site would bear in mind that it could do so at a Code no-network valuation if it followed Code procedures.

74. Adopting that structured approach Mr Sladdin first attributed an existing use value of £250 to the Site. That figure reflected the income available from hostile environment training which had a higher value than what he called its "underlying land value" as non-commercial woodland. No services were provided by the landlord but, basing himself on the Upper Tribunal's decision in *On Tower UK Ltd v JH &FW Green* [2020] UKUT 348 (LC), Mr Sladdin

attributed £600 to the benefit of the right to install a mast, to maintain a connection to an electricity supply, to enter adjoining land for associated purposes and to carry out any necessary pruning of trees. The Site was not in proximity to any dwellings and its use for telecommunications purposes would not impose significant burdens on the landlord so Mr Sladdin made a nominal allowance of £100 at the third stage (again consistently with view of the Upper Tribunal in *On Tower v Green* at paragraph 142). Aggregating these three figures produced an annual rent of £950.

75. Mr Sladdin also thought that the value of the Site would be affected by the access arrangements. In particular, if the access arrangements did not require the tenant to make a payment on each occasion when access was required (as proposed in the defendants' access protocol) he said he would increase the third stage component in the structured valuation (reflecting burdens on the landlord) from £100 to £500. If that approach was taken, he considered that it would be appropriate to reduce the existing use value from his original £250 to a nominal £100. The addition of £250 would produce a figure of £1200 which, by the end of his evidence, I took to be Mr Sladdin's view of the appropriate rent under section 34 if (as I have done) I determined that no separate access payments should be made.

76. If legal and valuation fees were not paid separately Mr Sladdin considered that they ought to be rentalised and an additional sum added to the annual figure. He did not suggest a figure, but referred instead to *Hanover Capital*, where the Court added £445 a year to the rent to reflect the market practice of operators making a capital contribution to the site provider's professional costs.

77. In his original report Mr Sladdin had assumed that the Site would be offered for letting without planning permission for a mast. He also considered that its designation as ancient woodland, SSSI, special conservation area, and area of outstanding natural beauty meant that commercial use would be unlikely to be granted planning approval (although some amenity or recreational uses would be consistent with planning policy). He therefore considered that the need to obtain planning permission would represent "a risk for the tenant". By the time he gave evidence Mr Sladdin had been advised that the statutory valuation assumptions do not require a disregard of the planning permission for a mast which already existed in reality. He nevertheless did not consider that any adjustment was required to his proposed rent because, he said, he had assumed the incoming tenant would be confident of obtaining planning permission.

78. Mr Sladdin did not consider that old Code lettings of other sites for telecommunications purposes at rents of £5,000 to £6,000 a year were reliable guides to value under the new Code. Because consensual transactions under the new Code take place off-market, and because deals typically included a significant incentive element, he considered that they were difficult to use in a section 34 valuation. In his view greater weight should be given to the structured approach applied by the Upper Tribunal in Code valuations.

79. Mr Sladdin also considered whether the fact that the letting must be assumed to take place in the open market meant that the rental value would be increased by competition for the Site between operators or infrastructure providers, but he

concluded that it was very rare for there to be competition in practice and that operators did not bid against each other for sites or take account of potential sharing income when deciding what to pay. On lease renewals the market did not differentiate between the value of a shared site and a site in single occupation. Site sharing between operators was rare (other than between EE and H3G through their joint ownership of MBNL, or between Vodafone and Telefonica through CTIL) and occurred at fewer than 5% of sites (although the subject site was one of them). He attributed this to technical and legal obstacles and considered that where sharing was both practically and legally possible it was likely to be pursued where an operator had an established site and another operator identified a need to install apparatus in that vicinity. But there was, as he put it, "almost zero prospect" of two operators having a need for a new site in the same location at the same time. Infrastructure providers (rather than operators) were interested in mature sites and would not speculate on a new site. Mr Sladdin's assumption was that there would be no competition for the Site if it was offered to the open market by the owner.

80. To support his view that the potential for sharing was irrelevant to the value of a site Mr Sladdin referred to a consensual lease renewal under the 1954 Act at Orange Woods in December 2020. The landlord had been professionally represented and a rent of £1,000 a year with a capital sum of £10,000 had been agreed. If the capital payment was rentalised on a straight-line basis this represented an equivalent rent of £2,000 a year.

81. As for capital sums paid on the grant of new leases, referred to by operators as ECIPs (for "early completion incentive payments") Mr Lester's evidence had been that although capital payments were not included in the opening offers made by MBNL, in practice they were paid in a high proportion of cases: "invariably, a high proportion involve payments". Mr Sladdin agreed with that evidence and that payments were offered both on lease renewals and on new sites, but he considered that in principle they should not be reflected in a rent determined under section 34 because they were a "payment for willingness". He also agreed that the fact that operators were prepared to make capital payments and to pay a site provider's professional fees was well known; in practice, he said, "as soon as people know about it everyone else will want it".

82. Mr Thornton-Kemsley thought that the appropriate annual rent for the Site was £12,000. Section 34 did not include a no-network assumption and, whatever the hypothetical parties might be taken to have in mind in their negotiations, there is now sufficient market evidence to enable a rent to be determined by the conventional comparative method of valuation. It was therefore unnecessary to follow the structured approach taken in *Hanover Capital*.

83. Mr Thornton-Kemsley identified 12 transactions which, after what he called "objective adjustments", he considered supported his rent for the Site of £12,000. The objective adjustments were very substantial and often led to an adjusted figure which was more than double the rent actually agreed. In most cases the adjustments included a figure of £5,000 or £5,500 said to reflect the site sharing potential of each site. The comparables included lettings to infrastructure providers and other tenants not entitled to the benefit of the Code

(Gatwick Airport, utility companies and police forces); some were new lettings of bare sites, others were lease renewals, and one was a litigation settlement.

84. A number of Mr Thornton-Kemsley's comparables were lettings of new sites. Several of these included a statement that the transaction had been negotiated before the commencement of the new Code in December 2017, although completed after it had come into force. Three other new lettings were not caveated in that way. Lettings of two sites to the Home Office at Hawick and at Selkirk on the Buccleuch Estates, agreed in April 2018 and completed in October the same year at rents of £5,400 a year, were said to include a premium element because of the strength of the Estate's bargaining position due to its extensive landownership in the locality. Another letting at Kirriemuir, in Angus, in December 2019 to the Secretary of State at a rent of £5,500 was said to require adjustment due to the remote location and consequent difficulties in servicing the site. Finally, the letting of a bare site at Lossiemouth in January 2020 to an infrastructure provider at a rent of £5,000 a year was thought by Mr Thornton-Kemsley to illustrate the sort of rent such a tenant might pay for the opportunity to acquire a site which it would then make available to an operator.

85. Mr Thornton-Kemsley was not attracted to the approach to competition taken by the Court in *Hanover Capital.* He considered that the appropriate way to take account of the fact that the Site was used by a number of different operators was to adjust the market transactions to reflect the potential for the tenant to generate an income from sharing, rather than by assuming that different operators would compete with each other in the open market for the opportunity to take a tenancy of the Site.

86. Mr Thornton-Kemsley also provided a valuation on the *Hanover Capital* model, which suggested to him that rent of almost £19,000 a year would be appropriate, although he did not think that the approach was applicable in this case. He took the existing use value of the Site to be £8,620 a year based on the daily rates of hire paid by training companies and the rents charged for storage containers.

Discussion

87. The new Code came into force in December 2017 but the evidence before the Court in *Hanover Capital* in August 2020 was that there had been very few new lettings (paragraph 4). It was suggested that situation was contributed to by uncertainty over the operation of the Code but, whatever the reason, it meant that the Court in *Hanover Capital* had very little market evidence of new lettings (meaning lettings of new sites, rather than re-lettings of existing sites) on which to base its determination of a rent. The evidence included only four transactions relating to new sites. Two of those were relied on by the landlord but both had been negotiated and agreed in principle before the commencement of the Code, and for that reason the Court did not find them a reliable guide to what would be likely to be agreed in the current market for a letting of a new bare site (see *Hanover Capital,* at paragraphs 76 to 80). The same can be said of a number of Mr Thornton-Kemsley's comparable transaction. The transactions referred to by the tenant's expert in *Hanover Capital* were complicated by substantial one-off capital payments and were not relied on by him for that reason (see *Hanover Capital,* at paragraph 88).

88. I agree with Mr Thornton-Kemsley that where a rent is to be determined under section 34 of the 1954 Act the adoption of the structured approach resorted to in *Hanover Capital* is only necessary where reliable transactional evidence is missing. This case is being decided sixteen months after *Hanover Capital* and on different evidence. If the evidence of new lettings of bare sites is of sufficient quality and quantity to enable clear conclusions to be drawn, as I believe it is in this case, it is unnecessary to adopt the structured approach previously identified.

89. I remain of the view that the negotiating parties would have in mind the possibility that, if they could not agree terms, the prospective tenant could give notice under the Code and apply to the Upper Tribunal for the imposition of a Code agreement. But such a protracted and expensive process would not be an attractive prospect for either party, and while it would serve as a backstop and provide a valuation context it would be unlikely to feature significantly in their negotiation. The same route is available to the prospective tenant in most new transactions and the effect which it has on the negotiation can be determined by looking at the outcome, without the need to undertake a valuation under paragraph 24 of the Code and then to speculate about how it might be adjusted up or down in light of the parties' relative bargaining positions.

90. In principle, therefor, based on the evidence which is now available, I prefer Mr Thornton-Kemsley's conventional comparative approach to the route taken by Mr Sladdin.

91. The weaknesses in Mr Thornton-Kemsley's approach were his preference for older comparables and the substantial and apparently arbitrary adjustments he made to the transactional evidence.

92. He qualified his acceptance of the proposition that a market transaction which was close in time to the valuation date was more useful than a historic transaction by saying that that was true in a changing market, but he made no attempt to demonstrate that the market in telecommunications sites was stable. The Upper Tribunal had been prepared to make that assumption in *Hanover Capital* at [107] but with the caveat that an absence of evidence of changes in rental value between 2017 and 2020 might simply reflect an absence of relevant transactions. Mr Thornton-Kemsley's own evidence appeared to demonstrate that an assumption of stability was no longer justified and other evidence of lettings of new sites not analysed by Mr Thornton-Kemsley strengthened that impression. His report included a list running to four pages of transactions between January 2018 and September 2020 (plus a litigation settlement in January 2021), yet the latest letting of a new site selected for inclusion in his 12 key comparables was in January 2020. He made no reference to 19 transactions in his list which completed in 2020 or to a further 13 such transactions of which there was also evidence. These 2020 transactions were almost all at substantially lower rents than Mr Thornton-Kemsley's preferred comparables. 17 of the 24 transactions in his list which completed after December 2019 were at rents of £2,250 or less (including capital payments rentalised on a straight-line basis).

93. Three of the 12 transactions on which Mr Thornton-Kemsley relied were plainly not comparable. One was at a rent of £27,500 plus a 15% pay-away and was part of a complex arrangement involving a much larger site with buildings which already hosted a 40m mast shared by at least 7 users. Two others had been settled in the course of litigation at rents of £13,000 (plus a contribution towards the landlord's costs) and £10,000 (which Mr Thornton-Kemsley agreed was not helpful).

94. Mr Thornton-Kemsley's other nine key transactions were lettings at rents of between £4,500 and £7,500 with an average of £5,740. After making adjustments he considered that these transactions supported a valuation for the Site of between £9,400 and £12,325. Whether one looked only at the nine transactions or at all 12, the average adjusted rental value of Mr Thornton-Kemsley's key comparables was around £11,200. He considered that average should be adjusted upwards "to reflect the fact that the lease is to two Code operators who are not joint and severally liable" (overlooking the fact that the lease in question is to a hypothetical tenant and that, in any event, the claimants will be jointly and severally liable under the terms of the new tenancy). By that route Mr Thornton-Kemsley arrived at his valuation of £12,000.

95. It can be seen from this overview that the influence on Mr Thornton-Kemsley's valuation of the adjustments he made to the transactional evidence was huge, enabling him to settle on a rent which was more than double the average of the rents agreed for his chosen comparables and 60% higher than the highest of the nine transactions with any claim to comparability.

96. The most significant adjustment was an addition to the rent agreed for the various comparables to reflect the potential of the subject Site to generate an income for the tenant through sharing its apparatus. Mr Thornton-Kemsley added £5,500 to the rents agreed in five of the nine transactions for that factor. He said he based his adjustment on the equipment present on the mast currently on the Site, which he took to be representative of the equipment which a prospective tenant would anticipate being able to place on a new mast which it would erect. He added £5,000 to the other four transactions.

97. I have three difficulties with these adjustments. First, Mr Thornton-Kemsley agreed that substantial payments to reflect the potential to share a new site, or to continue sharing an existing site on renewal, are not reflected in any of the transactional evidence. There were at least four lease renewals of sites with an established potential for sharing (because sharing was already taking place) where rents of £2,500 or less had been agreed (Park Saddle Wood, Orange Woods, Frimley Ridge and Battle). Secondly, the transactions to which Mr Thornton-Kemsley applied these adjustments themselves permitted sharing and it was clear that some at least were of sites which were being shared or were to be shared (Lossiemouth Road, Elgin for example). Thirdly, rents for new sites will be agreed in most cases against the background of paragraph 24 of the Code, with its no-network assumption. That assumption requires that the commercial value of the right to share a mast must be disregarded when consideration is determined by the Tribunal. It is therefore no surprise to find that any commercial value which the potential to share a site may have is not generally reflected in the rents agreed for the lettings of new sites.

98. The statutory valuation hypothesis is of a letting of a bare site. There is no justification for the assumption that an incoming tenant would be willing to pay an additional rent to reflect the apparatus which had previously been on the Site which must be assumed to have been removed. The transactional evidence demonstrates conclusively that such additional payments are not made when the leases of existing sites are renewed. The evidence of operational behaviour is also inconsistent with the underlying assumption that an incoming tenant would expect to be able to share a mast with previous occupiers of a site. Mr Lester's evidence was that where a mast has to be decommissioned and a site vacated, it is unusual for operators or others who had previously been sharing the site to move to the same replacement site. It is more common to see former sharers dispersing to whichever alternative site best suits the current needs of their own network.

99. For these reasons I did not find Mr Thornton-Kemsley's valuation convincing and it is clear to me from the transactional evidence that his figure of £12,000 a year is very much higher than would be agreed if an operator approached a potential site provider and concluded a letting off-market as almost always happens. He did not consider that competition between operators would influence rental value if, instead of being let off-market, a site was offered in the open market as the statutory hypothesis requires us to assume.

100. The transactional evidence appears to me to demonstrate a clear pattern. Between December 2019 and December 2020 (there was no evidence of later transactions) there was evidence of lettings of 33 new sites. In almost all cases where no capital payment was made the rent agreed was £2,250. Where capital payments were included as part of the deal a lower rent was paid, usually £1,000 but sometimes higher and sometime as low as £250. The up-front payments which featured in those transaction were usually £15,000 (there were examples at £12,000 and £18,000). Ms Tozer QC provided a table on which was shown the aggregate of the rent agreed and the annualised capital payments (on a straight-line basis) for each of the transactions in the most recent 12 months for which evidence is available. That exercise showed that in 28 of the 33 transactions the annual equivalent payment to the site provider was between £1,750 and £2,500. In addition to these agreed rents and capital payments, in cases where the full details of the transaction are apparent the incoming tenant also made a contribution towards the site provider's professional fees.

101. There is insufficient detailed evidence about these transactions to explain why some are at aggregate figures which are 40% higher than others, but they do indicate a range within which the financial elements of transactions agreed in the market can typically be expected to fall. A large number of the lettings of new sites were to EE and have an ESN site number, which I was told indicated that they were let for the purposes of the new emergency services network. It was suggested that the financial terms of lettings for this purpose are more generous to site providers than other lettings (EE was said to be under contractual pressure to complete the emergency services network). That suggestion is not reflected in the aggregate rent/annualised capital payments shown in the table prepared by Ms Tozer which had the ESN transactions in a range from £1,750 to £2,500, with higher aggregate figures (four in a range from

£3,000 to £6,000) for non-ESN lettings. On the evidence before me there is no reason to treat ESN lettings as uncharacteristically generous to site providers.

102. Comparing Mr Sladdin's figure of £1,200 a year, without a capital payment, to the transactional evidence of other lettings without capital payments it is clear that his valuation does not reflect what happens in reality when new sites are let. Assuming the Site is typical the evidence suggests it would let at about £2,250 a year (plus a contribution towards professional fees).

103. Mr Sladdin's approach excludes consideration of capital sums. That exclusion was a matter of principle because Mr Sladdin assumed that the payments represented incentives which would not have to be paid to a willing landlord. Mr Thornton-Kemsley agreed that in principle any payment which was required, in effect, to convert an unwilling site provider into a willing one should not be reflected in the open market rental value of a site, which assumed a letting between willing parties. But it is quite clear that the evidence does not support treating the capital payments now being made in that way.

104. There was no evidence of how any individual transaction was negotiated. Even if there was such evidence it could not be assumed that a site provider was an unwilling participant simply because they refused to accept an operator's opening offer and instead appointed an agent to negotiate on their behalf. There is no justification for the assertion (which is all that it was) that the capital payments made to site providers in 2020 and later were incentives which would not be required in a transaction between willing parties.

105. In *Hanover Capital* the evidence provided to the Tribunal by the operator's expert, Mr Stott, was that incentives were not offered in all transactions, but that they may be available if there was some special urgency or some other reason why the operator wished to encourage the landlord to close a deal promptly (*Hanover Capital* at [88]). The effect of the evidence of Mr Sladdin and Mr Lester in this case is that the market has moved on, and that capital payments are now almost invariably paid to site providers. They are still described by operators in their standard documents (drafted with more than half an eye on creating a body of evidence to deploy in other transactions) as early completion payments, ECIPs, "commercial payments" or other incentives but I am satisfied that these terms are simply window dressing. The agreed financial terms of one such transaction (at Coreglass Forest) were recorded in the Code agreement as comprising consideration "derived in accordance with the Code" of £4 a year, compensation "derived in accordance with the Code" of £11 a year and a "balancing payment" of £235 a year. The agreement omitted any reference to the fact that a premium of £12,000 was also paid.

106. The evidence is that in practice payments described as incentives for early completion are not dependent on early completion. For example, heads of terms drawn up by the claimants on 28 February 2020 for the letting to them of a site at Frimley Ridge in Surrey included provision for an "early completion incentive payment" of £13,000 payable on completion of the agreement provided that was achieved by 16 April 2020. Completion was not achieved until 17 June 2020 but the payment was still made in full. As usual, the capital payment was not referred to in the lease, where the rent of £1,000 was described

as Code consideration of £225 and a "commercial payment" of £775 a year. The only reason for the rent being divided in that way, I infer, was that £225 represented the claimant's assessment of a paragraph 24 figure and while it was willing to pay more than that sum it was not willing to see it described as rent or consideration.

107. Ms Tozer QC submitted that the Court was not entitled to analyse documented transactions inconsistently from the way they had been recorded by the parties to those transaction. Her suggestion was that a party to a letting by deed would themselves be estopped from submitting an analysis inconsistent with what was recorded in the deed (even if the deed ignored a substantial capital payment and recorded the rent as £4 a year "derived in accordance with the Code"), and moreover that no other party, even in unconnected proceedings, could advance an inconsistent analysis. I reject that unreal submission, which was unsupported by authority or valuation practice and flatly contrary to the evidence in this and other cases. That evidence is that, whatever terms parties agree, they will be documented in the manner dictated by the operator. That was the evidence of Mr Thornton-Kemsley in this case, which mirrors evidence the Court has heard from agents acting for site providers in other cases. Mr Lester was equally clear about this in his evidence: any sum agreed to be payable which exceeded MBNL's assessment of a paragraph 24 consideration would be documented as "a commercial inducement payment". I have no doubt that transactions are documented in this way to enable operators to present a case to other site providers, their agents, tribunals and courts. But those labels are irrelevant to the site provider and to the rest of the market, which is interested only in the bottom line. They are equally irrelevant to the Court's determination of a rent under section 34, which follows the market.

108. On the evidence before me, capital payments are an established feature of the market, available irrespective of the level of enthusiasm of the particular site provider or the significance of the particular site. They cannot be dismissed as payments for willingness but represent instead a core component of the financial package which willing landlords and tenants agree for the lettings of new sites.

109. There is a further point. Even if in practice substantial capital payments are paid because site providers are unwilling to transact at a true open market level (which I do not believe to be the case), they nevertheless reflect the real world in which our notional transaction is assumed to take place. Our site provider is willing and does not need to be induced, but his approach is not un-commercial, let alone charitable. There is no reason why, knowing that operators are prepared to make capital payments to secure sites, he would be willing to accept any less than other site providers are known to be receiving. As Mr Sladdin put it, "as soon as people know about it everyone else will want it".

110. I take as the starting point of my own valuation the figure of £1,200 a year proposed by Mr Sladdin. I found the logic of his final adjustment elusive (reducing the stage one element to compensate for an increase in the stage three element - see paragraph 76 above) and I doubt it would survive a negotiation with a well-advised site provider. A rent at or a little above that level would not be inconsistent with the transactional evidence of sites let with capital payments and would be the sort of figure around which a negotiation would take place.

111. To that figure must be added the annual equivalent of the capital payment which the landlord would be advised was routinely being paid on other lettings. Faced with that advice there is no reason why a willing landlord could be expected to let the Site without receiving a similar payment. The statutory hypothesis (a letting on the agreed terms, which do not include a premium) means that the premium which would be likely to be paid in practice must be reflected in an addition to the rent. A premium of £15,000 would be typical and the willing parties would know it; if it was accounted for by a straight-line apportionment it would add £1,500 a year to the rent. But the willing parties would also know that a sum paid over 10 years would be worth less to the recipient than the same sum paid at the start of that period. To receive the equivalent of £15,000 by instalments over 10 years, assuming a 5% yield, would require an addition to the rent of £1,943 a year.

112. In a negotiation in which Mr Sladdin's view of the appropriate level of consideration which might be ordered by the Upper Tribunal formed the basis of the operator's negotiating position, and assuming an agreement to convert a premium of £15,000 into an annual equivalent, I would expect the parties to negotiate in the space between £2,700 and £3,300 and to compromise at a rent of £3,000. That figure is higher than the range suggested by the 2020 comparables in Ms Tozer's table, which fell between £1,750 and £2,500 (including premiums expressed as an annual equivalent). I have considered whether that outcome is justified by the evidence, and I am satisfied that it is for two reasons. First, the figures in Ms Tozer's table converted the capital sums paid up-front to an annual equivalent on a straight-line basis, whereas a well-advised landlord would appreciate the opportunity to negotiate for a higher sum. Secondly, I am satisfied that a rent of £3,000 reflects the significantly greater than average management time, inconvenience and potential for interference with other more profitable activities on the Estate that are a feature of the use of this particular Site for telecommunications purposes.

113. Neither valuer thought that the exposure of the Site to the open market would result in the rent being pushed up by competition, and I make no allowance in that respect.

114. It is finally necessary to take account of the contribution towards professional fees which the site provider would receive if the letting took place off market. Such payments are absolutely standard, as Mr Sladdin confirmed, and there is no reason why the willing site provider would not expect to receive or the willing operator to pay such a contribution. They were not included in Ms Tozer's table of recent new lettings but were paid in addition to the range shown by the transactional evidence; they therefore do not affect the relationship between the figure of £3,000 and that range. The work involved on this Site would be more complicated than on a more straightforward letting (not least because of the involvement of the MoD) and an allowance of £500 a year would be justified.

115. The resulting total is £3,500 a year which I determine is the annual rent for the Site payable under the new tenancy to which the claimants are now entitled.