Neutral Citation Number:

Case No: C50MA035

IN THE COUNTY COURT AT MANCHESTER
TECHONOLOGY AND CONSTRUCTION COURT

Manchester Civil Justice Centre,
1 Bridge Street West, Manchester M60 9DJ

Date: 15 March 2017

Before:

HIS HONOUR JUDGE STEPHEN DAVIES
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

MRS LYNN BROPHY	**Claimant**
- and -	
VODAFONE LIMITED	**Defendant**

- -
- -

The claimant appeared in person

Stephanie Tozer (instructed by **Osborne Clarke Solicitors, Bristol**) for the **Defendant**

Hearing dates: 28 February, 1 March 2017
Draft judgment circulated 6 March 2017

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

……..

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

Introduction and Summary of Conclusions

1. In a cable running over land belonging to the claimant, Mrs Brophy, at Hallcat Farm, Lowca, Whitehaven, Cumbria there are 36 optical fibres. The defendant, Vodafone, the well-known provider of electronic communications services, makes use of some of these optical fibres as part of its public communications network. Mrs Brophy's case is that Vodafone has no right to make use of these optical fibres. Vodafone's case is that it is entitled to an order against Mrs Brophy under paragraph 5 of the Electrical Communications Code conferring upon it the right to use the optical fibres.

2. Paragraph 5 of the Code gives an operator such as Vodafone the right to seek a court order conferring rights upon it over third party land where it is not possible to reach agreement with the owner. The court shall make the order if:

> *"… it is satisfied that any prejudice caused by the order-*
> *(a) Is capable of being adequately compensated for by money; or*
> *(b) Is outweighed by the benefit accruing from the order to the persons whose access to an electronic communications network or to electronic communications services will be secured by the order;*
> *and in determining the extent of the prejudice, and the weight of that benefit, the court shall have regard to all the circumstances and to the principle that no person should unreasonably be denied access to an electronic communications network or to electronic communications services "*

3. By paragraph 7 of the Code any such order shall include:

> *"(a) Such terms with respect to the payment of consideration as it appears to the Court would have been fair and reasonable if the agreement had been given willingly; and*
> *(b) Such terms as appear to the Court appropriate for ensuring that that person and persons from time to time bound by the rights are adequately compensated (whether by payment of such consideration or otherwise) for any loss or damage sustained by them in consequence of the exercise of those rights."*

4. Vodafone accepts that it should pay consideration to Mrs Brophy for the rights which it seeks. In summary, it says that the appropriate consideration is £138.96 p.a., to be increased annually in accordance with the Retail Price Index, with each party being entitled to terminate the rights on 12 months' written notice. Vodafone says that there is no basis for any payment in relation to compensation.

5. Mrs Brophy's position as advanced at trial was that - whilst she did not accept that Vodafone was entitled to an order under paragraph 5 of the Code, which is a point which was not previously pleaded by her and to which I shall have to return - if an order was to be made it should be for an 80 year term for a one-off premium of £10,000 together with payment in relation to compensation.

6. The case was transferred into the Technology and Construction Court on the basis that although the relevant court for the purposes of paragraph 5 of the Code is the County Court, at an earlier stage in the proceedings it was believed that technical issues might arise as to the prejudice caused by the presence of the optical fibres compared with the benefit accruing from the use of the optical fibres. In the event, however, no such issues were raised at trial.

7. Mrs Brophy has represented herself throughout this litigation. She has presented her case with tenacity. Vodafone has been represented by solicitors and, at trial, by counsel, Ms Tozer, to whom I am indebted for her clear and helpful written and oral submissions.

8. I have heard oral evidence from Mr Price, employed by Vodafone as a "network expert" dealing with wayleave agreements of the type sought by Vodafone in this case. I accept Mr Price as an honest, knowledgeable and reliable witness.

9. I have also heard oral evidence from Mrs Brophy. Whilst this case does not turn on my assessment of her credibility, and whilst I accept her as an honest witness, I am satisfied that I am unable to place any real weight on her unsupported oral evidence. That is because I find that she is so determined to obtain substantial compensation, and has come to feel so strongly about this case, that as a result she is unable to give dispassionate or reliable evidence.

10. I have also received expert valuation evidence in the form of written reports from Ms Jackson on behalf of Mrs Brophy and from Mr Salomon on behalf of Vodafone. Ms Jackson is a surveyor in practise in Cumbria, who does not claim nor appear to have a specialism in valuations of rights under paragraph 5 of the Code, although she does appear to have a particular specialism or interest in agricultural valuations, being a fellow of the Central Association of Agricultural Valuers. Mr Saloman is a qualified valuation surveyor in practice in Cheshire, who has a particular specialism in the utilities and renewables sector, and in relation to compulsory purchase and the acquisition of wayleaves and easements.

11. Ms Jackson does not contest the valuation of the annual payment offered by Vodafone, although she does challenge the valuation of the one off premium for an 80 year right. After exchange of expert reports Mrs Brophy advised the court and Osborne Clarke that she did not consider that it was necessary for the experts to give oral evidence and I acceded to that request, with the result that Ms Jackson and Mr Saloman did not attend trial, and I shall address the issues between them by reference to their written reports. In short, I conclude that the expert opinions expressed by Mr Saloman are to be preferred to those expressed by Ms Jackson. Mr Saloman has expressed his views cogently and in detail, and clearly has far greater experience of the matters in issue in this case than does Ms Jackson. I accept Ms Tozer's submission that Ms Jackson's reasoning as to how she arrives at her valuation of £10,000 is both lacking in detail and unconvincing.

12. In summary, I accept Vodafone's case on the important issues in dispute, and am satisfied that it has made out its case for an order under paragraph 5 on substantially the terms proposed in the draft order it has proffered.

13. Somewhat unusually, but for understandable reasons, both parties agreed that I should see all correspondence passing between them in relation to this matter, both open and without prejudice. In the circumstances I indicated and the parties agreed that in my draft judgment I should include my provisional view as to the incidence of costs, although it would be open to the parties to make further submissions as to costs if they wished on receipt of the draft judgment, which both parties have done. My provisional view as expressed in my draft judgment was that since Vodafone had succeeded in obtaining an order in substantially the terms it had sought it was the successful party, and Mrs Brophy ought to have accepted either the terms originally offered or those terms, so that she ought to pay Vodafone's costs of the action, to be the subject of a detailed assessment on the standard basis if not agreed. (I have already made a costs management order, in which I left over for detailed assessment the costs already incurred and the question of the appropriate hourly rate to be payable for Osborne Clarke, Vodafone's solicitors.) Having read the further submissions I am satisfied that this is the correct order to make, together with a further order allowing Vodafone to set off such costs against the monies payable to Mrs Brophy under the terms of the order made under paragraph 5. My reasons appear in paragraphs 70 - 73 below.

14. I begin by setting out the relevant events, continue by referring to the relevant legal principles as regards the assessment of consideration and compensation under the Code, and then address the competing arguments and give my decision.

Relevant events

15. The story begins in 1948, when the then owner of property including Hallcat Farm granted what was then the British Electricity Authority a right, in consideration of an annual payment, and determinable on 12 months' notice, to place 6 electrical conductors, 2 earth wires and 3 towers over the property. In common parlance, this was a reference to the electricity pylons and overhead cables which were indeed installed and which still run across Hallcat Farm. There was, of course, no reference in this grant to any of these items being used for the purposes of electronic communications services in that grant.

16. In 1997 Mrs Brophy purchased Hallcat Farm from a Mr Carhart. There is in existence a document known as a Telecommunications Wayleave Agreement dated 2 June 1997 and made between Mr Carhart and Norweb plc under which the former appeared to consent to Norweb installing and using a telecommunications cable carrying up to 36 optic fibres over the property, which Norweb might combine with the earth wire used in connection with the overhead electric line. This wayleave agreement also provided for an annual payment of £26.25 and was also determinable on 12 months' notice.

17. However it is Mrs Brophy's case that by the time this agreement was concluded she had already purchased and moved into Hallcat Farm, and knew nothing of the wayleave agreement let alone consent to it. Her case, therefore, is that it was not and never has been binding upon her. Although she accepts that she received payments from Norweb, which I am satisfied were referable both to the 1948 grant and the 1997 wayleave agreement, she says

that he believed that both related only to the pylons and electricity cables. Her evidence is that whilst she was aware that Norweb had replaced the existing cables in August 1997 she was not told and did not know that a further cable containing optical fibres – for short the fibre optic cable, although more specifically an optical ground wire cable - had also been installed.

18. This shows, as Ms Tozer submitted, that the presence of the fibre optic cable over her land since 1997 was not something which had in fact caused any physical disturbance either to Mrs Brophy or to her use of the land. Although Mrs Brophy has contended that the apparatus as a whole is a physical disturbance to her, and makes an audible sound, and has also caused a diminution in the value of her land, and although she has also contended that the presence of the fibre optic cable plays at least a part in the totality of this, I am satisfied that the presence of the optical fibres themselves has absolutely no effect whatsoever. My reasons are as follows:
    (1) As Mr Price explained, and demonstrated, and as I accept, the fibre optic cable itself comprises a number of separate tubes within the protective outer reinforcement, and within two of these tubes are housed a number of separate optical fibres, 36 in the fibre optic cable installed in this case, which are similar in appearance and size to very fine wire. The rest of the structure operates as an earth cable.
    (2) Of these 36 optical fibres, two are used by the electricity operator to monitor the power transmitted, and of the remainder at present 27 are used by Vodafone, and the remaining 7 are currently unused.
    (3) There is no evidence whatsoever to support any argument that these optical fibres have any impact in terms of noise, and in terms of substance they are negligible. Moreover, as the chronology makes clear, the fibre optic cable was installed many years after the pylon and cables already on Hallcat Farm were installed.
    (4) There is no evidence from Mrs Brophy's valuer or anyone else that the presence of these optical fibres in themselves do, or might, diminish the value of the land or that they make more than an insignificant contribution to any diminution in value which there may be arising from the presence of the tower and cables over the land – as to which there is also no evidence.
    (5) As Mr Price said and as I accept, the optical fibres have a lifetime of around 40 years and the fibre optic cable around 60 years. There is no need for anything other than routine visual checks to ensure that the fibre optic cable is adequately affixed in the meantime. Since, as I explain below, pursuant to a Fibre Leasing Agreement the maintenance of the fibre optic cable and the optical fibres is undertaken at least in the first instance by the electricity operator, there is no evidence or reason to consider that the presence of the fibre optic cable or the optical fibres results in any increase in the number or duration of attendances required to serve the tower and cables already in place.

19. In the circumstances to which I also refer later, Vodafone does not seek to contend in these proceedings that it is entitled to rely upon the wayleave agreement. Its case is that it does not need to do so, because it is entitled to an order under paragraph 5 of the Code, regardless of

whether or not the wayleave agreement is valid or invalid. It says that Mrs Brophy has not disputed in her pleaded case that it is entitled to such an order.

20. In 2006 United Utilities Electricity plc ("UUE") as the successor to Norweb plc entered into a Fibre Leasing Agreement with a company known as Thus plc. This is a lengthy legal document but, in summary, it provided for Thus, in return for the payment of licence fees, to have a licence to use and operate the optical fibres comprising the telecommunications network installed on the electrical overhead infrastructure for the purposes of its telecommunications business. The agreement was for a term of 20 years and provided for UUE, at Thus' expense, to maintain and repair the optical fibres, with Thus having the right to do so itself if UUE failed to do so. The relevant optical fibre routes are identified in Schedule 1, and include the route which passes over Hallcat Farm.

21. Mrs Brophy referred me to paragraph 4.8 of the Fibre Leasing Agreement, under which UUE was obliged to assist Thus in obtaining consents, such as wayleaves, in relation to new optical fibres, in order to demonstrate that the Fibre Leasing Agreement only applied to optical fibres in respect of which there was a valid wayleave agreement. She also referred me to a Networks Rights Transfer Deed entered into at the same time, under which UUE assigned to Thus all relevant wayleave agreements, for the same reason. I entirely accept that it was envisaged under both agreements that Thus would secure the benefit of the relevant wayleave agreements which, as against the relevant landowners over whose land they ran, entitled the optical fibres to be run and to be used. However the fundamental flaw with Mrs Brophy's argument was that there is no basis for construing the Fibre Leasing Agreement as meaning that Thus' rights only extended to such optical fibres as had a valid wayleave agreement. As Ms Tozer submitted, the licence was granted in relation to all optical fibres running along the length of the routes identified in Schedule 1, regardless of whether or not there was, or was not, in existence a valid wayleave agreement in relation to any particular part or parts of that route.

22. In his witness statement Mr Price explained the chronology of transactions whereby in 2009 Cable and Wireless acquired the physical assets of Thus, including the optical fibre routes supported from the electricity apparatus of what was Norweb, then UUE, and now Electricity North West ("ENW"), and whereby in 2013 Vodafone acquired the fixed line communications network of Cable and Wireless. Although he did not produce all of the relevant agreements, there was no need for him to do so, given the scope of what is in issue in this case by reference to the statements of case. Mrs Brophy did not cross-examine him to the effect that what he was saying – or indeed what had been pleaded in this respect by Vodafone as to the effect of these corporate transactions – was incorrect. Although she denied that she had received correspondence from Cable and Wireless and then Vodafone in 2011, 2012 and 2013 enclosing the cheques sent in payment of the annual fees payable under the 1997 wayleave agreement, she accepted that she had received the payments, as indeed the evidence produced by Vodafone confirmed, and I am satisfied on the balance of probabilities that she did receive this correspondence. Moreover in the course of the trial Mrs Brophy produced an email from herself to ENW showing that she was in negotiations with them in relation to the grant of an easement over the pylon and cables on Hallcat Farm.

23. At some stage between 1997 and 2003 the rate paid under the 1997 wayleave agreement to Mrs Brophy was increased to £90 p.a.. As Mr Saloman explains in his report, in around 1996 an agreement was reached between Energis (a subsidiary company of National Grid, whose physical assets were acquired by Cable and Wireless in 2006, and thus by Vodafone in 2013) and the National Farmers Union (NFU) and Countryside Landowners Association (CLA) for payment of revised annual wayleave rates for telecommunications cables to be installed on existing electrical overhead infrastructure. These rates were not binding in any way but have continued to be used subsequently, subject to annual revisions by Cable and Wireless and then by Vodafone. These revisions were agreed until 2013, since which time in the absence of agreement Vodafone has increased the rates in accordance with the Retail Price Index (RPI). Mr Price has produced a schedule, which I am satisfied is accurate, which identifies the difference between what was paid to Mrs Brophy and what would have been paid under these rates.

24. However in December 2014 Mrs Brophy's stance changed. She asked for and received a copy of the 1997 wayleave agreement, asserted that it was not valid or binding upon her, refused to accept the cheque tendered in payment for that year, and wrote to Vodafone in February 2015 requiring them to remove its apparatus on that basis.

25. Vodafone, whilst not accepting what was said, in order to protect its position served what is known as a counter-notice under paragraph 21(3) of the Code upon her later that month. In short, an operator in the position of Vodafone who is required to remove its apparatus is entitled to serve a counter-notice within 28 days stating that its apparatus may not be removed and specifying the steps which it proposes to take to secure its rights. In this case, the notice specified that Vodafone would serve a notice under paragraph 5 of the Code.

26. Mrs Brophy complains that the explanatory note attached was inaccurate and misleading in that it recited that Vodafone "has installed electrical communications apparatus on the property in accordance with the Code and has the right to keep it there", whereas neither statement was true. Mr Price rightly accepted that it was not Vodafone which had installed the apparatus and there is, as I have said, an issue raised by Mrs Brophy as to the validity of the 1997 wayleave agreement. However it is clear that the form of the notes followed the precedent produced by the relevant regulator, Ofcom, so that there was no intention to mislead. More fundamentally, I am satisfied that the error neither invalidates the effectiveness of the notice as a paragraph 21(3) notice nor, and in any event, does any of this in any way prejudice Vodafone's ability to make an application under paragraph 5.

27. In April 2015 Vodafone duly served a paragraph 5 notice, enclosing a draft wayleave agreement providing for an annual consideration of £90 and terminable on 12 months' notice. That was not accepted, and in July 2015 Mrs Brophy said that she did not want an annual easement but would be prepared to consider a permanent easement. Vodafone responded stating that whilst that was not its policy, on this occasion it would do so, and offered £3,372 for an 80 year easement. It explained that this was its assessment of the capitalised value of an annual payment of £134.88. This annual payment was the "going rate" paid by Vodafone

under the agreement as negotiated with the NFU/CLA at the time. It explained that although multiplying £134.88 by 80 would get to £10,790.40, the sum of £3,372 was offered on the basis that invested now at a 4% return it would produce the equivalent of £10,790.40 over the 80 years.

28. This offer did not impress Mrs Brophy, who rejected it in emphatic terms in her reply. A few days letter she sent a further letter saying that she would agree the offer of an 80 year agreement but not the terms, which she would like to negotiate. In September 2015 Vodafone responded without increasing its offer for an 80 year term but making alternative offers based on shorter terms. It is clear that it was not agreeing that any offer would involve only an 80 year terms, and it is equally clear in my judgment as a matter of contract law that it was not open to Mrs Brophy to break down the previous offer and elect to accept one part of it (the term) but not the other (the amount). Mrs Brophy said that she would give Vodafone a permanent easement for £15,000, but this was not acceptable to Vodafone, and negotiations stalled.

29. In January 2016 Mrs Brophy issued proceedings in her local County Court, seeking an order requiring Vodafone to remove its apparatus on the basis that the 1997 wayleave agreement was invalid and no agreement had been reached for a new easement. In tandem with the court proceedings negotiations continued, in the course of which Vodafone agreed to meet up to £750 of the cost of Mrs Brophy instructing a valuer to produce and present a valuation based on valuation principles. In March 2016 a colleague of Mr Salomon, Mr Lumley, produced a report to justify Vodafone's position. In April 2016 Ms Jackson, who was by then instructed by Mrs Brophy, responded in terms whereby she: (a) accepted that an offer of £3,422.75 for a 25 year term would be "relative to comparable telecom payments"; (b) sought payment of the difference between the £90 previously paid and the going rate and the annual payments not yet made, totalling £350 including interest; (c) argued that Vodafone should pay an additional sum to bring the total to £10,000 on the basis of an argument that in the absence of a valid wayleave agreement there was no entitlement to make a paragraph 5 application.

30. As I have already said, Ms Tozer submits, and I accept, that this shows that Ms Jackson's valuation of £10,000 was based on no scientific valuation principle, since she was effectively accepting Vodafone's valuation, and was based on an assertion – which I regard as completely misconceived - that the absence of an existing valid wayleave agreement prevented Vodafone from obtaining a paragraph 5 order.

31. Vodafone made two further offers in April 2016, both based on an 80 year term at a premium of £3,422.75. Mrs Brophy says that she rejected the first. The second also included an offer to pay £2,000 towards the valuer's fees, £1,000 in legal fees for advice before signing the proffered wayleave agreement, £1,000 in respect of court and other costs, a £500 "handling fee" and the back payments of £350 requested. This offer was also said to be conditional on confirmation of acceptance by 28 April 2016.

32. Mrs Brophy did not accept this, and counter-proposed £25,000, which Vodafone did not accept either. In July 2016 Vodafone made an offer of an annual wayleave agreement at

£134.88 p.a. as revised from time to time, which Mrs Brophy did not accept. In September 2016 Vodafone wrote formally withdrawing the second offer of April 2016, making it clear that it was only prepared to consider an agreement based on an annual payment.

33. I have gone through this correspondence at some length because it is relevant to Mrs Brophy's argument that Vodafone had offered and she had accepted an 80 year term at a premium to be agreed, and so that it is not now open to Vodafone to contend for an annual terms at an annual payment. I have no hesitation in rejecting this argument, since as I have already said there was never any question of Mrs Brophy being able to pick and choose between various parts of the global offers made, and because even if what she proposed was a counter-offer to that effect it was never accepted by Vodafone. These exchanges are also of course relevant to costs, since they show Vodafone attempting any number of different means of resolving the dispute, but without success, with the fundamental obstacle being Mrs Brophy's insistence on receiving a substantial sum by way of one-off payment in excess well in excess of anything which even her own valuer thought was realistic based on comparable payment.

34. By this time the case had been transferred to the TCC and the first hearing in the TCC took place later that month. The court proposed that the parties agreed to limit the issues in dispute, in a way to avoid lengthy and expensive litigation, but Mrs Brophy was unwilling to do so. In the result the court, having received representations, made an order in November 2016 requiring the parties to file amended statements of case. Mrs Brophy was required to:

"… file and serve (by post only) a replacement properly particularised Particulars of Claim which: (a) identifies the claims which the claimant is making; (b) provides reasonable details of the factual and legal basis of those claims; (c) provides reasonable details of the quantification of those claims; (d) provides reasonable details of the factual and legal basis upon which the claimant opposes the making of an order under paragraph 5 of the Telecommunications Code and/or the terms upon which the claimant would be willing to agree to an order under paragraph 5 of that Code."

35. In her Amended Particulars of Claim Mrs Brophy challenged the validity of the 1997 wayleave agreement, and set out the terms on which she would be prepared to agree to an order under paragraph 5 of the Code. These included: "(a) a claim for compensation for injurious affection under paragraph 11 of the Code; (b) a claim for the added legal burden", and a claim for the arrears of payments and surveyor's fees, together with an order for an 80 year easement. The claim was particularised as being £10,000 for the "legal burden and 80 year easement", £2,030 for the surveyor's fees, £483 for the arrears of payments, and £550 for the valuation payment, and the claim for injurious affection being unable to be quantified.

36. In its Amended Defence and Counterclaim Vodafone pleaded in terms that since it understood Mrs Brophy not to oppose an order under paragraph 5 of the Code in principle but only its terms and payments it did not rely upon the 1997 wayleave agreement but instead relied upon its right under paragraph 5. I am satisfied that in so pleading Vodafone accurately recorded the effect of Mrs Brophy's pleaded case in the Amended Particulars of Claim and, in my subsequent further directions order, I recorded that "it has now been clarified as between the

parties that the only matter substantially in issue between the parties is the terms of an order under paragraph 5 of the Telecommunications Code".

37. In her written opening submissions Mrs Brophy advanced a number of arguments which Ms Tozer submitted had not been pleaded. I said that I would allow Mrs Brophy to make these arguments on a provisional basis and then decide whether or not I should entertain them, and if so on what basis. Ms Tozer was at pains to emphasise that insofar as there was any prospect of my making any finding either adverse to Vodafone or of more general application, where neither she nor her client had had an opportunity properly to consider or to address the argument, I should decline to allow Mrs Brophy even to raise the argument.

38. The first point was the allegation as to the impact of the alleged misleading statements in the explanatory note to the paragraph 21(3) counter-notice. I have already considered this in paragraph 26 above. It was not raised in the Amended Particulars of Claim and it is a hopeless argument anyway, for the reasons I have given. It would need a re-amendment of the Amended Particulars of Claim to allow Mrs Brophy to argue it. Applying the authorities on amendments in general and late amendments in particular I am satisfied that there is no proper basis for allowing Mrs Brophy to argue this point.

39. The second point was the allegation that because the 1997 wayleave agreement was invalid, Vodafone had no right to use the optical fibres under the Fibre Leasing Agreement or the Networks Rights Transfer Deed and, hence, Vodafone had no right to make an application under paragraph 5 of the Code. Ms Tozer particularly emphasised here that her client's concession not to argue the validity of the 1997 wayleave agreement was based on Mrs Brophy not pleading a positive case as to why that should impact on its right to obtain an order under paragraph 5 of the Code, and that if Mrs Brophy was to be allowed to raise this point Vodafone would need to consider whether or not it would wish to revisit that decision. As to this, I have already considered in paragraph 21 above Mrs Brophy's argument as to the construction of the Fibre Leasing Agreement, and concluded that her case is unarguable. I am also satisfied that, as Ms Tozer submitted, it cannot sensibly be argued that only those operators who already have an existing wayleave agreement or other right should be able to make an application under paragraph 5. There is no hint in the wording of paragraph 5 or in the Code as a whole that it is so limited. One can envisage any number of cases in which an operator who does not have a valid existing wayleave agreement or similar will wish to apply under paragraph 5, and no reason why they should not be permitted to do so. In the circumstances, and again applying the authorities on amendments in general and late amendments in particular I am satisfied that there is no proper basis for allowing Mrs Brophy to argue this point. Although Mrs Brophy argued that she had not seen the Fibre Leasing Agreement until disclosure, she was under an obligation under the existing timetable – which was set at her request to operate in a time and cost-efficient manner - to act promptly if on sight of Vodafone's evidence she considered that there was a further point she wished to raise, and she failed to do so.

40. Mrs Brophy also indicated in her opening written submissions that she wished to amend her claim for damages and interest. There was a modest increase in the claim for arrears of

payments, which Vodafone had come prepared to address and I am prepared to allow, but the more substantial proposal was to add a further £10,000 for the "2 additional burdens (lease/Deed)" and a further £5,000 for the fact that 27 fibres as opposed to 24 were being used. I ruled against Mrs Brophy at the hearing as regards these matters. Again the matters were raised late and should have been raised as soon as Mrs Brophy became aware of them. Moreover the first proposed claim is incoherent and unexplained and unsupported and unquantified by any valuation evidence and, insofar as it appears to relate to the Fibre Leasing Agreement and the Networks Rights Transfer Deed, has no prospect of success given the points made in paragraph 21 above. The second suffers from the same objections. Insofar as it is based on the 1997 wayleave agreement, which distinguishes between the use of 24 and more than 24 optical fibres, it could and should have been raised earlier, and insofar as it is based on more recent evidence it should also have been raised promptly and supported and quantified by valuation evidence.

The relevant legal principles as regards the assessment of consideration and compensation under the Code

42. The relevant legal principles as regards the assessment of consideration and compensation under the Code were first considered by HHJ Hague QC in Mercury Communications Ltd v London and India Dock Investments Ltd (1995) 69 P&CR 135. In a subsequent case, Cabletel Surrey and Hampshire Ltd Ltd v Brookwood Cemetery Ltd [2002] EWCA Civ 720, the Court of Appeal was not required to consider whether the principles expounded in Mercury were correct in every respect, because both parties to the appeal proceeded on the basis that they were. In a later case, The Bridgewater Canal Company Ltd v Geo Networks Ltd [2010] EWHC 548 (CH) Lewison J summarised the relevant legal principles as follows:

> *"37. Third, the payment terms must be "fair and reasonable". Fourth, they must be assessed "as if" the agreement had been willingly given. These last two instructions mean that the price will not necessarily be the same as the market value of the rights, although the market value may be a good starting point (Mercury Communications Ltd v London and India Dock Investments Ltd (1993) 69 P & CR 135, 144). A person may not be willing to agree unless proper (but not undue) account is taken of the potentiality of his land in unlocking development or other value (Mercury Communications Ltd at 159-60). But this still leaves open the question what is "fair and reasonable" which may involve a measure of subjective opinion (Mercury Communications Ltd at 144 and 159). In Cabletel Surrey and Hampshire Ltd v Brookwood Cemetery Ltd [2002] EWCA Civ 720 Mance LJ said, without expressing any concluded view, (§ 7) that this formulation:*
>
> *"… was no doubt chosen because of the public interest in enabling ordinary members of the public to be offered and to obtain new telecommunications services without individual landowners being able to insist on perhaps excessive sums, for example because of the need to use what might in some cases amount to no more than ransom strips."*
>
> *38. Later in his judgment Mance LJ seems to have approved the rejection in Mercury Communications Ltd of the argument that a ransom value may be set by the owner (§*

25). It seems to me, therefore, that even in the case of rights acquired over land of a private owner under the general regime, ransom payments are excluded by the statutory formula.

39. I should mention here that the general regime incorporates the landowner's power to require alteration or removal of apparatus where that is necessary for development (§ 20). Since this power applies irrespective of the terms of any agreement, it is plainly something that must be taken into account in assessing the amount of the consideration.

40. The second component of the money payment is called compensation. It is tied to loss or damage sustained by persons bound by the rights "in consequence of the exercise of those rights". This component seems to be tied to the actual (and future) exercise of rights, rather than the initial grant by court order. If this is right, then it seems that what the draftsman had in mind was some form of contractual indemnity rather than the fixing of an actual money payment at the date of the court order."

(Although there was a subsequent successful appeal to the Court of Appeal in that case, nothing said cast any doubt on the correctness of Lewison J's summary of the relevant legal principles.)

43. Both Ms Tozer and Mrs Brophy have drawn my attention to the Law Commission consultation paper no 205[1]. Part 6 deals with financial awards under the Code, and contains a concise summary of the existing law in sections 6.45 – 6.56. As appears, there is now a real controversy as to whether or not the approach of HHJ Hague QC in Mercury has been undermined by the decision of the Supreme Court in Bocardo SA v Star Energy [2011] 1 AC 380. In that case, in relation to a statutory provision containing similar wording to paragraph 7 of the Code, the Supreme Court held that the principles of compulsory acquisition law were applicable, even though not expressly incorporated, with the consequence that compensation should not be assessed by reference to the value of the rights to the operator or the value of the land attributable to the scheme. If that approach was applied to paragraphs 5 and 7 of the Code, it would inevitably have a depressing effect on the valuation. Moreover, as Ms Tozer explained, the government has adopted the Law Commission recommendation that the Code should be amended so as to follow the Bocardo approach, and this has now been embodied in the Digital Economy Bill which is currently in the House of Lords.

44. However, given the values involved, Vodafone has taken the pragmatic view in this case that it does not seek to resile from the basis on which it has approached the question of consideration in this case since April 2015, namely to adopt the rate as agreed with the NFU/CLA increased in line with the RPI (see paragraphs 23, 27 and 32 above). It follows that I am not being invited to decline to follow the approach adopted by HHJ Hague QC in Mercury on the basis that his judgment is inconsistent with the approach in Bocardo.

[1] See http://www.lawcom.gov.uk/wp-content/uploads/2015/03/cp205_electronic_communications_code.pdf.

45. Finally, I should refer to the provisions in the Code relating to injurious affection, because Mrs Brophy advances a claim for compensation for injurious affection under paragraph 11 of the Code.

46. I should say immediately that paragraph 11 is clearly irrelevant, since it deals with rights in relation to tidal waters and lands. Paragraph 16 is headed "compensation for injurious affection to neighbouring land etc", and confers a right to compensation for injurious affection to neighbouring land where a right conferred by or in accordance with the preceding provisions of the Code is exercised, which shall be determined by the Lands Tribunal under s 10 of the Compulsory Purchase Act 1965. I accept Ms Tozer's submission that paragraph 16 does not have any application here. Although, as she says, the relationship between paragraph 16 and paragraph 7(2) is unclear, paragraph 16 appears to apply only where either (a) a person is affected by the exercise of a right over his neighbour's land, but the operator has no rights over his land; or (b) a person has agreed an operator can have a right over his land, but compensation for the impact on adjoining land owned by the same person has not been agreed. This analysis is consistent with that of the Law Commission in paragraphs 6.25, 6.31 and 6.32.

The competing arguments and my decision

47. I should begin by reminding myself that the statutory pre-condition to making an order under paragraph 5 is that the court must be satisfied that any prejudice caused by the order is capable of being adequately compensated for by money or, if not, is outweighed by the benefit to the persons whose access to an electronic communications network or to electronic communications services will be secured by the order. Mrs Brophy has not pleaded or presented any evidence or argued that this pre-condition is not satisfied, and I am satisfied on the evidence that it is.

48. I turn then to address the issue which had played the most part in this case, which is the question of consideration under paragraph 5(1)(a) of the Code, which in this case is tied in with the question as to whether or not there should be a lump sum payment for an 80 year term or an annual payment for an indefinite terms capable of being terminated by either party on 12 months' notice.

49. The court clearly has jurisdiction under the Code to make either order. Paragraph 7(4)(a) permits the court to make an order for payments to be made from time to time to persons to be determined, so that the court clearly has jurisdiction to make an order as sought by Vodafone, and it is not suggested that the absence of specific provision for a lump sum payment prevents the court from so doing. I note that in Cabletel Mance LJ firmly rejected at [43-44] an argument that the judge below ought not to have ordered a lump sum as opposed to annualised payments. However whilst that confirms that the court has jurisdiction to make a lump sum order, it does not provide any guidance as to whether or not that is appropriate in this case, since it is clear that the decision in that case turned on the particular circumstances of, and evidence adduced in, the case rather than on any considerations of wider application. Finally, and insofar as relevant, I note that paragraph 23(5)(a) of the draft Code

accompanying the Digital Economy Bill makes clear that the court has the option of providing either for a lump sum or for periodic payments.

50. The primary argument advanced by Mrs Brophy for a fixed term is that this was agreed during negotiations, and it is not open to Vodafone now to resile from that agreement. I have already found (see paragraph 33 above) that there was no such agreement. Furthermore, insofar as Mrs Brophy advances her case based not on a binding agreement but an understanding or expectation which, albeit lacking binding legal effect, nonetheless ought to be adhered to, I am satisfied by reference to the communications to which I have already referred that Vodafone made it clear from the outset (see paragraph 27 above) that it was not its policy to offer an 80 year term, and it must have been clear to Mrs Brophy that unless a complete agreement was reached Vodafone would have been perfectly entitled to do what it in fact did, which was to withdraw its willingness to enter into an agreement on that basis and return to its original position of an agreement terminable on 12 months' notice with annual payments.

51. I am quite satisfied that the only reason why Mrs Brophy is seeking an 80 year agreement is because it suits her case since what she really wants is a substantial one-off lump sum payment. Indeed her own expert states, at page 5 of her report, that such a term imposes an additional burden on the property which itself imposes a "legal burden or injurious affection". In short, it is the 80 year term, without the opportunity to terminate early, review the rent or the other terms, which Ms Jackson regards as onerous and not typical (see page 6), which itself is then relied upon by her as justifying an increase in the consideration from the £3,422.75 which she accepts would otherwise be a reasonable market rate (see paragraphs 29 and 30 above).

52. In contrast, I have the evidence of Mr Price which I accept based on his long experience in this area, that electricity companies tend to offer a wayleave agreement terminable on 12 months' notice [¶22 1st witness statement], although they may be willing to negotiate a term certain agreement on the basis of a discounted capitalised payment, and that it is Vodafone's policy to proceed on the same basis [¶32], particularly in circumstances where it wishes to achieve flexibility in circumstances where it currently has duplication in its fixed network and where – as he said in cross-examination – its preference is for underground routes as opposed to overland routes. I accept his evidence in cross-examination that there is a likelihood that Vodafone would only require this overhead route for the next 5 – 10 years rather than the next 80 years.

53. Ms Tozer also pointed to the real difficulties which arise with an 80 year term. As she said, if the optical fibres were removed from the site within that period, Vodafone would have no right to recover the pro rata proportion of the premium for the remainder of the term unless the order made provision for that to happen. Whilst it could be argued that this would be Vodafone's commercial risk if that was its decision, that begs the question why it should be forced into that situation. The argument has even more force if the optical fibres were removed either because ENW decided or was obliged to remove the electrical apparatus supporting it, and still yet more force if it was because Mrs Brophy or her successor in title

made a successful application under paragraph 20 of the Code to require it to be altered. As Ms Tozer submitted, if provision for a partial refund was made in the order, and if any of these events occurred after Mrs Brophy's transfer of ownership, whether voluntary or after her death, unless the order also made provision for the liability to be imposed on the successor in title – which in itself would be unfair - Vodafone would have no effective remedy. Since Mrs Brophy has had the property on the market in the past, this is not idle speculation. Although Mrs Brophy said that she would be willing to undertake to repay the part premium personally, that is no consolation if she has died or has no funds to do so.

54. Whilst it may be said that none of this should matter very much to Vodafone if the premium is of the order which it contends for, and it might be said that the same is true even if it had to pay the £10,000 sought by Mrs Brophy, in my view this court should consider this as a principled issue and in a principled way.

55. I am satisfied that there is no evidence and no justification in this case for an 80 year terms or for anything other than an agreement terminable on 12 months' notice with annual payments.

56. So far as the amount is concerned, as I have said Ms Jackson accepted in her report (at p.4) that it was "standard practice industry wide" to use the NFU/CLA rates for wayleave payments in negotiating annual wayleave payments. She accepted that this is what Vodafone had done. She did not suggest any other rate.

57. In evidence Mrs Brophy contended that she was not bound by the NFU/CLA rates. That is not disputed, but the fact remains that it is, I am satisfied, and as the experts agree, the best evidence of the current market rates. She also contended that these rates were not applicable to her, because she uses the land for the purposes of her equestrian business, as opposed to for agricultural use. However, she has adduced no evidence as to the planning status of Hallcat Farm, nor evidence to suggest that this different use would impact in any material way on the value of the land over which the optical fibres run or more generally, or that it makes any difference to the impact which the presence of the optical fibres has on her use. She also referred to the fact that two of the neighbouring landowners were contemplating applying for planning permission for residential development, doubles following the relaxation in policy due to the introduction of the National Planning Policy Framework (NPPF), but again produced no evidence to indicate that this made any difference to her position nor, if there was any difference, that it related to the presence of the optical fibres as opposed to the electrical apparatus.

58. Insofar as Mrs Brophy suggested that the rate should be uplifted because more than 24 optical fibres were being used by Vodafone, as I have already said this is not a case which was pleaded, and I have refused Mrs Brophy permission to advance it as a justification for increasing the lump sum claimed. In any event, I accept the evidence of Mr Price and Mr Salomon that the NFU/CLA rates are used for fibre optic cables with up to 36 optical fibres, rather than for up to 24 optical fibres with more being paid for more than 24 optical fibres. It is true, I accept, that Mr Salomon's colleague, Mr Lumby, was under the impression when he prepared his report in March 2016 that Cable and Wireless and then Vodafone only entered

into agreements for up to 24 fibres, on the basis that this was the maximum use agreed with the electricity companies, but I am satisfied from Mr Price's evidence that this was mistaken. Even if I was wrong about that, there is no evidence as to what if any increase would be justified in relation to any annual payment.

59. Insofar as Mrs Brophy suggested that the rate should also be uplifted because of the diminution in value due to the presence of the optical fibres and the impact of an order being made, as I have already said I am satisfied on the evidence that there is no diminution in value of significance due to the presence of the optical fibres additional to that already present due to the presence of the electrical apparatus. Although Ms Jackson described them as an "additional burden", I simply do not accept this and, in any event, there is no evidence as to the extent of any overall diminution in value let alone the extent to which that is increased due to the optical fibres. I have no doubt that insofar as there is any diminution in value it is built in to the annual rates agreed with the NFU/CLA. I reach the same conclusion in relation to the impact of the order. I have no doubt that since it is an agreement terminable on 12 months' notice, where Mrs Brophy retains her rights under paragraph 20 of the Code, and where the rights are contingent upon the electrical apparatus remaining in place, there is no diminution in value of any significance in this regard, other than is already built in to the NFU/CA rates.

60. In short, I am satisfied that in this case ordering consideration to be payable on an annual basis in accordance with the NFU/CLA rates as increased in accordance with increases to the RFI is fair and reasonable as if the agreement had been given willingly and subject to the other provisions of the order.

61. Vodafone agree that the order should include provision for Mrs Brophy to be paid an amount equal to the difference between what she has been paid since 2004 and what she would have been paid under the NFU/CLA rates together with interest. This includes, so far as necessary or appropriate, any entitlement under paragraph 7(3) of the Code. Although there appeared to be a difference between the figure of £640.80 put forward by Mr Price and the figure included in the skeleton argument, it became clear that this was explained by the date to which the claim had been taken, and I am satisfied that I should, as the draft order provides, adopt Mr Price's figure.

62. Vodafone also agree that the order should include provision for Mrs Brophy to be paid the sum of £2,580 in respect of the fees of Ms Jackson's firm, to be paid to that practice directly.

63. In the circumstances I need not decide the debate between the parties as to what would have been the appropriate premium for a fixed 80 year term. I will however indicate briefly what I would have decided had I needed to do so. In short, as I have said, I am satisfied that I should prefer the expert opinion of Mr Salomon to that of Ms Jackson for the reasons already given (see paragraphs 11, 29 and 30). The debate turns on the appropriate yield to adopt, with Ms Jackson contending that the 4% yield adopted by Vodafone and endorsed by Mr Salomon being too high in the context of existing low interest rates. However, the fundamental flaws with Ms Jackson's view, aside from the reasons already given, are that: (a) making a decision

about an 80 year return based on current low interest rates, as opposed to taking a suitably long term view, is clearly incorrect; (b) Ms Jackson has adduced no evidence to the effect that the current market approach is to move away from what I am satisfied – and indeed as she says at p.5 – has been a representative yield, to one which would produce the £10,000 which she contends for.

64. I should also refer to the question of compensation under paragraph 5(1)(b). I respectfully agree with the view expressed by Lewison J in Geo Networks that this requires not payment of compensation but the inclusion of terms appropriate to ensure that adequate compensation is paid for loss and damage sustained by them in consequence of the exercise of the rights conferred by the order. I am satisfied that these are included here.

65. If however I am wrong about that, I am also satisfied on the evidence to which I have referred that the consideration payable under the order will be sufficient to compensate Mrs Brophy and her successors in title for any loss and damage which may be sustained if, for example, it is necessary for ENW or Vodafone or their successors in title to obtain access to inspect or to undertake works to the optical fibres themselves, separate and distinct from any works to the electrical communications apparatus as a whole, including the optical fibres, on the land.

66. For completeness I should say that paragraph 7(2) of the Code also requires the court, when determining what terms should be specified in an order under paragraph 5 above for requiring an amount to be paid to any person in respect of: (a) the provisions of that order conferring any right or providing for any right to bind any person or any interest in land; or (b) the exercise of any right to which the order relates, to take into account the prejudicial effect (if any) of the order or, as the case may be, of the exercise of the right on that person's enjoyment of, or on any interest of his in, land other than the land in relation to which the right is conferred. This appears to me to have no application to Mrs Brophy's case, since she does not claim and there is no evidence that she has land other than the land in question, or in any event that there is any prejudicial effect which is not adequately taken into account by the annualised payments. I would reach the same conclusion if, contrary to my view, paragraph 16 of the Code applied to this case and this court had jurisdiction to award such compensation.

The terms of the order

67. Vodafone has produced a draft order, which has been the subject of some revision during the course of the hearing and which I am satisfied is now, in the form of the draft attached to this judgment, in appropriate terms. Particular points of note are as follows.

68. The relevant definitions are at paragraph 1 of the order. On reflection I consider that the definition of the "Apparatus" should make it clear that it is the optical fibre and joint boxes (see the definition at p.58 of the Fibre Leasing Agreement) which is covered.

69. Under paragraph 2 of the order the rights granted to Vodafone include the right to use, keep, inspect, maintain, repair and replace etc the Apparatus, and a right to provide temporary

apparatus if the existing apparatus is defective or broken. Although Mrs Brophy contends that these rights go beyond the rights which Vodafone has in relation to the optical fibres under the Fibre Leasing Agreement, even if that was true I do not consider that this is a good reason for not including them. As I have said, I am satisfied that one must distinguish between the rights which Vodafone has in relation to the fibre vis-à-vis ENW and the rights which it should reasonably have as against the owner of the land, namely Mrs Brophy. In any event, I consider that there is no difference of any significance between the rights which Vodafone has under the Fibre Leasing Agreement and those conferred under paragraph 2 of the order. I have re-drafted paragraph 2.3 slightly so as to make it consistent with the revised definition of the Apparatus.

70. Paragraph 3 addresses the question of costs, and provides for Mrs Brophy to pay Vodafone's costs of the action from the outset, for the following reasons. Before the action was brought Mrs Brophy was offered a term wayleave agreement with a premium which was based on the NFU/CLA annual payments and capitalised in a way which I would have accepted was appropriate had I considered a terms wayleave agreement to be appropriate. At that stage there was no issue in relation to costs or surveyors' fees and no reason to think that Vodafone would not have been willing to pay any arrears as well. Since then I am satisfied that Vodafone has bent over backwards to reach a reasonable settlement, and that the only reason why that has not happened is that Mrs Brophy wanted at least £10,000 as a one off payment. I quite understand her desire to receive such a payment, but it was not an ambition which has succeeded or had a strong prospect of succeeding at trial. She rejected the offer made July 2016 for an annual wayleave agreement. In short, she has achieved nothing by these proceedings which she could not have achieved without them. There is no reason why she should not therefore have to bear the costs of this futile exercise.

71. I do not consider that her criticisms of Vodafone's conduct have any substance. In her supplemental written submissions in relation to costs she complains that it was not until a late stage that it made it clear that it was not going to rely on the 1997 wayleave agreement. I do not accept this, in that it was made clear by Vodafone immediately after the first case management hearing before me that this was its position and, in contrast to Mrs Brophy's vacillation on that issue, that remained its position throughout. She also complains about its change of position in relation to whether or not it was prepared to offer an 80 year wayleave agreement. She submits that Vodafone left it late to change its position and too late to allow her to address it. I do not accept this either. As I have found Vodafone made it plain throughout that its normal practice was to offer an annual wayleave agreement and also made it plain to Mrs Brophy as long ago as September 2016 that it had withdrawn its proposal for an 80 year term. It was Mrs Brophy who was determined to argue a case based on the wayleave agreement and on an 80 year term, without addressing Vodafone's clearly stated position that the former was not relied upon and irrelevant and the latter inappropriate. She complains of the short time allowed for her to accept the offer of 25 April 2018. However this time limit was imposed due to the imminent hearing then listed for 28 April 2016, which was in fact adjourned, and I have no doubt that it would have been extended had Mrs Brophy stated that she was seriously considering it as an option, but wished to take legal advice before

doing so. In short, I am satisfied that there is no basis for refusing Vodafone its costs, whether in whole or in part.

72. Of course the costs will have to be the subject of detailed assessment, and I accept that the payment of monies due to Mrs Brophy should be put on hold pending the conclusion of that detailed assessment so as to allow a set off to take place.

73. There is no basis for awarding Mrs Brophy any costs in relation to these legal proceedings, whether under paragraph 4(9) of the Code or otherwise.

74. Turning to the Schedule, the order contains provisions which satisfy the requirement of paragraph 5(5) that "The terms and conditions specified by virtue of sub-paragraph (4) above in an order under this paragraph, shall include such terms and conditions as appear to the court appropriate for ensuring that the least possible loss and damage is caused by the exercise of the right in respect of which the order is made to persons who occupy, own interests in or are from time to time on the land in question". Paragraphs (7) - (10) contain such provisions. Paragraph (2) also contains an indemnity against loss due to default or negligence in the exercise of the rights, subject to a limit of £1 million per annum and £3 million overall. I am told that these are Vodafone's standard terms. Whilst that is not in itself a reason for allowing them, I am satisfied that overall they are fair and reasonable, in particular having regard to the fact that what is under consideration here is the limited use of these optical fibres, as opposed to the electrical communications apparatus on which it is supported.

75. The order also contains provisions for termination on notice in paragraph (5). As ventilated in the hearing, I have added provision for termination in the event that the Electricity Company removes its equipment including the Apparatus from the property voluntarily and on a permanent basis. As now drafted, they seem to me to be fair and reasonable.

76. As advanced, the order also contained exclusion clauses seeking to exclude Vodafone's liability for loss of profits and indirect or consequential losses other than those which "cannot by law be excluded or restricted". Again I was told that this was Vodafone's standard form. However on balance I do not think that this can be justified. It could cut across the provisions of clauses (7) – (10). It is by no means clear that Mrs Brophy or her successors could argue that they were unreasonable under the Unfair Contract Terms Act 1977. I have already allowed a limitation on liability; that should be sufficient.

Conclusions

767. I make an order in the terms referred to above and contained in the order which accompanies this judgment.