UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 188 (LC) **LC-2018-555; LC-2023-181**

**Royal Court of Justice, Strand,
London WC2A**

1 August 2023

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

**IN THE MATTER OF NOTICES OF REFERENCE
UNDER SCHEDULE 3A TO THE COMMUNICATIONS ACT 2003**

ELECTRONIC COMMUNICATIONS CODE – COSTS OF REFERENCE

BETWEEN

CORNERSTONE TELECOMMUNICATIONS INFRASTRUCTURE LTD

Applicant

-and-

**(1) GATEWAY PROPERTIES LTD
(2) AP WIRELESS II (UK) LTD**

Respondents

**Re: Windsor House and
11a, 13 and 15 High Street,
Kings Heath,
Birmingham B14 7BB**

Martin Rodger KC, Deputy Chamber President

Hearing Date: 12 July 2023

Mr J McGhee KC, instructed by Gowling WLG (UK) LLP, for the applicant
The first respondent did not appear and was not represented
Mr T Watkin KC and *Ms F Schofield*, instructed by Evershed Sutherland (International) LLP, for the Second Respondent

The following case is referred to in this decision:

Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd [2022] UKSC 18

1. This decision was given *ex tempore* after hearing argument on 12 July.

2. There are two references before the Tribunal today, one commenced in 2018, which has already been to the Supreme Court on a preliminary issue and has now returned, the other commenced in 2023, and having its first outing today. The references are both under the Electronic Communications Code. I refer anyone who is not already extremely familiar with the background and general operation of the Code to the decision of the Supreme Court in the conjoined appeals including in this case (*Cornerstone Telecommunications Infrastructure Ltd (Appellant) v Compton Beauchamp Estates Ltd* (Respondent) [2022] UKSC 18).

3. The applications before the Tribunal today concern the costs of the references, excluding the costs of the preliminary issue, which are to be determined by the Supreme Court. This is one of those cases where both parties are able, superficially at least, to claim to have been the successful party and, other things being equal, to be entitled to have their costs.

4. The relevant background to the references can be recapped briefly. In 2002 the owner of a building in Kings Heath in Birmingham entered into an agreement with Vodafone for the grant of rights over the roof of that building, which it is now accepted created a tenancy to which the Landlord and Tenant Act 1954 applied. The agreement was for a term of 10 years and reserved a rent of £5,000 a year, which was increased after five years by RPI. Following the expiry of the term Vodafone remained in occupation as tenant as its tenancy was continued by the 1954 Act. I assume that the rent has continued to be paid at the reviewed rate agreed in 2007.

5. Vodafone and Telefonica are joint shareholders in the claimant Cornerstone Telecommunications Infrastructure Ltd, ("CTIL"), which managed the rooftop site initially on behalf of Vodafone. In July 2018 CTIL behalf gave notice on its own under paragraph 20 of the Code seeking a new Code agreement which was expressly intended to replace Vodafone's continuing tenancy and to be on CTIL's then standard terms. The notice was served on Ashloch Ltd, which owned the freehold of the building at that time. Ashloch did not agree to give CTIL what it wanted, so on 28 September 2018 CTIL commenced the first of three references against it seeking the imposition of a new agreement under Part 4 of the Code.

6. Meanwhile Vodafone took no steps to end its continuing tenancy, or to claim new rights under the Landlord and Tenant Act 1954, or to assert any rights of its own under the Code.

7. Very early in the reference, AP Wireless ("APW") made its appearance. The nature of APW's business has been described in more detail elsewhere but its business model involves inserting itself between a site provider and a telecommunications operator by taking an intermediate long lease. In October 2018 Ashloch granted APW a 99-year overriding lease of the rooftop of the building. In order to tie APW in to the Code agreement it sought in the reference CTIL served a further pair of paragraph 20 notices on Ashloch and APW and started a second reference in December 2018. The two references were consolidated and have continued without distinction ever since. Ashloch then dropped out of the picture, agreeing to be bound by any order made against APW, and its eventual successor as owner of the freehold, Gateway Properties,

has adopted the same position. So, this is, as it were, a straight fight between CTIL and APW.

8. CTIL's approach to the proceedings changed in 2019 when, in the *Compton Beauchamp* case, this Tribunal and then the Court of Appeal determined that CTIL could not apply in its own name for rights under Part 4 of the Code while Vodafone was already in occupation of a site. That reverse prompted CTIL to take an assignment of the continuing 1954 Act tenancy in August 2019 and then to serve a third round of paragraph 20 notices and to apply to amend its statement of case.

9. The third pair of notices included, as had the previous notices, a draft agreement which the recipient was invited to enter into, but the August 2019 notices were slightly different from those which had gone before. Whether by way of correcting a previous omission or as something being sought consciously for the first time, the new notices included a new plan which extended the area of the roof over which rights were sought beyond the area of the demise under the continuing 2002 tenancy.

10. The Tribunal interpreted the proposed amendment as, in effect, the abandonment of CTIL's original case and as the reference largely starting again and it permitted CTIL to amend its statement of case only on condition that it paid 75 per cent of APW's costs incurred up until that time. Importantly for what we are concerned with today, in relation to the other 25 per cent of the costs the Tribunal directed that those would be APW's costs in the reference. So, if APW was successful in the reference it would get those costs. I am told that the sum which remains in issue as a result of that order, the residual 25 per cent, is about £40,000.

11. APW's response to the amendment was that the Tribunal had no jurisdiction to grant anything to CTIL because it now had rights under the 1954 Act and so could obtain a new tenancy by applying to the County Court under that statute. The Tribunal directed a preliminary issue to determine whether it had jurisdiction to impose a Code agreement under paragraph 20 in Part 4 in circumstances where there was an existing 1954 Act tenancy in place.

12. For the most part the costs incurred in the reference since that order are costs of the preliminary issue. The Tribunal determined the preliminary issue in APW's favour, and the Court of Appeal upheld that decision before its decision was the subject of one of the appeals to the Supreme Court. The preliminary issue was determined by the Supreme Court in slightly different terms from those suggested by the parties or by the Court of Appeal. I have been referred extensively to the Supreme Court's decision, but, in summary, what it decided was that CTIL was not the occupier of the land for the purposes of the Code, that CTIL was not entitled to seek to renew or modify its existing rights for so long as it had rights under the 1954 Act, but that it was entitled to seek new additional rights under Part 4 of the Code.

13. In the judgment of the Supreme Court delivered by Lady Rose, she acknowledged that the distinction between a modification of existing rights and the grant of new rights might in some circumstances be a difficult one. Because it was unclear quite what category the rights claimed by CTIL fell into, the Supreme Court remitted the reference to this Tribunal for us to grapple with. That question was to have been our diet this week but thankfully the parties managed to reach agreement.

14. The parties made submissions to the Supreme Court on costs. Because of the intermediate position which the Supreme Court had taken between the extremes argued for by each party, it was not obvious how the costs should fall and it remains not obvious because the Supreme Court has not yet given a decision. It is acknowledged, I think, by APW that CTIL should be entitled to part of its costs at least of the preliminary issue, but whether it gets all of them we must wait to discover. I would have been considerably assisted by knowing what the Supreme Court thought about the costs of the preliminary issue, but neither party has suggested that I should wait for it.

15. I was not shown the Supreme Court's order remitting the reference to the Tribunal, but I assume there is one. I was shown an email from a member of the Supreme Court staff, which explained how the Supreme Court envisaged the reference would proceed after it returned to the Tribunal. The email stated that, following remission:

> "The Tribunal will then be able to consider which, if any, of the rights now sought by Cornerstone are within the jurisdiction, being new additional rights, and which are, out with the jurisdiction, being existing rights that can and should be included in a new lease pursuant to Part 2 of the 1954 Act. On modifications of existing rights, they must await the availability of Part 5 of the new Code. The Court agrees with the comment of Ashloch in paragraph 48 of its recent submissions. Once Cornerstone has renewed its lease, as it is entitled to do under Part 2 of the 1954 Act, it should recast its paragraph 20 application to identify those additional rights it needs that are not included in the renewed lease and which do not amount merely to requests for modification of those renewed rights."

16. The reference to paragraph 48 of Ashloch's submissions was to a paragraph in which Ashloch had disputed whether what was proposed did include new rights and, even if the barrel included "one good apple", CTIL's approach of not distinguishing between new and existing rights was unacceptable: "Policy should dictate that an operator seeking new Code rights should identify those clearly and not leave them to be found in a morass of other renewal material after extensive enquiry. Requiring that exercise to be undertaken is a wholly disproportionate use of the Tribunal's resources."

17. At a case management hearing on 12 December 2022 the Tribunal directed CTIL to undertake the exercise which the Supreme Court seems to have had in mind. Namely to amend its pleading, or serve a new pleading, clearly identifying which terms of its agreement were said to be new Code rights which it was entitled to apply for, and which it acknowledged were not in that category. I recall that at that stage CTIL's position was that it was still entitled to seek an entirely new agreement under paragraph 20.

18. The Tribunal's direction appears to have prompted a tactical shift by CTIL. It served a further paragraph 20 notice, which for the first time identified those provisions of its existing standard form agreement which it maintained were new Code rights, as opposed simply to variations in the language in which the rights it already enjoyed were described. It also served a revised statement of case in support of those new notices, identifying the four additional rights which it intended to seek and supported them with draft agreements.

19. That narrowing and clarification prompted APW to propose an alternative disposal of the dispute, namely a variation of the existing 1954 Act tenancy so as to incorporate the four additional terms, or rights, which CTIL claimed in the amended statement of case. APW also took points about the timing of the amendment, which was either on the same day as or the day before the necessary paragraph 20 notices had been served (therefore denying it the opportunity to agree to the proposal before the reference was commenced). That objection prompted the service of a final set of notices and the issuing of a third reference on 29 March in which CTIL sought identical relief.

20. That, I think, is all I need to say about the procedural history. The parties reached agreement in principle at a relatively early stage after APW's proposal, and by 3 May they had reached a complete agreement and entered into a Deed of Variation of the continuing 1954 Act tenancy.

21. I have been reminded of the Tribunal's powers and of its practice directions in relation to costs. The position is as in the High Court and the governing principle is that as a general rule the unsuccessful party will be expected to pay the costs of the successful party, although the court, or Tribunal in this case, may make a different order.

22. I have also been reminded very helpfully by Mr McGhee KC, who appears on behalf of CTIL, of authorities providing guidance on the approach which should be taken where the parties have settled their dispute but have not managed to agree what should happen about costs. Mr McGhee's summary of those authorities in the Supreme Court and Court of Appeal is not substantially dissented from by Mr Watkin KC, who appears with Ms Schofield on behalf of APW, and it is a good enough summary, despite Mr Watkin's slight qualms, for me to adopt it.

23. The principles which Mr McGhee distils from the authorities are as follows:

> First, where the parties have settled their dispute, save as to the question of costs, it is not right that the likely order is no order for costs.
>
> Secondly, in such a case the Tribunal will consider whether it can fairly and sensibly make an order for costs in favour of one party without a disproportionate expenditure of judicial time.
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> Thirdly, if the Tribunal considers that it can make such an order, then it will take into account relevant factors, including, in particular, the result of the settlement, the conduct of the parties in the course of the litigation, and any reasonable offers of settlement that had been made.
>
> Fourthly, and finally, the Tribunal will only consider which party would have succeeded at trial where this is tolerably clear or obvious and that should not involve giving a fully reasoned judgment on the points, nor in deciding an important issue in dispute which no longer exists.

24. The case was due to begin today and was listed for three days. The Tribunal would have had to decide a number of difficult and important points about the distinction between an agreement conferring new Code rights and a variation, or modification of

an existing agreement conferring rights. It would have had to tackle the interpretation of the 2002 agreement and no doubt it would have had to have heard some evidence as well, but we have been spared all of that by the parties' agreement.

25. The first question really arises before the issue of costs can be addressed and that is: what should the Tribunal do about the existing references? Mr McGhee has not withdrawn them, but he has not offered any evidence, and he says that now that the parties have resolved their ongoing relationship by varying the existing agreement, there is no need for the Tribunal to make any order. Mr Watkin says that the references should each be dismissed. The practical significance of this question arises out of the Tribunal's order of 18 September 2019 when it ordered that 25 per cent of APW's costs, effectively incurred in the first year of the references, should be its costs in the reference. So, APW will only be entitled as of right to recover those costs if the reference is dismissed.

26. It seems to me that dismissal is the appropriate course, for three reasons.

27. First, because this is the final hearing of the reference. No evidence or argument has been put before the Tribunal which would entitle CTIL to any relief, so, in those circumstances, the reference should be dismissed.

28. Secondly, it is unsatisfactory to leave the references in being, sitting, as it were, on the Tribunal's electronic shelf, with the respondents protected from their revival only by the doctrine of abuse of process for CTIL. Pyrrhic victories are liable to be misinterpreted, or even misrepresented, and the better course is for the proceedings to be brought definitively to an end.

29. Thirdly, because the costs incurred before 18 September 2019 are not insignificant and CTIL undoubtedly failed to achieve what it sought prior to the amendment of its statement of case on that date. A disposal which gives proper effect to the order for APW's costs in the reference is the appropriate disposal.

30. For those reasons the Tribunal's first order is that both references will be dismissed.

31. The bulk of the costs of at least of the first reference will have been incurred in determining the preliminary issue. Those costs are, as I have said, the subject of consideration by the Supreme Court. There is nothing more I need say about them.

32. The remaining costs fall into three broad periods of time, although there is some overlap in relation to some of the costs. The first is the period before the order of 18 September 2019, when the preliminary issue was directed. I have already indicated my view on that but I will return to it shortly.

33. Secondly, the period from the date on which the Supreme Court directed that the reference be remitted to the Tribunal. The date itself is unclear, but I assume it was in August 2022. The email correspondence I have referred to is dated 23 August 2022 and arose out of the Supreme Court's order, so I assume somewhere there is an order before that date remitting the matter. From the date of remission until the date on which CTIL served its next round of notices on 16 January 2023 is a significant period, because it was only in January 2023 that CTIL first identified the four additional rights

which it claimed to be entitled to, in addition to those it already had under the continuing 1954 Act tenancy. So, that is a distinct period, from August 2022 until the middle of January 2023.

34. From then on up until today it is appropriate to look at all of those costs together, both before and after the parties entered into their Deed of Variation on 3 May on the basis of the notices which had been served on 16 January. Finally, there are the costs of the 2023 reference, which was commenced on 29 March.

35. So, in accordance with the usual principle, the question is who has been the successful party overall in these references?

36. When it commenced the first reference in 2018 CTIL asked for a new 10-year agreement under the Code at a consideration of £50 a year on its standard terms. It has not achieved that outcome. It has been granted no new lease and, in place of Vodafone, it now occupies under the original 1954 Act tenancy, paying a new rent in excess of £5,000 a year on substantially the same terms as before; there have been what appear to be modest amendments or variations which may or may not afford CTIL any additional practical benefits over and above those first enjoyed by Vodafone in 2002.

37. I am not going to resolve the issue or issues of construction of the original agreement, nor the more difficult issue of whether the additional terms are new Code rights at all, but whatever they are, they are peripheral, modest rights, hardly worth the candle. But they are all that CTIL has achieved in the proceedings. It has failed to establish the strategic principles for which it contended, that agreements originally granted to Vodafone could be renewed by CTIL under the Code, notwithstanding Vodafone's rights under the 1954 Act, even after CTIL acquired those rights halfway through the references. For its part, APW has succeeded in defeating CTIL on those principles, at the cost of some very modest tinkering with the terms of the existing agreement.

38. CTIL's suggestion that it has achieved what it set out to obtain in the proceedings involves recasting its objectives from the perspective of the Supreme Court's conclusion that additional Code rights could be sought under Part 4 while an agreement was being continued by the 1954 Act.

39. That proposition, which does not appear to have been part of CTIL's case until the Supreme Court, is now the starting point of CTIL's reinterpretation of its claim in these references. That reinterpretation involves a significant rewriting of history, as is apparent from the opening paragraph of Mr McGhee's skeleton argument in which he refers to the original tenancy and suggests that CTIL was not content with the extent of the rights granted by that tenancy and applied under Part 4 of the Code for the imposition of a Code agreement to include additional rights. In fact, CTIL's original statement of case in the reference contains no hint of that suggested discontent with the extent of the rights which were, of course, enjoyed by Vodafone, not CTIL, under the 2002 agreement.

40. What is said in paragraph 23 of CTIL's original statement of case is that the original agreement had expired and a new agreement was required to confer statutory rights pursuant to the Code; because of an agreement between CTIL's shareholders, including Vodafone, it was proposed that those new rights would be acquired by CTIL in its own

name. It has only been since the decision of the Supreme Court that CTIL has found it necessary to identify and then emphasise the difference between the rights it already has and the terms of the standard form of agreement it wishes to obtain.

41. Those additional rights could have been sought consensually as part of an application for renewal of the existing tenancy under the 1954 Act. Mr McGhee has suggested that he might not have succeeded as there is an argument that some of the rights (including wider easements) could not have been granted. He goes so far as to assert that he would not have succeeded, but that is another of the issues which it is unnecessary for me to determine. The additional rights could certainly have been the subject of an application for renewal under the 1954 Act. If Vodafone, or CTIL after the assignment, had requested a renewal of their rights under the 1954 Act in the ordinary way, one would have expected there to be some modernisation and for that to be achieved by consensus.

42. Whether the additional terms incorporated in the existing tenancy by agreement are Code rights within the meaning of paragraph 3 of the Code is distinctly debatable. Whether they allow CTIL to do anything which it was not already entitled to do is similarly debatable, but it is perfectly clear that those four additional rights, or terms, are not the reason CTIL commenced these references. Had it requested only those extra rights and had it been prepared to agree to pay the existing rent reserved by the continuing tenancy, I have very little doubt that APW would have quite happily agreed to the necessary variation without the need for any of the costs of the references to be incurred.

43. I, therefore, do not accept Mr McGhee's suggestion that CTIL is the successful party. There is no doubt in my mind that, looking at what Mr Watkin described as the war as opposed to the battle of the preliminary issue, APW is the successful party in the proceedings as a whole. It has the continuing benefit of the 1954 Act tenancy on substantially its original terms, together with the right to continue to receive a rent which is more than a hundred times greater than CTIL originally proposed.

44. On the contrary, APW has succeeded. It has retained its rights under the existing agreement and the renewal of that agreement will take place under the 1954 Act, which is what it has sought to establish in the proceedings. So, in principle, and unless there is some other consideration which requires a different outcome, CTIL should be liable for the costs of the references to the extent that they fall for determination by this Tribunal and not by the Supreme Court in the preliminary issues.

45. A consideration of the distinct phases of the reference does not, to my mind, suggest a different conclusion overall or provide grounds for any reduction on CTIL's liability. Before the assignment of the lease to CTIL and the substantial repleading of its case in January 2020, it was seeking relief that it could not have obtained and for that reason it should pay the outstanding 25 per cent of the costs which are the subject of the order of 18 September 2019. That is the effect of the original order and what will be my own order for the dismissal of the reference, but it also seems to me that even if I had acceded to Mr McGhee's invitation to make no order in the reference, it would also have been the appropriate treatment of the costs before the assignment of the tenancy from Vodafone to CTIL.

46. CTIL should also pay the costs of and occasioned by the repleading of its case, which may have overlapped with the direction for the preliminary issues and which, chronologically at least, might fall into the second phase of the references the costs of which are being dealt with elsewhere.

47. After the Supreme Court remitted the references to the Tribunal it remained, initially at least, CTIL's case that it was entitled to a new agreement in place of the existing agreement. It was not until 16 January 2023 that it identified the additional rights it sought and not until 7 February 2023 that it amended its statement of case. That amendment was after the offer by APW to vary the existing agreement, which was accepted in principle on 27 March. So, in my judgment, up to 16 January at the earliest APW was still entitled to say that it was the successful party and that CTIL could not have what they were asking the Tribunal to give them.

48. After that date, or at the very latest after 27 March, the case was effectively over and the climb down by CTIL had begun. That climb down did not stop costs from being incurred, but it would be unrealistic and inappropriate, in my judgment, to treat those costs differently from the costs before 16 January. It was the fundamental change in CTIL's position on 16 January which led in fairly short order to a consensus emerging.

49. It is not necessary for me to form any concluded view on the nice points on whether the rights sought are or are not Code rights. As a matter of jurisdiction, until 7 February CTIL as asking for things which it could not have; the Tribunal could perhaps have pruned the agreements which CTIL was asking for to identify the four apparently unobjectionable apples, but that was not what it was being asked to do.

50. The model provided by the Code is for the operator to propose, for the site provider to agree, and if no agreement is forthcoming then for a reference to resolve the dispute. That is eventually what happened in response to the notices of 16 January. The costs were incurred in continuing litigation while that consensus was being arrived at because CTIL was already seeking rights to which it was not entitled.

51. I therefore reach the conclusion that CTIL cannot claim to be successful at any stage of the proceedings, other than in relation to the preliminary issue and that, on the contrary, APW is entitled to describe itself as the successful party which should be entitled to its costs including those after the remission of the reference to the Tribunal by the Supreme Court.

52. That leaves only the most recent reference, which was made necessary by CTIL having jumped the gun in amending its statement of case to rely on the final notices before 28 days had elapsed from the service of those notices. Mr McGhee says that was a perfectly reasonable thing to do. Maybe it was reasonable in the circumstances, but it has, nonetheless, has given rise to costs which were generated by CTIL's original tactical decision to amend its case on the same day as it served its final tranche of notices.

53. The objection by APW to that tactic is not, in my judgment, a technical quibble. The amendment was premature. The 28 days provided by the Code after service of a notice is a relatively short but important opportunity for the parties to seek to reach agreement. It allows the recipient of the notice to consider it and to respond to it and, if it is minded

to agree, to say so. It is an important safety net to avoid the costs of unnecessary proceedings.

54. By the time the final reference was served the parties had already reached agreement in principle. So, if CTIL had waited 28 days before amending its statement of case, the final reference would probably not have been required. In those circumstances, the additional costs incurred in the final reference should also be paid by CTIL to APW.

55. Mr Watkin suggested that CTIL's failure to withdraw the claim after the case management hearing in December 2022 should be the watershed for an award of costs on the indemnity basis. I do not agree that indemnity costs are appropriate. This has been hard fought litigation but nothing which CTIL and its advisors have done seems to me to be in any way out of the ordinary or meriting disapproval or an unusual costs order.

56. So, the order I will make is that the costs of the references will be paid by CTIL to APW. No application has been made by Gateway or Ashloch for their costs. The costs will be assessed on the standard basis if they cannot be agreed.

Martin Rodger KC

Deputy Chamber President

1 August 2023

Right of appeal

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