Case No: H00BM926

IN THE COUNTY COURT AT BIRMINGHAM

Sitting at the Royal Courts of Justice,
London WC2A

26/08/2022

Before:

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

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Between :

ON TOWER UK LIMITED

Claimant

- and –

AP WIRELESS (II) UK LIMITED

Defendant

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Mr John McGhee QC and Mr Daniel Petrides (instructed by **Pinsent Masons LLP**) for the Claimant
Mr Wayne Clark, Ms Fern Schofield and Mr Mike Atkins (instructed by **Hugh James LLP**) for the Defendant

Hearing dates: 7, 8 and 9 June 2022

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JUDGMENT

Judge Rodger QC:

Introduction

1. This is the Court's judgment following the trial of an unopposed claim under the Landlord and Tenant Act 1954.

2. The claimant, On Tower UK Ltd, applies for the renewal under Part II of the 1954 Act of a lease of a telecommunications mast site located at New Zealand Farm in the village of Aberford near Leeds. On Tower is the tenant under the lease which was originally granted in 1998 for a term of 20 years and which has been continued since its contractual expiry in December 1997 by the 1954 Act. The defendant, AP Wireless (II) UK Ltd (APW), is its landlord, having been granted a concurrent or overriding lease of the site by the original landlord in 2014.

3. On Tower's tenancy is a "subsisting agreement" within the meaning of Schedule 2 of The Digital Economy Act 2017. On renewal under the 1954 Act, the new tenancy will be a code agreement to which the Electronic Communications Code (Schedule 3 to the Communications Act 2003, introduced by The Digital Economy Act 2017) will apply.

4. There is no disagreement between the parties over the principle that the claimant should be granted a new lease, but they remain in dispute over a small number of non-financial terms, and over the rent to be paid.

5. On Tower is part of a group of companies which jointly comprise Europe's largest operator of wireless electronic communications infrastructure with over 100,000 operational sites, including over 9,000 in the United Kingdom. It is a neutral host which makes its infrastructure available to providers of electronic communications. As an infrastructure provider it exercises functions under the Code and is regulated by Ofcom.

6. APW is a property investment company. Its business involves the acquisition of leasehold or freehold interests in existing telecommunications sites entitling it to receive the future rent payable by the relevant operator. APW is On Tower's landlord at over 360 sites across the UK.

7. I was informed that there are 134 sites at which On Tower is entitled to a new lease from APW under the 1954 Act. Shortly after the hearing in this case was completed the Upper Tribunal gave a decision in relation to three sites occupied by On Tower where APW was also its landlord (*On Tower UK Ltd v AP Wireless II (UK) Ltd* [2022] UKUT 152 (LC), which I will refer to as *Audley House*). Each was a ground level site in an industrial location, and each was occupied under an agreement already governed by the Code so that renewal was sought pursuant to Part 5 of the Code. This case is different in that the renewal is claimed under the 1954 Act and the site is in a rural location. It is hoped that the two decisions will resolve matters of principle and enable the parties to complete other renewals by negotiation.

8. The parties agreed that the Court should have the assistance of an assessor who was a chartered surveyor and a member of the Upper Tribunal, Lands Chamber, with experience

of valuation under the Code. I therefore sat with Mrs Diane Martin MRICS FAAV and after the conclusion of the trial I had the benefit of being able to discuss the valuation evidence with her. At trial the claimant was represented by John McGhee QC and Daniel Petrides, and the defendant by Wayne Clark, Fern Schofield and Mike Atkins. I am grateful to each of them for their assistance.

General approach

9. There was no dispute of law between the parties on the general approach which the Court should take when resolving the issues in this case.

10. The terms of the new lease will take account of the legislative change brought about in the telecommunications sector by the new Electronic Communications Code (Schedule 3A to the Communications Act 2003, introduced by the Digital Economy Act 2017), but the principles which the Court must apply in determining what those terms should be are no different from any other lease renewal under the 1954 Act. The starting point is section 35(1) of the Act which requires the Court to have regard to the terms of the current tenancy and to all relevant circumstances when determining any terms which cannot be agreed between the parties. The guidance provided by the House of Lords in *O'May v City of London Real Property Co Ltd.* [1983] AC 726 is applicable, so that a party seeking a change from the terms of the current tenancy bears the burden of justifying the proposed change.

11. The rent to be paid under the new tenancy will be determined in the usual way applying section 34 of the Act. The fact that the site is a telecommunications site and subject to the new Code does not alter the principles to be applied. In particular, the rent is to be such as the Court determines the site would reasonably be expected to let for in the open market on the terms of the new agreement by a willing lessor disregarding the matters in section 34(1)(a)-(d), including any effect on rent of the tenant's occupation and any goodwill attached to the holding by reason of the tenant having carried on its business there.

12. The effect which the Code has had on the rental value of telecommunications sites is well known, but the rent to be determined in this case is an open market rent, not a rent determined on the assumptions required by the Code. Guidance on how an open market in telecommunications sites might behave in light of the Code (and on how the current market differs from an open market) can be found in *Vodafone Ltd v Hanover Capital Ltd* [2020] EW Misc 18 (CC) and *EE Ltd v Morriss* [2022] EW Misc 1 (CC).

The basic facts

13. New Zealand Farm is no longer a working farm, and now comprises only the original farmhouse and its extensive grounds. The house is occupied by the owners, Mr and Mrs Ellis, and is about 67m from the mast standing on the site.

14. The mast site comprises a small, fenced compound measuring approximately 18m x 11m. located on the edge of a wooded area close to a major road, the A1(M). Access from the nearest public highway is by means of a short, shared track which passes through an electronically controlled gate when it enters New Zealand Farm then divides, with one

branch leading to the site and to a paddock used by the owner of the farm and the other leading to the farmhouse. The gate was installed by Mr and Mrs Ellis and is controlled by them by means of an intercom system. The original lease includes unrestricted rights of access for the tenant, subject to compliance with what are referred to as security regulations issued from time to time by the landlord.

15. The site is served by its own electricity supply and houses a 20-metre mast on a concrete plinth and various ground level cabinets belonging to O2, EE and H3G. It is screened by trees and only the top of the mast is visible from most parts of the farm.

16. On Tower has been in occupation of the site since 2000. It owns the 20m lattice mast, on which are currently installed five antennae and three microwave dish antennae, supported by a number of ground level cabinets. Apart from the tower most of this apparatus belongs to other operators, including EE, H3G and Cornerstone Telecommunications Infrastructure Limited, each of whom place their own apparatus on On Tower's infrastructure so as to provide 2G, 3G and 4G coverage. The site is also believed by On Tower to be suitable for the forthcoming rollout of 5G.

17. The annual rent payable under the continuing tenancy is £5,004 plus a 30% "pay-away" which yields £3,700 from two site sharers, O2 and BT.

18. APW's interest in the site derives from a concurrent lease granted to it by the owner of New Zealand Farm, Heather Walker, on 19 December 2014 in return for a premium of £75,000. The term of APW's Lease will expire in 2113 and for as long as it continues APW is the competent landlord for the purpose of the 1954 Act.

19. The land demised to APW by the concurrent lease is the same as the land demised to On Tower by its lease. While On Tower's tenancy continues, and for the term of the new lease, there is nothing that APW can do with the site other than collect the rent and enjoy the benefit of the covenants. It is not entitled to possession of the site and it has no interest in any other part of New Zealand Farm.

20. On 6 November 2017 APW gave notice to On Tower to terminate the tenancy under section 25 of the 1954 Act. By agreement between the parties the time within which an application for a new tenancy had to be made was extended and these proceedings were not commenced until 18 May 2021.

Disputed terms

21. The parties have agreed that the new lease will be for a term of 15 years. For estate-management reasons On Tower would like it to be on terms consistent with those at other sites in its portfolio.

22. The terms in dispute had narrowed significantly by the commencement of the hearing, with sensible concessions being made on both sides. APW's proposal that On Tower should be required to accept it as a go-between when notifying the owner of New Zealand Farm that it was coming to the site was dropped. A suggestion that the apparatus to be installed on the site should be limited to a specified list was also abandoned.

23. The issues which remain outstanding concern access arrangements, the provision of health and safety information, a right for APW to carry out repairs at On Tower's expense, some details of a contractual indemnity and a dispute resolution clause. I will deal with them in the order in which the relevant term appears in the draft lease.

Access (clauses 1.1 and 23)

24. The 1998 Lease gave the tenant unrestricted rights of access subject to an obligation to lock any gates which they opened, keeping keys safe and secure and complying with the landlord's security regulations issued from time to time. I do not know if any security regulations were issued.

25. APW had originally proposed that the new agreement should oblige On Tower to book access visits through APW's on-line access portal, but that suggestion was dropped before the hearing. The only issue over access is now whether, as APW proposes, On Tower should be required to give APW two days' notice in writing (except in an emergency) and to provide a description of the work to be undertaken and a copy of relevant risk assessments and method statements. I will deal with the wider topic of risk assessments and health and safety information under the next heading and restrict consideration at this stage to the issue of notice.

26. APW explained that it had agreed a similar notice provision with a site provider in another case and said that it would enable it actively to manage its portfolio and to inform the superior landlord when access was to be taken. The suggested benefit it identified for On Tower was that it would be spared a wasted visit if, for example, there had been a change to the security code on the gate. Mr Talbot, a chartered surveyor and APW's Director of Strategy, suggested in evidence that APW would potentially be in breach of its own obligations to On Tower if On Tower or its customers were unable to obtain access.

27. On Tower objected to a requirement to notify APW whenever it or one of its customers (the telecommunications companies whose apparatus is located on the site) wished to have access. It already had an access team of its own whose job it was to approve access requests by On Tower's clients and their contractors and to notify landowners over whose land access would be taken, which in this case meant Mr and Mrs Ellis and not APW. Mr Brearley, a landlord care manager for On Tower who gave evidence on its behalf, explained that where the terms of On Tower's own lease or easement did not require it to give notice before taking access it did not usually require its customers to do so either, although they did have to notify it and obtain authorisation. As a courtesy, if work was to be undertaken which was identified as high risk, or which was to be carried out outside the demised premises on the site provider's land, notice would routinely be given.

28. Mr Clark suggested that the only issue concerning notice concerned the principle and not the period of notice which was appropriate. I agree. It has not been suggested that a period of less than 48 hours would make any difference, or that the exception for emergency access proposed by APW has been too restrictively drawn. The issue is whether, in principle, On Tower should be obliged to give APW notice when it wished to have routine access to the site.

29. Despite Mr Clark's suggestion that APW had to "facilitate" access and Mr Talbot's evidence that APW "manages" access, there is no evidence of any active management at this site. APW is under no obligation to Mr and Mrs Ellis under the concurrent lease to notify them of access being taken by On Tower, nor is it responsible to On Tower if access is obstructed by others. Indeed, it had been unaware that a gate had been installed across the route by Mr and Mrs Ellis. There is no evidence that the current arrangements have given rise to any difficulties for On Tower or its customers in obtaining access to the site and APW's protestations that it might be required to step in to facilitate or manage access appear fanciful. The grant of a right of way in common with others is not a guarantee that there will never be times when access is temporarily unavailable because someone else is making use of it and APW need not fear claims for compensation if access is obstructed. Nor is it necessary for APW to keep a log of everyone who visits the site just in case it may have to resort to the indemnity against claims which On Tower gives elsewhere in the lease. The evidence is that On Tower has an efficient system for recording attendance at the site and if records are ever required there is no reason to believe they will not be made available.

30. In *Audley House* at [100]-[103] the Upper Tribunal refused to include a notice requirement in a new Code agreement between the same parties. For the same reasons, and to promote the additional benefit of standardisation, I also refuse to include it.

Provision of risk assessments, method statements and similar information (Clauses 3.4, 24.1.6, 24.6 and 24.7)

31. Clause 3 of the draft lease grants various rights to the tenant including the right to use the access way, to enter the Estate (as New Zealand Farm is referred to), and to install and operate electronic communications apparatus. Clause 3.4 mirrors the current tenancy by providing that in exercising these rights the tenant should cause as little inconvenience and damage as possible and should make good any damage to the reasonable satisfaction of the landlord.

32. APW wishes to supplement the agreed text of clause 3.4 by including a further requirement that the tenant should "provide safety method statements and timescales for the installation of the apparatus prior to any work being commenced". The proposed addition does not include a requirement to obtain APW's consent to the content of these documents and is intended merely to keep it informed. Nor is it concerned with giving notice when work is to be undertaken, as that is dealt with elsewhere in the draft. A similar requirement was included in APW's draft access clause which I have already refused in part, but I still need to deal with the suggestion that anyone coming to the site should provide a description of the work to be undertaken and a copy of relevant risk assessments and method statements.

33. Clause 24 is concerned with compliance by the tenant with relevant laws and regulations. Two aspects of this clause are contentious. First, clause 24.1.6 currently requires the tenant to comply with its obligations under health and safety legislation including the CDM regulations. APW proposes to bolster this obligation with a requirement that, where reasonably so requested, the tenant will provide the landlord with details of its or its contractors' safe working practices. Secondly, clause 24.5 requires the tenant to ensure

that the apparatus on the site complies with and is operated in accordance with the regulations laid down from time to time by the International Commission on Non-Ionising Radiation Protection (ICNIRP). APW proposes that On Tower should additionally be obliged to provide a "site specific ICNIRP compliance certificate with both occupational and public exclusion zone plans" (clause 24.6) and provide updated copies whenever the exclusion zones change (clause 24.7).

34. APW argues that its proposals are not onerous and do not require On Tower or its contractors to prepare any document which would not already be in existence. It is perfectly possible, Mr Clark submitted, that the exercise of the rights will involve work being carried out beyond the boundaries of the site on other parts of the Estate. APW needed to know what work was being carried out so that it could properly advise and liaise with the superior landlords, Mr and Mrs Ellis so that, for example, any work which they might wish to undertake would not conflict with On Tower's contractors. It ought therefore to be provided with RAMS (risk assessments and method statements) for all visits to the site, or at least whenever works were being carried on outside the demise.

35. Mr Atkins also submitted that the provision of this information, including about the ICNIRP exclusions zones, would enable APW to carry out its health and safety responsibilities under sections 3 and 4 of the Health and Safety at Work etc Act 1974. APW is concerned about potential criminal liability under the 1974 Act if the relevant regulator took the view that the activities conducted on the site were part of APW's undertaking. He referred in particular to the covenant in APW's concurrent lease which obliged it to enforce the terms of On Tower's current lease and any renewal of it. Mr Atkins acknowledged that he had been unable to find any example of a landlord being found to have breached its own health and safety obligations because of a breach of duty on the part of its tenant, in the context of a telecommunications lease (nor did he refer to any in any other context).

36. On Tower objected to these proposals, arguing that there was no good reason to include them and pointing out that there was nothing similar in the current tenancy.

37. Evidence on the disputed terms was given on behalf of APW by Mr Talbot. He said that APW had obligations to the owners of New Zealand Farm under its own concurrent lease to manage the tenants (meaning On Tower) appropriately and to ensure that anything done on the site or the estate was done properly. It had similar obligations under health and safety legislation. Mr McGhee QC pointed out, correctly, that the concurrent lease imposes no obligations at all on APW and does not require it to manage On Tower's access. APW has no presence on the site and no staff to protect. It is already regulated by Ofcom and subject to a battery of health and safety legislation supervised by the Health and Safety Executive. It was therefore difficult to see what providing a copy of RAMS to APW would add to these protections.

38. On behalf of On Tower Mr Brearley explained that its customers were required to obtain authorisation from On Tower whenever they wished to visit a site. To be efficient, the notification and authorization process had to be highly automated. It would be very inconvenient and would cause delays if every time a visit was to take place safety

information had to be given to APW. Expensive and unnecessary changes to software would be required for no good reason. On Tower's works teams routinely liaise with landowners and would be happy to give notice when it needed to have access to the Estate, especially if it was undertaking major works.

39. Mr Holloway, an Estates Surveyor with On Tower who also gave evidence, explained that ICNIRP certificates were produced for all sites to show the areas from which the public should be excluded and the smaller areas in which precautions were required when staff were working. He believed there was no practical reason for APW to be aware of these zones since they had no staff on site and a person walking around at ground level would not be affected by exclusion zones relating to apparatus mounted at high level. If the owner of the Estate wanted to carry out work on trees at high level close to the mast On Tower would be able to give advice.

40. I agree with On Tower that no sufficient reason has been given to introduce the proposed obligations to provide information before accessing the site. In *Cornerstone Telecommunications Infrastructure Ltd v University of the Arts London* [2020] UKUT 248 (LC), at [70], the Upper Tribunal suggested that it was "important…. not to generate requirements for the transmission of information where that would be of little or no practical benefit to either party". More recently, in *Audley House*, the Upper Tribunal considered APW's specific concerns about its potential criminal liability under the 1974 Act (at [60]-[84]). It concluded that in general a site provider which did not conduct its own undertaking on a site could not be liable under section 3 of the 1974 Act, and that a site provider which was not in control of access to a site could not be responsible under section 4. I agree and adopt the reasoning of the Upper Tribunal. APW is not responsible for health and safety at the site and has no relevant obligations to the owners of New Zealand Farm. These requirements are the remnants of a much more elaborate access portal which APW initially wished On Tower to use, but that proposal has not been pursued and these vestiges of it serve no purpose.

41. As for the provision of ICNIRP information, which the Upper Tribunal in *Audley House* was content to leave to On Tower to provide voluntarily if it chose, it is not obvious that APW would be able to do anything with the information requested, and in the absence of any health and safety responsibility it has no reason to collect it. Supervision of electronic communications is the responsibility of statutory regulators and introducing an additional layer of reporting would be burdensome, counterproductive and pointless.

42. The additional provisions relating to the provision of information in clauses 3.4, 24.1.6, 24.6 and 24.7 will therefore be omitted.

Landlord's remedies for breach of repair and maintenance obligations (clause 25)

43. The 1998 Lease required the tenant to keep the site clean and tidy and to maintain its equipment, including the tower, in a good state of repair and condition. These provisions are to be repeated at clause 18 of the new agreement.

44. APW also seeks the inclusion at Clause 25 of a *Jervis v Harris* clause giving the landlord the right to serve notice on the tenant requiring repairs to be carried out which, if not complied with, would entitle the landlord to go on to the site and undertake the works itself, recouping the cost from the tenant (*Jervis v Harris* [1996] Ch 195). The new right would not apply to the tenant's "apparatus", an expression defined by reference to paragraph 5 of the Code, which includes apparatus and other structures or things designed or adapted for use in connection with the provision of an electronic communications network.

45. There is no evidence of any history of disrepair at this site, and (through its solicitors rather than its witness, Mr Talbot) APW gave only the flimsiest explanation why it sought the inclusion of this clause. It suggested that "any modern lease" should allow the landlord the ability to remedy breaches of repairing covenant "to ensure that damage is not caused to their land or adjoining land". Despite this plea no such clause is referred to in the Upper Tribunal's decision in *Audley House* and I assume either none was proposed by APW, or any proposal was dropped. APW has no interest in adjoining land and its suggested clause would not allow it the right to carry out work to any of the structures on the site. Mr Clark's only submission in support of the clause was that it was not onerous, which was not enough to get it airborne. Its incorporation in the new agreement would be pointless and I refuse to include it.

Indemnity

46. The new agreement is to include a comprehensive indemnity by the tenant in favour of the landlord covering all claims by any third party arising directly or indirectly from the exercise of the rights and the use of the demised premises and the tenant's apparatus. The only issue is whether, as the party bearing the cost of claims, the tenant is to have the right to defend claims or whether that right will remain with the landlord as the party against whom the claims will be brought, subject only to an obligation to take account of reasonable representations which the tenant may make in respect of those claims. The 1998 Lease included a provision that the landlord was to permit the tenant to defend claims in the landlord's name but at its own cost. The party seeking to depart from that approach is APW.

47. APW argues that the parties are competitors in the wider infrastructure market and that in principle it ought not to be required to cede the conduct of litigation to a rival. Unlike the original landlord, who was a private individual, it has the experience and capacity to conduct any claim and should be entitled to protect its own reputation and relationship with its own customer, the superior landlords (who it was suggested were the parties most likely to bring any claim).

48. On behalf of On Tower, Mr McGhee QC submitted that the acts or omissions which were to be the subject of any potential claim covered by the indemnity would be acts or omissions by On Tower and that the risk of reputational damage therefore fell on it to a much greater extent than on APW. As the paying party it was appropriate that On Tower should have the conduct of any litigation.

49. When this issue has arisen in the past, as it did in *University of the Arts* (which did not involve either of the parties to these proceedings) and again in *Audley House*, the Upper Tribunal has determined that the appropriate form of indemnity should give the tenant the conduct of the proceedings but should also prevent either party from settling any claim without the other's qualified consent (i.e. subject to such consent not being unreasonably withheld). That arrangement proceeds on the basis that fairness and practicality require that the paying party should have general control, while recognising that both parties have a legitimate concern for their own reputation, and each ought therefore to have a say in the terms on which they are settled.

50. In my judgment there is no good reason to depart from the basic principle agreed between the parties to the 1998 Lease, which mirrors the terms previously imposed by the Upper Tribunal and therefore has the additional attraction of standardisation. I therefore refuse APW's proposal that it should retain control of litigation and direct that the settlement of claims by either party should be subject to the consent of the other party, provided such consent is not unreasonably refused.

Resolution of disputes (clause 35)

51. APW wishes to introduce a compulsory dispute resolution clause committing the parties to attempting to resolve any dispute under the new agreement by negotiation between "senior members of both parties who have authority to settle disputes". If no resolution had been achieved within 30 days the parties are to attempt to resolve the dispute by an agreed form of alternative dispute resolution (or, in the event of disagreement, a form of ADR selected for them by the President of the RICS). If compulsory ADR has not produced a resolution within 90 days the next step is to be compulsory arbitration.

52. On Tower considers APW's suggested clause "overly prescriptive and convoluted". I agree. The parties are both substantial commercial organisations, well advised and perfectly able to devise a sensible and proportionate route to resolving any dispute as it arises. If it is in their mutual interests to escalate through the stages which APW proposes, they will no doubt agree to do so. If one wishes to obtain an earlier resolution there is no good reason why they should be denied unrestricted access to the courts, especially if there is a need for urgent relief. Mr Clark submitted that the parties should try not to be a burden on the resources of the court. That is all very laudable but the likelihood is that the party seeking an early resolution of any dispute would be On Tower, as it is in occupation of the site and making use of it to run its business; a compulsory ADR clause would provide APW with an obstacle it could fling in On Tower's way. In any event, Mr Clark's concern to preserve judicial resources does not seem to me to be a good enough reason to introduce such an over-engineered clause before any dispute has arisen. If a serious dispute does arise, the parties can always agree to an appropriate form of ADR.

53. I note that in *Audley House* the Upper Tribunal refused to include a compulsory arbitration clause on the grounds that it was subject to so many exceptions that it was effectively toothless. My reasons for refusing to include the proposed ADR clause are different, but the result is the same.

Rent

54. Having resolved the remaining disagreements over the terms of the new lease it is now possible to determine the rent which will become payable from the date of commencement of the new tenancy and the interim rent payable while the current tenancy has been continued by the Act since 10 May 2018.

55. Both parties relied on expert evidence on rent. Mr Jonathan Stott MRICS gave evidence on behalf of On Tower and Robyn Peat FRICS gave evidence for APW.

56. Mr Stott considered that the rent for the site determined under section 34 of the 1954 Act should be £675 a year and that an interim rent should be payable at the same rate. Mr Peat valued the new rent at £7,000 a year and believed the interim rent should be £5,750.

57. This is the third case since the commencement of the Code in which the rent payable for a new lease of a telecommunications site under section 34 of the 1954 Act has been considered by the Court. In the first, *Hanover Capital*, an absence of evidence of rents agreed in the market meant that the Court had to make assumptions about the factors which would be in the minds of parties freely negotiating a rent for a new letting of a mast site around which it then constructed a valuation by attributing value to each factor. In the second case, *EE v Morriss*, at [88], I explained why it ought no longer to be necessary to resort to that approach when valuing under section 34. Agreeing with one of the expert witnesses, I said this:

> "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."

58. Both experts relied on a comparative valuation based on market evidence of comparable transactions and on a *Hanover Capital* structured valuation.

Mr Stott's analysis

59. On behalf of On Tower, Mr Stott provided a useful review of the different approaches to new lettings taken by the major operators and infrastructure providers in the telecoms sector. I summarise his evidence in relation to each of the four largest participants.

60. EE typically agrees total rents of between £750 and £1,000 for new sites. These totals are usually the aggregate of a base rent and a "commercial top-up". In addition it offers

premiums which it refers to as early completion incentive payments or "ECIPs". Mr Stott said that in the last year these payments had become a standard figure of £15,000 offered in almost all cases subject to completion of the transaction by a fixed date (although he was aware of cases where the payments were made despite the transaction being delayed for reasons beyond the control of the site provider). Mr Stott explained that EE's willingness to make these ECIP payments was related to commercial pressure it was under to deliver new sites for the emergency services network (ESN) programme. This, and the fact that New Zealand Farm was not an ESN site, led Mr Stott to disregard ESN deals as not being representative of a market in which he assumed prospective tenants would not be under similar pressures.

61. Mr Stott said that MBNL tends to renew agreements at rents of £1,000 to £2,000 which again are expressed as a base rent plus a "commercial top-up". It too offers premiums which vary from site to site and range from £1,750 to £25,000.

62. Cornerstone seeks to limit the rents it is prepared to agree on renewals or for new sites to the level it considers properly reflects a valuation undertaken in accordance with the Code. It then offers premiums ranging between £1,450 and £20,000 to secure lettings at those rents.

63. On Tower was said not to be in the market for new sites. When renewing leases of existing sites it also seeks to base the rents it agrees on its own assessment of consideration under paragraph 24 of the Code, but it authorises its agents to increase this figure to a higher level in order to reach agreement. For renewals at greenfield sites with no alternative use value the average annual rent agreed by On Tower in 2021 was said by Mr Stott to be around £1,750. It seeks to complete lease renewals without making capital payments, although it has been prepared to do so on some occasions. As an alternative to capital payments it has been prepared to agree a reducing level of rent over a short period of years to achieve a less painful transition from old Code to new Code levels.

64. Mr Stott emphasised that capital payments were not a feature of every transaction and that they varied in size. The range of premiums paid is apparent from all of the evidence; as for their prevalence, Mr Stott suggested in his written evidence that "capital payments are not readily available" notwithstanding that the evidence heard by the Court in *EE v Morriss* was that they were "almost invariably paid".

65. Despite Mr Stott's disagreement with the evidence and the Court's conclusions in *EE v Morriss* his own evidence demonstrated that premiums are almost invariably paid by EE for its ESN sites. They were also paid in eight of the nine Cornerstone transactions he identified (in two of these cases the capital payment was the only payment made) and in five out of nine MBNL transactions. His view was that such payments were necessary to incentivise otherwise unwilling site providers and that they should be disregarded when assuming a new letting between a willing landlord and a willing tenant as section 34 required. In his experience almost all site providers were unwilling to transact at a rent determined in accordance with paragraph 24 and needed to be induced to do so by an

additional capital sum. He applied this analysis across the board and did not distinguish between private individuals on the one hand, and local authorities or commercial organisations for whom the provision of improved electronic communications might have been thought to be attractive. One example was provided in the evidence of an agreement for a new letting of a greenfield site in West Yorkshire by a local authority which was intended to replace a site on a redundant building which was being redeveloped to provide a new supermarket. Mr Clark suggested that there was no reason for the operator to incentivise the local authority in that case and that the agreed premium was simply part of the financial package which the parties negotiated. Mr Stott did not agree. He considered there was no reason why operators in the open market would agree to pay a premium or a rent enhanced because no premium was paid, because he assumed that operators would not be under the sort of commercial pressures that were experienced in reality and would not be in any particular hurry to complete the deal.

66. Mr Stott next identified nine new lettings of bare, greenfield sites completed by Cornerstone since the introduction of the Code. He focused on five of these which had been completed between August 2020 and October 2021. He considered the most recent of these transactions to be the best comparable, the letting of a rural site at Speycoe Lane in Longford, Derbyshire at an annual rent of £425. That letting happened to be at the lowest rent of any of Mr Stott's comparables, but the tenant was also paid a premium of £6,000 on completion and a disturbance payment of £2,000 while the site was being constructed.

67. Mr Stott calculated that the average annual rent of his five comparables was £766, and that where capital payments were agreed these reflected an average annual equivalent of £541, providing a combined rent and annualised premium equivalent to £1,307. For the reasons previously mentioned Mr Stott disregarded the capital sums paid at Speycoe Lane and the capital payments which featured in the other transactions and had regard only to the agreed annual rent.

68. In order to compare these transactions to New Zealand Farm Mr Stott applied a discount of 10% to the rent in each case except Speycoe Lane to reflect what he considered to be the inferior access to the New Zealand Farm site. He applied a further discount of 20% to each rent to reflect what he took to be the lack of a set down area at New Zealand Farm. In the case of the site at Speycoe Lane this 20% adjustment produced a comparable annual rent of £350, which Mr Stott adopted as his base rent for the site. He made no allowance, either positive or negative, for the fact that the tenant was obliged by the agreement at Speycoe Lane to install a new gate and a new road to provide access to the site.

69. Mr Stott then added an annual sum of £332, in lieu of a one-off payment for professional fees which he would expect to be paid by the tenant on any Code transaction (calculated on the basis of a payment of £3,500 with a yield of 5% over the 15-year term). This produced an annual rent of £682, which Mr Stott rounded up to £700.

70. Despite his conviction that capital payments were not a proper reflection of market value and ought in principle to be ignored when undertaking a comparative valuation, Mr Stott

acknowledged that the evidence suggested that landlords were generally prepared to accept lower annual rents where a premium was paid but required a higher rent in cases where no capital payment or only a modest payment was offered. In fact the evidence he provided about Speycoe Lane gave a slightly different picture. An email from one of the agents who had negotiated the letting explained that in that case the site provider had asked for a higher annual rent but Cornerstone had insisted instead that the premium should be increased. I take that to be an example of a case where the operator was prepared to pay more for a site than its own assessment of a paragraph 24 valuation but wished to preserve a low headline rent figure by increasing the capital payment, even where the site provider would have preferred a lower premium and a higher annual rent. That is typical of what appears, from the evidence in this and in other cases, to be a common approach amongst operators, who seek to restrict the headline rent figures which they are prepared to agree, while nevertheless being prepared to pay significantly more than the headline figure by adding "commercial top-ups", "early completion incentives". No explanation for that approach has been provided, but one obvious inference is that it is done so that those negotiating new rents, or giving evidence to courts or tribunals, can maintain that anything above their assessment of a paragraph 24 rent is a concession or an incentive and does not truly reflect the appropriate rent which should be agreed or determined.

71. Mr Stott suggested that the evidence of comparable transactions involving new lettings was not sufficiently plentiful or detailed to be relied on in isolation. He therefore referred additionally to evidence of Code lease renewals. He acknowledged the limitations of this evidence identified in previous judgments of the Court, and in the end the material he supplied did not feed directly into his valuation. Nevertheless, his experience of lease renewals of rural greenfield sites by MBNL and Cornerstone was that rents were generally in the range £1,000 to £1,400 with capital payments averaging £6,300 for Cornerstone and £8,500 for MBNL. On Tower more often agreed rents at around £1,750 and was less likely to offer an additional capital sum.

72. Mr Stott also undertook a valuation following the *Hanover* staged approach. He originally assumed that the site had no alternative use value and arrived at a figure of £632 (including a contribution to professional fees), which he rounded to £650. In his oral evidence he increased this total figure to £1,150 (including contribution to fees) because of the evidence of an email from Mr Ellis confirming his interest in taking a lease of the site at a rent of £1,200 a year in order to get rid of the mast in the grounds of his estate and within view of his house. Mr Stott did not think that £1,200 was a realistic alternative use value and he assumed that, on reflection, Mr Ellis would be prepared to pay only 25% of the figure he had originally suggested.

73. Averaging his comparable and staged valuations Mr Stott came to the conclusion that the annual rent which would be agreed in the open market between a willing landlord and tenant on the assumptions required by section 34 was £675. He acknowledged that for most sites a rent at that level would be "improbably low", but he considered that the nature of the landlord's interest in this case, which was restricted to the demised site itself, justified an assessment which was "significantly lower than the general tone of the market". That was a surprising conclusion since he had made no allowance for that factor

in his comparative valuation, which was based on lettings by landlords who, as at Speycoe Lane, owned other land surrounding the site. The only allowance in his *Hanover* staged valuation was to omit what would otherwise have been a sum of £100 to account for "burdens" placed on the landlord by the transaction. Had that allowance not been made Mr Stott's *Hanover* valuation would have been at £732 and had he applied the same rounding and averaging the final result would have been a figure of £700 or £725, which would still have been significantly lower than the general tone of his own evidence.

74. When he came to give his oral evidence Mr Stott abandoned his reliance on a comparative valuation. He preferred instead to base his view exclusively on his revised *Hanover* valuation of £900. That was because, as he explained it, a comparative valuation was only relevant where a site had no alternative use value. Where, as here, there appeared to be a special purchaser, a "site specific analysis" was required.

75. Cross examined by Mr Clark, Mr Stott did not accept that the New Zealand Farm site would attract competitive bidding if it was offered to the open market. That was because operators do not bid against each other for sites, and an operator would not pay more for a site than its own assessment of the paragraph 24 consideration. In his view the rent determined under section 34 of the 1954 Act should be the same as a rent determined under paragraph 24 of the Code, except that an additional sum would be added to reflect professional fees which would be payable as compensation under the Code but not under section 34.

76. Finally, Mr Stott considered that since the date for assessing the interim rent post-dated the coming into force of the Code, it should be set at the same level as the rent for the new lease.

Mr Peat's analysis

77. Mr Peat relied only on a comparative valuation and although he did not consider that the structured approach was helpful now that more transactional evidence was available he nevertheless carried out a structured valuation of the sort discussed in *Hanover*.

78. Mr Peat provided evidence of rents agreed for a number of 1954 Act renewals since the coming into force of the Code. Some of these transactions included premiums and when these were rentalised the average annual rent at four sites renewed in 2022 and 2021 was £4,000. Mr Peat considered that these transactions were an unreliable guide, because the parties were in an existing relationship and the context was therefore unlike the hypothetical circumstances of a new letting which section 34 required to be assumed. He also considered that the levels of rent were "artificially low" and reflected the relative strength of the tenants with huge portfolios of sites and the weakness of small landlords. For that reason he eventually placed little or no weight on them in his final valuation.

79. Mr Peat did take account of historic transactions pre-dating the Code, which he uprated for inflation using the retail prices index; he considered that these transactions supported an annual rent of £7,000. He acknowledged the comments in *EE v Morriss* and in decisions of the Upper Tribunal about the utility of historic comparables but took the view that where a site was being offered in the open market (rather than within the constraints of paragraph 24 of the Code) and where it was likely to attract interest from infrastructure providers who were not Code operators (such as Cellnex or AP Wireless), the market would be competitive and historic levels of rent would be a valid point of reference. Site providers would be aware that the value of their site to an operator was reflected in old Code rental levels and would bear those levels in mind when considering what they were prepared to accept. Mr Peat nevertheless considered that his valuation of £7,000 was supported by other evidence even if old Code transactions were ignored.

80. Mr Peat placed greatest weight on what he referred to as "general market data" (although the data on which this part of his evidence was based was specific to one site and one infrastructure provider and comprised an estimate of the cost of constructing a new mast and the return which could be expected from it by an infrastructure provider who attracted two operators to the site). In what Mr Peat called a properly functioning market he considered that there would be competition for this site between operators and infrastructure providers (including those already present at the site): it was an important location with planning permission in the green belt which was already shared and hence known to be suitable for a number of operators. He considered that the income that an infrastructure provider would expect to make from the mast, or alternatively the saving that an operator would achieve by providing their own mast, would support a rent of £9,900 a year.

81. Taking account of each of these different approaches, and after undertaking a reality check by reference to the current income from the site (including site share payments), Mr Peat arrived at an annual rent on the comparative basis of £7,000.

82. Although he did not regard it as a satisfactory approach, Mr Peat also prepared a valuation on the *Hanover* model. He identified two alternative uses: for storage, and acquisition by the owner of New Zealand Farm to regain control of the whole Estate, thereby enhancing their own security and amenity. He originally incorporated a figure for the loss to the site provider of the opportunity of putting up their own mast. Mr Clark did not rely on that aspect of Mr Peat's valuation and, accepting that its admissibility turned on a point of law, Mr Peat did not press the point. Omitting the loss of opportunity element from the calculation, the resulting annual figure was £1,400. This figure was underpinned by an indication from Mr Ellis, the owner of New Zealand Farm, that he would be prepared to pay a rent of £1,200 for a lease of the site which would ensure that there would be no mast. Mr McGhee QC questioned why someone would pay such a rent when the site might be the subject of a notice from an operator claiming Code rights but, in agreement with Mr Peat, I do not think that is a legitimate objection where the purpose of the first stage of a *Hanover* valuation is to identify the value of the site for a use other than for telecommunications.

83. Mr Peat also thought that an interim rent of £5,750 would be appropriate, but that was on the assumption that the existing "pay-away" (currently £3,700 a year) would continue to apply while the tenancy was continued under the 1954 Act.

84. Mr Peat was cross examined by Mr McGhee QC about his experience of premiums in the current letting market. He agreed that they were not offered in every case and that they were usually offered to get a landlord interested in doing a deal and to ensure an early conclusion to a transaction. In his experience they were still paid if the site provider refused to agree to an early completion condition and on behalf of his own clients he had never agreed to a conditional premium. Nor could he see why a site provider who was willingly offering his site to the market would be prepared to accept less for it than a site provider who was reluctant to let.

Discussion and conclusion

85. I begin with Mr Stott's evidence that the site would be let by a willing landlord in the open market at a rent of £375 plus a contribution towards costs. He acknowledged that a rent at that level would be "improbably low" yet he persisted in it until he finally abandoned his comparative valuation in favour of an enhanced *Hanover* valuation.

86. I did not find any of the changing stages of Mr Stott's analysis persuasive. His original figure of £375 plus costs was so far from being a credible valuation that it called his objectivity into question. The base figure almost represented a return to the derisory rents offered by operators to unrepresented site providers in the earliest days of the Code.

87. Mr Stott's original figure (net of professional fees) was significantly lower than any rent agreed in any of the transactions in evidence. It was only half of the bottom end of the range of rents (£750 to £2,500) which he said was typically paid for new sites or renewals. It was not supported by his own comparables and depended on the lowest rent agreed (Speycoe Lane) which was massaged down by 20% because of the allegedly more favourable arrangements for a set down area than at New Zealand Farm. There was no substance in that discount, and no evidence at all that the erection of a mast would be more or less difficult on any of the sites, yet Mr Stott applied the same discount to all of his comparables no matter how much space was available. He made no attempt to reflect the benefit to the site provider of the capital sums and compensation, totalling £8,000, paid in addition to the rent, nor the benefit of the operator's agreement to resurface the road and install a new gate.

88. Mr Stott's insistence that capital payments are irrelevant and must be ignored was dogmatic and insupportable. The evidence establishes beyond doubt that capital payments are very widely available and that there is a relationship between rents and premiums such that if no premium were to be offered the transaction would be likely to be completed at a higher rent. Sometimes, as at Speycoe Lane, it is only the operator's insistence on a low rent and a higher premium which causes transactions to be structured in the way they are. There is no reason why a site provider who was willing to let a site without a premium

would be prepared to do so at a figure which ignored the payments so generally available to others letting more reluctantly. Nor is there any reason why operators, prepared to pay significant capital sums to ensure that transactions proceed smoothly, would refuse to pay comparable amounts for a site offered on the open market which they wished to secure.

89. Mr Stott initially justified his improbably low valuation by reference to the assumption that the site provider owned no other land and so would not be inconvenienced by the presence of a mast. Had he considered that was a point of valuation significance one would have expected an allowance to have been made to reflect it in his comparative valuation. No such allowance was made, and the suggested justification for Mr Stott's unrealistic figure was an unconvincing afterthought. The willing lessor identified in section 34 is an abstraction and is not APW. I am far from convinced that it is permissible to rely on a particular characteristic of the actual site provider, rather than of the site, in order to drive down the price which would otherwise be agreed in the market, and no legal submissions were made in support of Mr Stott's approach. Even if such a discount is permitted by section 34, Mr Stott provided no evidence that it is encountered in reality.

90. Mr Stott eventually recognized that his comparative valuation and his revised *Hanover* assessment were irreconcilable. Rather than question his analysis, he then abandoned his comparative valuation altogether, despite it being an evidence-based approach which ought in principle to be preferred, and despite his own initial preference for it.

91. Mr Stott said that he was aware of 250 new lettings of greenfield sites with no alternative use value since the commencement of the Code. In *EE v Morriss* I explained why, with the availability of real market evidence, it ought no longer to be necessary when valuing under section 34 to resort to the artificial structured approach resorted to out of necessity in *Hanover.* A section 34 valuation is an open market valuation and there is no need to adopt the speculative *Hanover* approach. Mr Stott's abandonment of his own comparative valuation and his exclusive reliance on an approach which has nothing to do with the open market hypothesis meant that none of his opinion evidence was relevant to the exercise required by section 34.

92. Mr Peat's opinion that a rent of £7,000 was the appropriate rent was undermined by his misunderstanding of the statutory valuation hypothesis in two important respects.

93. First, he wrongly assumed that the notional transaction would take place in a "functional market" and not in the real market for telecommunications sites. Section 34 requires that the subject of the valuation be taken to be offered by the site provider to the open market, but it does not require that other sites should be assumed to be offered in the same way rather than, as actually happens, taken by operators identifying the sites they want and negotiating off market with the site provider.

94. Secondly, Mr Peat assumed that On Tower and the two operators who are currently on the site would be very keen to return because they would be suffering from the creation of a "not-spot" in their network coverage. That is not a permissible assumption. Section

34(1)(a) requires that the valuation should disregard any effect on rent of the fact that the tenant or its predecessors in title has been in occupation of the holding. Section 34(1)(b) requires that there be disregarded any goodwill attached to the holding by reason of the carrying on of the tenant's business. These statutory disregards prohibit any allowance in the valuation for the fact that On Tower has previously occupied the site or has conducted a business which has enhanced its rental value.

95. Both of those misconceptions were important to Mr Peat's assessment of rent because they contributed to his expectation that there would be significant competition between those who already have an interest in the site if it was offered to the market on a new lease. As Mr McGhee QC conceded in closing argument, there is no reason to assume that the site would be of interest to only one operator, but that is different from the expectation which underpinned Mr Peat's evidence that there would be particular competition between operators with an established need for a presence in this location.

96. Despite these difficulties, Mr Peat's evidence was thoughtful and conscientious although his final figure was significantly too high. His assumption that an informed site provider would be aware of pre-Code rents and would take them to be a measure of the true value of sites to operators was coherent and his treatment of such rents as a point of reference rather than a direct comparable was moderate. His focus on "economic drivers" was less persuasive and a more straightforward analysis of the evidence of comparable transactions would have been more helpful.

97. The most useful part of Mr Stott's evidence was his review of how different operators behave in the current market and the rents and other sums they are prepared to pay for new sites. He provided details of deals done by Cornerstone for nine new greenfield sites and by MBNL for nine replacement sites where notices to quit had been given on existing sites in the vicinity. All of these leases were for terms of 10 years.

98. Six of the Cornerstone transactions post-dated August 2020; four included a capital payment of between £6,000 and £7,500 in addition to the rent. In the other two cases the consideration was paid as a one-off capital sum with only a peppercorn rent being reserved. Converting all sums other than site-specific compensation to an annual equivalent over the 10-year term (at 5%), produces a range from £637 (Mullany Business Park) to £1,971 (Prime Four Ltd – also a business park).

99. Mr Stott's evidence of MBNL transactions was all from 2021 and included five greenfield sites, of which three were let on terms which included a capital payment in addition to an annual rent. Converting all sums other than compensation to an annual equivalent in the same way as the Cornerstone transactions produces a range from £750 pa (Focal Community Centre and Slacky Lane) to £2,295 (land at Garnet Lane next to the A64).

100. Mr Peat provided evidence of three lease renewals agreed for greenfield sites in 2020 and 2021 by Airwave, EE and Arqiva. The equivalent annual payments ranged from £1,300 to £3,750. His evidence of three renewals under the 1954 Act by EE, EE/H3G and Arqiva in

2020 and 2021 included capital payments in each case and ranged on an annual equivalent basis from £2,324 to £5,090. None of these transactions was at arm's length because they were between parties who were already in a landlord and tenant relationship, but they provide evidence of the levels at which settlements are reached between such parties which would be available to a reasonably well informed and advised site provider.

101. A properly advised landlord offering a site to the market at large and looking to receive an annual rent which was not supplemented by a premium would expect to better a rent restricted by the artificial assumptions dictated by paragraph 24 of the Code. They would look around at the transactions taking place and would see that Code consideration is routinely enhanced by annual "commercial payments" and capital sums. They would recognise the substantial saving in time and money which an operator would achieve by doing a consensual deal rather than by using the Code. So too would the operators to whom the site would be likely to be attractive.

102. Based on the range of evidence presented in this case I am satisfied that a negotiation between willing parties in a competitive market would be in the space between £2,000 and £3,000. Because of the site's proximity to an important arterial road and its relative ease of access it would be towards the top of that range, settling at £2,750. To that would be added the annual equivalent of professional fees. Mr Stott assumed that these would be recouped by the site provider over the full 15-year term at an annual equivalent rate of £332. I do not think a site provider would be willing to agree to that; it is not what happens in practice (fees are invariably reimbursed up front). The inclusion in the new lease of a tenant's right of termination would increase the risk that later payments would not be received. Annualising a typical contribution to fees of £3,000 over a 10-year period (at 5%) would add £450 to the annual rent, and that is what I would expect willing parties to agree. In aggregate they would be likely to settle on an annual rent of £3,200.

103. Neither party made submissions on the appropriate level of interim rent but after a draft of this judgment was released to them they agreed that, in this case, the interim rent should simply follow the new rent.