UPPER TRIBUNAL (LANDS CHAMBER)

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UTLC Case Numbers: TCR/141/2020, LC-2020-68, LC-2021-17

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE – INTERIM CODE RIGHTS – COSTS

REFERENCES UNDER SCHEDULE 3A TO THE COMMUNICATIONS ACT 2003

BETWEEN:

EE LIMITED AND HUTCHISON 3G UK LIMITED **Claimants**

-and-

AVIVA INVESTORS GROUND RENT HOLDCO LIMITED
AVIVA INVESTORS GROUND RENT GP LIMITED

Respondents

AND BETWEEN:

EE LIMITED AND HUTCHISON 3G UK LIMITED

-and-

DERWENT LONDON OLIVER'S YARD LIMITED (1)
MICHAEL JOHN DUFF (2)
JEAN ROSS COOPER (3)
XIN HAN XIA (4)
THE OCCUPIER OF PENTHOUSE 45, 24 LEONARD STREET, LONDON EC2 (5)

Respondents

Re: 24 Leonard Street, London EC2

Martin Rodger QC, Deputy Chamber President and Mark Higgin FRICS
11-12 March 2021
By remote video platform

Oliver Radley-Gardner, instructed by Womble Bond Dickinson UK LLP, for the appellant
Fearn Schofield, instructed by Pinsent Masons, for the respondents

The following case is referred to in this decision:

Cornerstone Telecommunications Infrastructure Ltd v The University of London [2019] EWCA Civ 2075

1. These three references began as a single claim under paragraph 26 of the Electronic Communications Code in Schedule 3A of the Communications Act 2003 for the imposition of an interim Code agreement for a period of 24 months to enable the claimants to install electronic communications apparatus on the roof of a residential building at 24 Leonard Street, London EC2A. The claimants had recently lost an operational site nearby and needed a temporary replacement until a new permanent site could be found. The only parties to the original reference were the two claimants, EE Ltd and Hutchison 3G UK Ltd, and the respondents, Aviva Investors Ground Rent Holdco Ltd and Aviva Investors Ground Rent GP Ltd, who jointly own a 999-year headlease of the building, and who are in a position to grant rights over the roof.

2. There are now three references before the Tribunal, each of which is concerned with the installation of the same apparatus. The parties to the second reference are the same as to the first. The third reference is also brought by EE and H3G, but the respondents are others with interests in parts of the building.

3. The building is a modern apartment block with a flat roof, part of which is maintained as a "green roof". The flat roof features a number of large glazed roof lights which admit daylight to Flat 45, one of three penthouse flats on the eighth floor. In addition to this feature, the three penthouse flats have roof terraces or roof gardens which are overlooked from the flat roof on which the claimants wish to place their apparatus. The building contains 47 flats all of which are let on leases for terms of 999 years less a few days.

4. Aviva are the long lessees of the building pursuant to a head lease granted on 29 July 2011 for a term of 999 years. The freehold is owned by Derwent London Oliver's Yard Ltd, one of the respondents to the third reference.

5. As is the Tribunal's usual practice, the application for interim rights in the original reference was listed for a short hearing at an early date after Aviva had filed its response and statement of case. That case, and the statements of five witnesses filed in opposition to the claim, raised issues about the structural capacity of the roof to receive the claimants' proposed phone mast, about the claimants' ability to satisfy the qualifying conditions for imposition of an agreement, and about the impact the installation and operation of the claimants' apparatus may have on the privacy of the occupiers of the penthouse flats whose living and recreation space will be overlooked through the roof lights and on their terraces.

6. At the first hearing of the original reference on 4 December 2020 the Tribunal took the view that, on the material then before it and in the limited time available at that initial hearing, it could not be satisfied even to the evidential standard required by paragraph 26 of the Code for the imposition of interim rights (a good arguable case), that the conditions in paragraph 21 were made out. Additionally, because of the privacy implications of the roof lights at this site the Tribunal was not willing to exercise its discretion to impose an agreement summarily without giving the occupants of the penthouses the opportunity, if they wished, to make representations at a substantive hearing. At that stage the occupiers were unaware of the proceedings and no application had been made for Code rights to bind them.

7. The Tribunal also expressed concern at the first hearing that the claimants were inviting the Tribunal to apply the "good arguable case" standard in paragraph 26 to technical issues on which there appeared, on the evidence then available, to be a good deal of uncertainty. That is not objectionable in itself, and it is the basis which paragraph 26(3) provides for the determination of claims for interim rights. But it was not, at that stage, the intention of the claimants to seek permanent rights by making a claim under paragraph 20 of the Code. They sought only interim rights, but for a relatively long period of 2 years. The rights sought were "interim" in the sense that they were required to fill an operational gap which was said to jeopardise the quality of the service the claimants are able to provide; but they were not "interim" in the sense of being granted pending the hearing of an application under paragraph 20 at which the claimants would be required to prove, to the normal civil standard, that the conditions in paragraph 21 are satisfied. Once again, that is a course of action permitted by the Code, as the Court of Appeal confirmed in *Cornerstone Telecommunications Infrastructure Ltd v The University of London* [2019] EWCA Civ 2075, at [61]-[84]. But in reaching that conclusion the Court of Appeal pointed out the power of the Tribunal to control abuse of the interim rights procedure (at [80]-[81]).

8. The Tribunal indicated that, in the event the Claimants chose to serve notice under paragraph 20 of the Code seeking final rights over the roof of the building, and to commence a second reference, it would list both references together.

9. The Tribunal also invited the claimants to consider whether notice should be given additionally to the leaseholders (and occupiers if different) of the flats most directly affected by the proposed installation, to enable them, if they wished, to participate in the proceedings. The Tribunal did not require that such notices be given, nor has it done so in other cases where Code rights have been imposed in respect of residential buildings. It is for an operator to consider which parties it needs its rights to bind. But where apparatus is proposed to be installed on the roof of a building designed like this building the Tribunal may be expected to take the privacy of residential occupiers into account when considering how to exercise its discretion under paragraph 26.

10. Having taken stock, the claimants subsequently gave notice to Aviva seeking an agreement under paragraph 20 which they followed by making a second reference. The Tribunal gave directions on 23 December 2020 that the two references should be heard together. The claimants also gave notices to other interested parties, namely the freeholder, the leaseholders of the three penthouse flats, and the occupier of one of those flats (who has not been identified by name).

11. As between the claimants and Aviva, the Tribunal directed the exchange of further information and evidence including expert evidence relating to the impact of the proposed installation on the structure of the building and the coverage and capacity of the claimants' network in light of the loss of the operational site nearby. The disclosure of information in preparation for the filing of expert evidence satisfied Aviva that the structure of the Building will not be adversely affected by the proposed installation. The directions given in relation to the participation of the residents of the penthouses enabled them to raise their own concerns in the reference and caused Aviva to be less anxious to represent their interests.

12. As a result, Aviva altered its position, and on 9 February 2021 it informed the claimants that it no longer objected to the principle of a Code agreement for the installation of electronic communications apparatus on the roof of the building.

13. By the date of the final hearing the original parties had reached a consensus in principle that an agreement for interim Code rights should be imposed on them under paragraph 26 on terms which were agreed. Issues regarding the lower threshold for the imposition of an interim agreement were no longer relevant, as Aviva no longer resisted imposition. The agreement is to be a lease between Aviva and the claimants for a period of two years on the agreed terms. It has been agreed that the terms relating to consideration and compensation will provide for those to be settled by the Tribunal at a later date if the parties are unable to agree them.

14. As for the position between the claimants and the others with interests in the building, the notices served on the freeholder, the penthouse leaseholders, and the occupier of No. 45 were under paragraphs 20 and 26 of the Code and proposed that each of those parties should be bound by the Code rights to be conferred by the agreement imposed by the Tribunal on the claimants and Aviva. None of the parties responded agreeing to be bound by those Code rights and a third reference was therefore made to the Tribunal to which they named as respondents.

15. The Tribunal gave directions in the penthouse reference on 22 January 2021, providing for all the references to be heard together, and for any of the leaseholders who wished to participate to file a response.

16. Before the hearing the Tribunal was informed that the freeholder, Derwent London Oliver's Yard Ltd, had agreed to be bound by any agreement imposed between the claimants and Aviva. It did not attend the final hearing of the references.

17. The leaseholder of penthouse 43, Mr Michael Duff, had taken legal advice and filed a witness statement in which he explained that in view of the fact that Aviva was now satisfied that the proposed installation would not create a risk to the structural integrity of the building, he intended to remain neutral on the claimants' application against him. He explained some of his concerns about the effect the proposed mast may have on his enjoyment of his roof garden and indicated that he had been considering selling the lease. He intends to make a claim for compensation. He did not attend the hearing.

18. The leaseholder of penthouse 44, Ms Jean Cooper, corresponded with the claimants and took a similar position to Mr Duff. She did not voice any positive objection to the imposition of an agreement on Aviva, or on the rights conferred by that agreement being made binding on her, but she intends to bring a claim under the Code for compensation. Ms Cooper did attend the final hearing, and did not depart from the stance she had already indicated.

19. The leaseholder of penthouse 45 is Mr Xin Han Xia, who is understood to let his flat. Neither the claimants nor the Tribunal have received any response from the leaseholder or from the tenant in occupation to the notices of reference served on them.

20. Paragraph 26 of the Code enables interim rights to be imposed by the Tribunal, but they may not be conferred by agreement between the parties. The prohibition on entering into a consensual paragraph 26 agreement is intended to prevent abuse of the limited security conferred by interim rights. It is nevertheless significant that the parties on whom it is suggested an agreement should be imposed, both being professionally represented, have agreed in principle that interim rights are appropriate in their case. We are satisfied that the conditions in paragraph 21 for the imposition of Code rights are made out, having regard in particular to the report of Mr Simon Green, an expert in radio access network capacity planning, which we have read. We are also satisfied that the claimants' need is for Code rights is a temporary one, until it can find a permanent replacement for the site it has recently lost, and that interim rights are justified. We will therefore impose an agreement under paragraph 26 on the terms which the claimants and Aviva have agreed.

21. We will also make an order under paragraph 26(1)(b) providing for the Code rights imposed on the claimants and Aviva to bind each of the respondents. Although only the freeholder has agreed to be bound, none of the leaseholders has taken the opportunity to object. We are satisfied that the prejudice which may be caused to the respondents by the order will be capable of being adequately compensated by money. We are also satisfied that, despite such prejudice as may be caused, the imposition of the Code rights in favour of the claimants is a proper exercise of our discretion, having regard to the public benefit test in paragraph 21(3).

22. The only matter which was contentious at the hearing was the issue of costs. The claimants did not ask for an order for costs against any of the leaseholders, but Mr Radley-Gardner invited the Tribunal to make a limited order that Aviva pay the claimants' costs of the paragraph 20 reference and the expert evidence filed after the initial hearing of the paragraph 26 reference. He justified his application on the basis that, when they commenced the paragraph 26 reference, the claimants had understood that Aviva was willing to accede to their request for interim rights, but that it had then reversed its position when it filed a hostile statement of case objecting in principle. The grounds of its objection related to the impact of the installation on the structure of the building and the green roof, and a vicarious concern for the privacy of the leaseholders. It had also disputed the claimants' satisfaction of the public benefit condition in paragraph 21(3). Those objections had fallen away, but the claimants had been put to expense in addressing them in expert evidence, and in commencing the paragraph 20 reference.

23. For Aviva Ms Fearn Schofield submitted that the Tribunal should defer consideration of the claimants' application for costs to enable the parties to refer in detail to pre-reference correspondence. Alternatively, Aviva did not seek costs of its own, but it resisted any order that it pay the claimants' costs.

24. The appropriate order in this case is that the claimants and Aviva should each pay their own costs. In making that order we take into account a number of factors.

25. The first is the nature of paragraph 26 proceedings themselves and the accelerated timetable by which the Tribunal is required by the Code to conduct them. The parties were not at liberty to enter into the agreement and it was necessary that an application be made to the Tribunal. Once made, given that the reference related to a new site, the Tribunal was

required by regulation 3(2), Electronic Communications and Wireless Telegraphy Regulations 2011 (as applied to Code proceedings by paragraph 97) to determine it within six months. That demanding requirement has the unfortunate effect of seriously limiting the time which might ordinarily be available for parties to consider information disclosed to them and to reach sensible compromises and accommodations before the need to incur additional costs on the preparation of evidence.

26. Secondly, we have regard to the fact that the timing of the original reference was dictated by the claimants (no doubt for good commercial reasons, but nevertheless for reasons of their own). The parties have eventually been able to reach agreement through a fuller exchange of information, and might have been able to do so without the need for a contested reference if all of Aviva's concerns had been resolved before the reference was submitted to the Tribunal.

27. Thirdly, it has never been suggested that Aviva's concerns about the structural integrity of the building and its ability to support the claimants' apparatus were not genuine. The claimants' engineers had proceeded on the basis of assumptions about the structure of the building which were shown eventually to have been justified, but Aviva was not required to take those assumptions for granted. The building was selected by the claimants as suitable for their purposes, but Aviva was not prevented by the claimants' choice from asking the sort of relevant and reasonable questions any responsible building owner would ask before acquiescing in the installation of heavy apparatus on its roof.

28. Fourthly, the cost of answering the relevant and reasonable concerns raised by Aviva should fall on the claimants. Part of the compensation to which a site provider is entitled under paragraph 84(2)(a) of the Code covers expenses to which it has been put, which include but are not limited to its reasonable legal and valuation expenses. Rather than themselves incurring expenses in conducting the investigations required to establish that the building could safely accommodated the apparatus, Aviva required the claimants to do so, and then had its own structural engineers check the resulting calculations. The fact those investigations were eventually presented in the form of an expert's report was the result of the demanding litigation timetable initiated by the claimants.

29. Finally, we do not think the claimants can complain that they were put to additional expense in demonstrating that the public benefit condition was satisfied by adducing evidence of the impact the loss of their adjacent site would have on their network. That evidence was either missing from the material filed in support of the paragraph 26 reference, or provided only in the form of assertion. Aviva, and the Tribunal, were entitled to be satisfied on that account also and, provided it acted reasonably in doing so, as we consider it did, there is no reason why Aviva should meet the claimants' costs of making out the statutory conditions.

30. For these reasons we refuse the claimants' application that Aviva pay part of their costs. The represented parties should agree a draft order between them on which they should invite the unrepresented parties to comment before submitting it to the Tribunal. Provision should be made for a case management hearing to take place after the apparatus has been installed at which directions can be given for the resolution of any claims for compensation or

determination of any of the financial terms of the agreement which have not by then been agreed.

Martin Rodger QC, Mark Higgin FRICS

Deputy Chamber President 12 March 2021