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Claim No: D01BS346

IN THE COUNTY COURT AT MANCHESTER

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 August 2020

B e f o r e:

MARTIN RODGER QC, DEPUTY CHAMBER PRESIDENT OF THE UPPER TRIBUNAL (LANDS CHAMBER)
(SITTING AS A JUDGE OF THE COUNTY COURT)

Between:

VODAPHONE LIMITED

Claimant

- and -

HANOVER CAPITAL LIMITED

Defendant

Stephen Jourdan QC and Oliver Radley-Gardner (instructed by Osborne Clarke, Solicitors) for the Claimant

Kester Lees and Fern Schofield (instructed by Pinsent Masons, Solicitors) for the Defendant

Hearing dates: 3, 4, 5 August 2020

HTML VERSION OF JUDGMENT

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Introduction

1. This is the Court's decision following the trial of a claim for the renewal of a tenancy of a telecommunication mast site under Part II of the Landlord and Tenant Act 1954.

2. As far as I or the parties are aware this is the first occasion on which a Court has had to determine such a claim since the amendment of the Communications Act 2003 by the Digital Economy Act 2017 to introduce a new electronic communications code in Schedule 3A, 2003 Act ("the Code"). The Code came into effect on 28 December 2017, subject to transitional provisions. It regulates the grant and renewal of rights in relation to land, known as "Code rights", for the purpose of the provision of electronic communications networks and infrastructure systems by "operators". The Code replaced a previous statutory code found in Schedule 2 to the Telecommunications Act 1984 ("the Old Code").

3. In England and Wales claims under the Code must be commenced in the Upper Tribunal (the First-tier Tribunal also has jurisdiction, but it is currently exercisable only in proceedings transferred from the Upper Tribunal). The Upper Tribunal has no jurisdiction under the 1954 Act, and these are County Court proceedings which I have heard in my capacity as a Judge of the County Court. I have had the assistance of an assessor, Mrs Diane Martin MRICS, who is a Member of the Upper Tribunal, Lands Chamber. Provision is made by CPR 35.15 for an assessor to assist the Court. The claimant requested the appointment of an assessor and, at the hearing, the defendant did not press an earlier objection made in correspondence.

4. Since the introduction of the Code day to day negotiations in the market for the renewal of leases of existing telecommunications sites, and the grant of lease of new sites, have been bedevilled by uncertainty over its operation, especially in relation to the basis on which rent or other consideration is to be determined. I was told by Mr Bodley Scott, the defendant's expert witness, that before December 2017 the market had been very active, with many transactions taking place (his firm completed 80 in 2017 alone), but it had become very slow indeed since the commencement of the Code. He understood that in 2018 CTIL, completing transaction for two of the largest operators, had agreed rents under the Code for only 20 sites across the whole of the UK. That figure was not corroborated, but it is striking that the evidence in this case includes very few new lettings. Both parties therefore invited the Court to provide guidance on the proper approach to the determination of rent in cases brought under the 1954 Act, many of which are currently stayed. The parties recognised, of course, that, a decision of the County Court is not binding on other Courts.

The basic facts

5. Vodafone Ltd, the claimant, is an "operator" for the purposes of the Code, within the meaning of paragraph 2.

6. Vodafone is the tenant of a small area of hardstanding adjoining the car park of a two-storey office building known as Signal Point, on the Bredbury Trading Estate a few miles east of Stockport in Greater Manchester. The land once formed part of the car park but it is now fenced off and is the site of a 22.5 m mobile telephone mast with associated telecommunications equipment cabinets. I will refer to it as "the Site". The Site is surrounded by the Signal Point car park on two sides and by plant hire yards on the other sides. Access is along a short stretch of tarmacked private road from Bredbury Park Way and is shared with users of the car park, which provides 70 parking spaces for the occupiers of the office building.

7. Both the Site and Signal Point are owned by the defendant, Hanover Capital Ltd, which became registered proprietor of the freehold interest in June 2019. Signal Point and the car park are let to another tenant, Vodat International Ltd, which is not concerned in these proceedings.

8. Vodafone was granted a lease of the Site in 2008 by a predecessor of the defendant for a term of 5 years ending on 6 February 2013. The rent reserved by the lease was a peppercorn and instructions given by Vodafone to its expert confirmed that a premium of £10,000 was paid. The lease restricts the use of the Site to use as an electronic communications base station, and Vodafone uses it for the purpose of its business of providing an electronic communications network. The lease permits Vodafone to share the use of the mast with other operators, and it has entered into sharing arrangements with Telefonica, EE and Hutchison 3G.

9. Because Vodafone occupies the Site for the purpose of its business, the 1954 Act applies to the tenancy created by the 2008 lease. On the expiry of the contractual term the tenancy was continued under the statute, at the same peppercorn rent. On 6 December 2016 the then freehold owners of the Site served notice on Vodafone under section 25 of the 1954 Act terminating the tenancy but stating that they would not oppose its renewal.

10. In August 2017, Vodafone duly issued these proceedings claiming a new tenancy of the Site under section 24 of the 1954 Act. The original defendants, the freeholders at the time, applied for the determination of an interim rent which would be payable until the commencement of the new tenancy. Hanover was substituted as defendant following its acquisition of the freehold.

The hearing

11. Evidence concerning the term of the new tenancy was contained in witness statements by two witnesses who, in the event, were not called to give oral evidence: Mr Richard Barwell for Vodafone and by Richard Harrison for Hanover. Expert evidence on rent was given by Jonathan Stott MRICS of Gately Hamer Ltd, for Vodafone, and by Tom Bodley Scott MRICS of Batchelor Monkhouse, for Hanover.

12. At the hearing Vodafone was represented by Stephen Jourdan QC and Oliver Radley-Gardner, while Hanover was represented by Kester Lees and Fern Schofield. I am grateful to them and to those who gave evidence for their assistance

13. After the completion of the evidence, and before they made their closing submissions, I shared with counsel the advice I had received from Mrs Martin in response to two questions of valuation and they were able to comment on it. I will come to those questions in due course.

Matters not in issue

14. The legal framework in which the issues are to be resolved was agreed, and I can summarise it as follows.

15. The tenancy created by the 2008 lease is a tenancy to which Part 2 of the 1954 Act applies. It was not contracted out of the security of tenure provisions of the Act. It was therefore continued following its contractual expiry by section 24 of the Act, and will continue until terminated in accordance with the provisions of the Act (as will occur on the commencement of the new tenancy which the parties agree should be ordered by the Court).

16. The 2008 lease was an agreement in writing to keep electronic communications apparatus installed on the Site and, for that reason, the Old Code applied to it until it was repealed on 28 December 2017.

17. For the purpose of the Code the 2008 lease is a "subsisting agreement", meaning that it has effect as an agreement under Part 2 of the Code but subject to modifications provided for in Schedule 2 of the Digital Economy Act 2017. One modification provided for by paragraph 6 of Schedule 2 is that Part 5 of the Code, which deals with the renewal of agreements, does not apply to a subsisting agreement if it is a lease to which Part 2 of the 1954 Act applies and it was not contracted out of the security of tenure provisions of the Act.

18. The renewal of the tenancy created by the 2008 lease must therefore take place under the 1954 Act, and not under Part 5 of the Code.

19. The rights conferred on Vodafone by the new tenancy will be Code rights.

20. By section 43(4) of the 1954 Act (inserted by the 2017 Act) a lease granted after the coming into force of the Code on 28 December 2017 cannot be one to which the 1954 Act applies if its primary purpose is to grant Code rights. The new tenancy will therefore not be one to which the 1954 Act applies.

The issues

21. Before the commencement of the hearing the parties were able to agree almost all of the terms of the new tenancy with the exception of the rent, the length of the term and the details of a tenant's break clause which is to be included. The terms allow Vodafone to assign the new lease to CTIL, a company owned in equal shares by Vodafone and the

Telefonica group which they have set up to pool their previously separate infrastructure systems.

22. The parties also agreed that the interim rent under section 24C of the 1954 Act should be £6,750 a year, payable from 6 June 2017; an interim rent is intended to reflect the rent which would have been agreed in the open market had a tenancy of the Site been granted on the same terms as the original lease. In this case the valuation date for the interim rent is a date before the commencement of the Code. The figure agreed was a compromise to reduce the issues and neither party suggested that the figure was of any evidential significance for the matters which remained in dispute.

23. The duration of the new tenancy falls to be determined under section 33 of the 1954 Act. Vodafone would like it to be for a term of 3 years with a rolling tenant's break clause exercisable on 6 months' notice. Hanover would like a term of 10 years with a break after 5 years or on 12 months' notice in the event of the tenant losing its operator's licence or the Site becoming unsuitable for telecommunications use.

24. The new rent is to be determined applying the assumptions in section 34 of the 1954 Act. In this case, and in summary, these require the Court to determine the rent at which, having regard to the terms of the new tenancy (other than those relating to rent), the Site might reasonably be expected to be let in the open market by a willing lessor, there being disregarded any effect on rent of Vodafone's occupation, goodwill attributable to its business, and improvements (which it is agreed comprise the mast, cabinets, and fencing surrounding the Site).

The duration of the new tenancy and inclusion of a break clause

25. Section 34 of the 1954 Act requires that, in determining the rent payable under the new tenancy the Court must have regard to the terms of the tenancy other than those relating to rent. The first task in this case is therefore to determine the terms which the parties have not been able to agree for themselves.

26. The form of any break clause to be included in the new tenancy is a question to be determined under section 35 of the 1954 Act, which requires the Court to have regard to the terms of the current tenancy and to all relevant circumstances: *O'May v City of London Real Property Co. Ltd.* [1983] 2 A.C. 726 at 747, *per* Lord Wilberforce.

27. The 2008 lease did not include an unconditional break clause and it is therefore for Vodafone, as the party seeking a change, to justify its inclusion. The parties have agreed that the new tenancy will include a conditional break clause, exercisable on 3 months' notice if the tenant loses its status as an operator under the Code. During closing submissions it was also agreed it should incorporate a term (which was in the 2008 lease) allowing termination on 12 months' notice if the Site becomes unsuitable for telecommunications use for technical reasons. Hanover additionally offers Vodafone the right to break on 12 months' notice exercisable for any reason on the fifth anniversary of the term (on the basis that the term will be for 10 years) subject to Vodafone being up to

date with the rent and having complied with its obligations under the tenancy, and subject to it giving vacant possession at the expiry of the break notice.

28. Vodafone's desire to have a rolling break clause exercisable on 6 months' notice entirely at its own discretion is put forward for the same reasons as those used to support its case that the term of the new tenancy should be only 3 years, and it is convenient to consider both the duration of the term and the form of break clause together.

29. The duration of the new tenancy is required by section 33 of the 1954 Act to be such as may be determined by the Court to be reasonable in all the circumstances. When the Court exercises that discretion the question of reasonableness is at large and although the duration of the current tenancy may be a relevant consideration, there is no presumption in favour of repeating it, nor any onus of justification on a party seeking a longer or shorter term. I was referred by Counsel to the discussion of the applicable principles in *Reynolds & Clark: Renewal of Business Tenancies* (5th ed) [8-27] to [8-44].

30. The overriding consideration which emerges from that discussion is that each case depends on its own facts. The length of the current tenancy, and the length of its continuation by the 1954 Act are relevant considerations, as is the nature of the tenant's business. The primary purpose of the legislation is to protect the tenant so the Court will seek to confer on the tenant a term sufficient to protect it in carrying on its business. The length of term likely to be granted in the open market is of only limited assistance in determining what is reasonable. The Court will seek to balance the degree of protection to which the tenant is entitled in the interests of its business and the need to ensure that the decision is neither unfair on nor oppressive to the landlord.

31. Evidence on the disputed terms was given on behalf of Vodafone by Mr Barwell who is the Central Estates Manager for CTIL and the employee responsible for the renewal of the lease. He was not cross-examined and I accept his evidence. He explained that Vodafone had three reasons for seeking a 3-year term with a rolling 6 month break clause.

32. First, a 5-year term was sought when the proceedings were issued in August 2017, but they had been stayed by agreement and the new tenancy would not now be granted until towards the end of 2020. Vodafone's case had been amended in 2020 to reduce the term sought to only 3 years. There had also been a substantial period of holding over by Vodafone following the expiry of the 2008 lease in 2013.

33. Secondly, since the claim was issued, the Code has come into force, radically altering the legal landscape governing agreements for telecommunications sites and creating considerable uncertainty, particularly as to the relationship between the Code and the 1954 Act. In view of that uncertainty Vodafone wants as much flexibility as possible to enable it to respond to the evolving understanding of its rights under the Code.

34. Two additional reasons mentioned by Mr Barwell were overtaken by the agreement on other terms which the parties were able to reach after he prepared his witness statement and were not pursued in closing. I therefore assume the form of tenancy which the

parties have agreed includes all the "key Code rights" which Vodafone currently considers necessary and to which Mr Barwell referred, and that the wider conditional break clause eventually agreed addresses his fourth concern.

35. Mr Radley-Gardner (who dealt with this aspect of the case on behalf of Vodafone) developed the theme of legal uncertainty in his submissions. The Upper Tribunal has recently determined that an operator in occupation of a site and having rights to seek a new tenancy under the 1954 Act cannot make use of the Code to obtain a new agreement from the Upper Tribunal. In *Cornerstone Telecommunications Infrastructure Ltd v Ashloch Ltd* [2019] UKUT 388 (LC), the Tribunal took the view that that conclusion followed inevitably from the decision of the Court of Appeal in an earlier case. That case, *CTIL v Compton Beauchamp Estates Ltd* [2019] EWCA Civ 1755, was itself an appeal from the Upper Tribunal which, although consistent with the Court of Appeal in the outcome, took a rather different view of the functioning of the Code. Appeals are currently pending in the Court of Appeal and the Supreme Court against the decisions in those cases. Vodafone therefore wants as much flexibility as possible to enable it to respond to the appellate decisions when they arrive, which is expected to be during 2021 and 2022.

36. Mr Radley-Gardner explained that Vodafone's most important reason for seeking a short term and an unconditional break clause was its concern that in these proceedings it may, contrary to its case, be awarded a new tenancy at the rent sought by Hanover, which is much higher than Vodafone considers it would achieve under the Code. Vodafone's portfolio includes many sites which are held on tenancies continuing under the 1954 Act, and a modest difference in rent on this Site may be multiplied many times over if applied across this sector of its estate. If the operators' view of how the Code applies to such tenancies prevails in the Court of Appeal or Supreme Court, Vodafone wishes to be able to take advantage of the rights Parliament intended it to have by terminating the tenancy it will have obtained under the 1954 Act and negotiating a new one exclusively within the framework of the Code. It is prevented from doing that for this renewal by the current understanding of the law. A short term or an unconditional break clause would enable Vodafone to free itself of the new tenancy and secure a new agreement at a lower rent on the basis of the favourable assumptions in paragraph 24 of the Code, free of the overlay of the different assumptions in section 34 of the 1954 Act. If the meaning of the Code is eventually settled in the operators' favour, Vodafone will therefore wish to determine the new tenancy it obtains in these proceedings as soon as possible by giving 6 months' notice and simultaneously claim a new agreement under Part 5 of the Code, paying a rent determined by reference to paragraph 24.

37. Additionally, even if Vodafone is satisfied with the rent which the Court determines for the new tenancy, it may need new rights in addition to those conferred by the new tenancy the parties have agreed. There is no evidence what those new rights might be but Mr Radley-Gardner submitted that telecommunications technology advances rapidly and, to remain competitive, an operator needs to be able to be able to upgrade its equipment. On the state of the law as it is, he submitted, that would not be possible because Vodafone is in occupation of the Site. If Vodafone can terminate the new lease it can then seek a new Code agreement with additional rights under Part 5 of the Code.

38. On behalf of Hanover, Mr Lees submitted that a reasonable balance between Vodafone's business interests and Hanover's desire for stability and resolution would be a ten-year term with a break after 5 years, conditional on the operator giving vacant possession of the Site. That would allow Hanover a guaranteed income for 5 years and a healthy period in which it could not be embroiled in expensive litigation of very little benefit to itself. A minimum term of 5 years (which would be the effect of the term and break clause package Hanover proposes) would be consistent with the original 5 year term agreed under the 2008 lease term and provide the same degree of certainty for the landlord. A condition that the tenant must comply with its covenants and give vacant possession on expiry of the break notice is a standard term in commercial leases and should be included to avoid Vodafone terminating the new tenancy with no intention of bringing the parties' relationship to an end but simply to substitute better terms for its own benefit.

39. The conclusion I have reached is that the term of the new tenancy should be one of ten years, with a break clause exercisable on 6 months' notice expiring on the fifth or subsequent anniversary of the term. The break clause will be conditional on the tenant paying all outstanding rent by the date of termination and not being in material breach of covenant, but it will not be conditional on the tenant giving vacant possession.

40. In reaching that conclusion I have given weight to the needs of Vodafone's business, and to the rights which Parliament intended operators to enjoy under the Code. I also take into account the burden of these proceedings on both parties in terms of costs and commitment (Vodafone's costs exceed £300,000 plus VAT, while at a time last year when it was thought the hearing would last one day instead of three, Hanover's predecessor submitted a costs budget of £69,000). Vodafone regards these proceedings as a test case and has willingly assumed that burden because of the significance of the outcome for its wider estate, but for Hanover they represent an expensive and unwanted distraction, hugely disproportionate to the very modest income it will receive whatever view I take of the valuation issues. In the circumstances of this case I consider that the operator's wish for flexibility must be balanced against the landlord's understandable desire for a respite from uncertainty and expense. That balance is satisfied by a minimum commitment of 5 years, with the operator being entitled to greater flexibility at fixed intervals after that period has expired.

41. The tenancy will be terminable during the first 5 years for the limited operational reasons the parties have agreed to carry forward from the 2008 lease. I do not think Vodafone's reasons for seeking greater flexibility, by either a very short term or a rolling 6-month break clause, justify the resulting uncertainty and I consider they would be unfair to the landlord after the expense and disruption of these proceedings. The proposal for inclusion of a rolling 6-month break clause, exercisable from the commencement of the term, would have the effect that the tenancy could not be guaranteed to continue for more than 6 months. There would be nothing to stop Vodafone exercising the break immediately so it cannot be seen as a response to the legal uncertainty created by the progress of appeals through the higher courts.

42. The possibility that appeals may bring a change in understanding of how the Code is intended to work is a factor which I bear in mind, but it is not one to which I give

particular weight. The law may not change, but even if it does, the break clause proposed by Vodafone is not contingent on the Court of Appeal and Upper Tribunal being shown to have been wrong in limiting the opportunities for operators to seek new agreements under the Code. If Vodafone is dissatisfied with the rent determined in these proceedings it would have the opportunity first to take up, and then immediately to terminate the new tenancy on 6 months' notice, before the outcome of any appeal was known. It would then be entitled to remain in occupation and to seek a new agreement under the Code. That does not seem to me to be a prospect which can fairly be imposed on Hanover.

43. As for the need for flexibility to ensure that equipment can be upgraded, paragraph 17 of the Code already guarantees the operator the right to upgrade. That right is conditional on any change not altering the appearance of the site to more than a minimal extent and not imposing a greater burden on the site provider than the existing apparatus. Vodafone's desire to avoid the limitations which Parliament has thought it appropriate to impose by giving it the flexibility to seek an entirely new agreement covering additional apparatus at relatively short notice is not a particularly weighty consideration. There is no evidence of whether this mast might be required, for example, for the roll-out of the 5G network nor evidence of the realistic time scale for the introduction of new apparatus. The evidence shows that operators, including Vodafone and CTIL, have regularly entered into new Code agreements with break clause exercisable only after 5 years; of nine Code agreements entered into by CTIL for which details were provided by Mr Bodley Scott only 3 had unconditional rolling breaks, 3 had rolling breaks after 5 years, and 3 had them after 10 years. This evidence does not suggest that Vodafone or CTIL need the rights sought in this case for operational reasons, nor that they are often able to negotiate them in practice.

44. As for the conditions sought by Hanover, I agree that compliance with covenants and payment of rent are both standard and reasonable and I reject Mr Radley-Gardner's suggestion that the risk of human error is justification for omitting them. On the other hand, the inclusion of a requirement that vacant possession be given would make a break clause much less useful to Vodafone and I do not think it is reasonable to introduce it. It is likely that the introduction of 5G technology will require significant upgrading which may not be possible under the constraints of paragraph 17 of the Code, and an opportunity for renegotiation at annual intervals after 5 years will allow Vodafone to modernise both the agreement and its apparatus.

45. I have preferred ten years with breaks exercisable fairly freely after 5 years, rather than a simple 5 year term, because the parties provided evidence of the effect on rent of a ten-year term without a rent review clause, and I am therefore in a position to settle an agreement of that duration. Doing so will provide at least the possibility that further recourse to lawyers will be unnecessary if, by 2025, Vodafone finds that the terms of the new lease continue to meet its needs.

46. The duration of the new term will therefore be 10 years with the break clause I have described.

Rent

47. Having ascertained the terms of the new tenancy, it is now possible to consider the issue of valuation.

The valuation hypothesis

48. Section 34 requires the Court to determine the rent at which the holding might reasonably be expected to be let in the open market by a willing lessor on the terms of the tenancy. This exercise involves the familiar valuation technique of imagining a negotiation between two parties, a "hypothetical landlord" and a "hypothetical tenant", who are willing to enter into a tenancy of the Site on the terms which have now been settled. Except to the extent that the statutory hypothesis requires, all other circumstances are to be assumed to be as they are in reality at the date of the Court's decision.

49. The negotiation is assumed to take place in anticipation of the hypothetical tenancy commencing on the date the existing tenancy will come to an end in accordance with the 1954 Act, which will be 3 months after the final disposal of the proceedings. In practice this means that the valuation must be undertaken by reference to the position at the date of the trial but taking into account any evidence there might be suggesting a change in value is likely to occur between the date of the hearing and the date the new tenancy will commence.

50. The subject of the hypothetical negotiation is the Site, which is assumed to be in the condition it would be in if the actual tenant had removed fixtures installed by it and complied with its obligations. The value of tenant's improvements is to be ignored. In practice, the Site must be assumed to be as it was before the 2008 lease was granted, that is, part of a car park, unfenced and unimproved apart from its tarmac surface, and with no mast, cabinet, or other apparatus in place. Any effect on rent of Vodafone's occupation is also to be ignored.

51. In this imagined negotiation the hypothetical tenant is a Code operator (because the terms of the new tenancy say so and the only permitted use of the Site under those terms is for Code purposes). The hypothetical tenant may or may not be Vodafone or one of the other operators with whom it shares the mast. Both negotiating parties are assumed to be prudent and knowledgeable, and it is likely that both would be professionally advised. Both parties would therefore be aware of how the Code operates.

52. Being prudent and knowledgeable, the parties in the negotiation are aware that the hypothetical tenant (or any other operator in the market) has the right to give notice under paragraphs 20 or 26 of the Code requesting that the hypothetical landlord enter into a tenancy on terms proposed in the notice, which may or may not be the same as those which have been agreed. The parties would know that if a notice was served and the landlord did not agree to the operator's terms, the operator would have the right to refer their dispute to the Upper Tribunal. The reference might take up to a year or more to be concluded after a decision was taken to serve a notice. Its outcome would not be certain, although in this case there is no evidence to suggest that the hypothetical tenant would have difficulty in satisfying the test in paragraph 21 of the Code. If the hypothetical tenant (or whoever had given the notice) wanted to get on to the site early, it could apply

for interim rights under paragraph 26 of the Code, which would be likely to be granted. Once a notice was given, the process would become increasingly costly for both parties until they reached agreement or a new lease was imposed on them by the Tribunal. The consideration which the Tribunal would include in the hypothetical agreement (the rent) would depend on the evidence which the parties adduced, as would any additional compensation which the hypothetical tenant would be required to pay to the hypothetical landlord. These sums would be ascertained, in default of agreement, under paragraphs 24 and 25 of the Code.

The terms of the hypothetical tenancy

53. These are assumed to be as have now been agreed by the parties and determined by the Court. Two particular features of those assumed terms need to be kept in mind.

54. First, under the new tenancy the rent to be determined will be the only quantified sum payable by Vodafone to Hanover, and for the purpose of the valuation hypothesis the parties are assumed to be in the same position. Thus, no premium or capital incentive will be paid to Hanover, and none can be assumed to be available to the hypothetical landlord. Nor will any lump sum in compensation for loss or damage be payable at the start of the tenancy under paragraphs 25 and 83 to 86 of the Code in addition to the annual rent. The evidence shows that, in practice, operators almost invariably make a contribution towards the professional fees incurred by landlords in connection with the grant of leases of new telecommunications sites (and often do so on lease renewals) and this is provided for as a head of compensation by paragraph 84(2)(a) of the Code where an agreement is imposed by the Upper Tribunal. No such separate contribution can be assumed in our hypothetical transaction, because none is payable under the terms of the new tenancy. The parties disagreed whether as a matter of law a contribution towards professional fees could be rolled up as part of the annual rent or whether in practice, applying the willing landlord hypothesis, it would do so.

55. Secondly, although no attempt will be made by the hypothetical parties to agree a sum in compensation at the start of the hypothetical tenancy, the terms of that agreement and of the new tenancy include various provisions for the tenant to pay further sums to the landlord (such as the costs of consents), to make good damage caused, and to indemnify against losses. These obligations could be the subject of compensation claims under the Code, but are dealt with by contractual provisions instead. In principle, because the agreement will confer Code rights there may be room for a compensation claim in respect of loss or damage sustained in future which was not covered by these contractual provisions (see *EE Ltd v Islington* [2019] UKUT 53 (LC) at [144]).

The willing parties

56. Section 34 refers only to a willing lessor, but it is well established that the hypothetical letting must be assumed to be between two willing parties, and a willing tenant is necessarily implied by the requirement to assume a letting in the open market: see *Dennis & Robinson Ltd v Kiossos Establishment* [1987] 1 EGLR 133.

57. The negotiation is assumed to be fair and friendly, and will be conducted in the light of all the advantages and disadvantages which would affect the property and any tenant of it. The willing parties are willing to enter into a tenancy of the Site at a rent which reflects the open market. Neither party is anxious to do a deal, nor under particular pressure to do so, and the hypothetical tenant will not pay more than is necessary, nor will the hypothetical landlord expect to receive more. In *FR Evans (Leeds) Ltd v English Electric Co Ltd* (1978) 36 P. & C.R. 185, 190, Donaldson J explained that the hypothetical tenant is a willing lessee, "not an importunate one". Moreover:

> "It is known that he will remain a willing lessee so long as the willing lessor does not press his demand for rent beyond the point at which he is ceasing to act as a willing lessor and at which a willing lessee would cease to be such."

58. The willing lessor is willing to let on the agreed terms so will not require any form of inducement to persuade it to do so at the rent which reflects the open market. Mr Jourdan referred to a series of cases which illustrate this important proposition, which I accept. I will refer to three of them.

59. *BP Petroleum Developments Ltd v Ryder* [1987] 2 EGLR 233 concerned a statutory valuation of rights to exploit an oilfield under the Mines (Working Facilities and Support) Act 1966. The statute required consideration to be assessed on the basis of an agreement between a willing grantor and a willing grantee. The evidence, summarised at 247M-248F, was that owners of farms were generally unwilling to allow oilfield development and that the prices voluntarily paid by oil companies for similar facilities in the area in the recent past greatly exceeded existing use value. Peter Gibson J held that evidence of those voluntary transactions was of no assistance in the statutory valuation, because the owners had not been willing grantors but instead had been unwilling grantors who had had to be paid to "overcome that un-willingness". In practice, oil companies were "…anxious to maintain good relations with the landowner" and keen to avoid the delay which would be caused by having to apply to the court for rights, but the Judge concluded that:

> "In my judgment the willing grantor and the willing grantee under the 1966 Act are not to be treated as affected by such considerations which have militated in favour of bargains being struck at prices reflecting the landowner's unwillingness and the oil company's anxieties."

60. In *Northern Electric plc v. Addison* [1997] 2 EGLR 111 the Court was required to determine the rent payable on the renewal of the lease of an electricity sub-station under the 1954 Act. The tenant proposed a rent of £15, but the landlord argued for a rent of £1,000, which took into account the potential of the land to be let for more profitable uses than as a sub-station. In the Court of Appeal Potter LJ said:

> "The judge's task under the 1954 Act, on an application of this kind, is to assess the rent upon the basis of the rent at which the premises might reasonably be expected to be let on the open market by a willing lessor. It is to that matter that expert evidence should be directed.... As the judge rightly

> highlighted, it was also his task to determine that rent, having regard to the terms of the tenancy other than those relating to rent. Therefore the judge was required to assume a willing lessor of premises limited to use as an electricity substation, the term already agreed between the parties.
>
> That combination of considerations necessarily precluded a notional lessor unwilling to let the premises for such restricted use unless a premium was paid to take into account other potential uses. That is because (a) such an approach would represent a qualification on the overall notion of a willing lessor whose willingness falls to be judged on the assumption that it relates to the lease before the court; (b) because taking into account other potential uses involves ignoring what are in fact terms providing for one use and one use only."

61. In *Marklands Limited v Virgin Retail* [2004] 2 EGLR 43, Lewison J held that the only alternatives to the hypothetical letting which can be taken into account are those within the framework of the hypothetical transaction. He contrasted behaviour in the real world and in the hypothetical world:

> "In the real world, parties often do not reach agreement, since their individual aspirations are irreconcilable. But in the hypothetical world, they always reach agreement. Although each party may have alternatives, it seems to me that the only permissible alternatives are those within the framework of the hypothetical transaction. Thus the landlord can point to other tenants willing to take a lease of the property on the offered terms and the tenant can point to other properties that he would be willing to take. But it does not seem to me to be permissible for the landlord to say that he could enter into a different kind of transaction, when he is known to be willing to enter into that which the lease prescribes."

62. I therefore accept that because the parties must be assumed to be willing, they do not need to be coaxed into the hypothetical transaction by any form of inducement. The need for inducements to be paid to make a site provider willing to enter into a transaction or to accelerate progress do not feature in the hypothetical negotiations between the willing parties.

63. Mr Lees did not challenge Mr Jourdan's analysis, but he warned that it may have the effect of rendering transaction which occur in the market unreliable as comparables. That proposition was also common ground, although Mr Jourdan submitted that comparables infected by inducements need not be disregarded altogether if the value attributable to the inducement could be identified and an allowance made for it. I accept that submission, although assessing that value is unlikely to be an easy task.

The open market

64. The hypothetical transaction is one which takes place in the open market. The principle that evidence of real world transactions may not be reliable evidence on which to base a statutory valuation which assumes an open market was illustrated by a number of cases

relied on by Mr Jourdan, including *BP v Ryder,* referred to above. I need mention only one other.

65. *Lynall v Inland Revenue Commissioners* [1972] AC 680 concerned the valuation for Estate Duty of a minority shareholding in a private family company. The taxing statute required an estimation of the price which such property would fetch if sold in the open market. The evidence of how large blocks of shares in private companies were in fact sold proved that such sales were not announced publicly and that no invitation to submit competitive bids was issued. Instead, an expert acting on behalf of the intending seller would approach a potential purchaser to establish whether they might be interested. If they thought they might be, the directors of the company would make relevant information available to the potential buyer's accountants confidentially.

66. The House of Lords held that this was not a sale "in the open market" and that the price which could be obtained in that way was not relevant when ascertaining the open market value of the shares. Lord Reid explained why, at 695B-G:

> "In my view this evidence is irrelevant because this kind of sale is not a sale in the open market. It is a sale by private treaty made without competition to a selected purchaser at a price fixed by an expert valuer. The Act of 1894 could have provided - but it did not - that the value should be the highest price that could reasonably have been expected to be realised on a sale of the property at the time of the death. If that had been the test then the respondents would succeed, subject to one matter which I need not stop to consider. But the framers of the Act limited the inquiry to one type of sale - sale in the open market - and we are not entitled to rewrite the Act. It is quite easily workable as it stands.
>
> No doubt sale in the open market may take many forms. But it appears to me that the idea behind this provision is the classical theory that the best way to determine the value in exchange of any property is to let the price be determined by economic forces - by throwing the sale open to competition when the highest price will be the highest that anyone offers. That implies that there has been adequate publicity or advertisement before the sale, and the nature of the property must determine what is adequate publicity. Goods may be exposed for sale in a market place or place to which buyers resort. Property may be put up to auction. Competitive tenders may be invited. On the Stock Exchange a sale to a jobber may seem to be a private sale but the price has been determined, at least within narrow limits, by the actions of the investing public. In a particular case it may not always be easy to say whether there has been a sale in the open market. But in my judgment the method on which the respondents rely cannot by any criterion be held to be selling in the open market.
>
> If the hypothetical sale on the open market requires us to suppose that competition has been invited then we would have to suppose that steps had been taken before the sale to enable a variety of persons, institutions or financial groups to consider what offers they would be prepared to make. It would not be a true sale in the open market if the seller were to discriminate

> between genuine potential buyers and give to some of them information which he withheld from others, because one from whom he withheld information might be the one who, if he had had the information, would have made the highest offer."

67. At 699C, Lord Morris considered that: "Mere private deals on a confidential basis are not the equivalent of open market transactions", while at 701E, Viscount Dilhorne described a sale in which "only a person or persons selected by the vendor will be able to make an offer" as "the antithesis of a sale in the open market".

The letting of mast sites in the real world

68. The experts agreed that, in the real world, the process of negotiating terms for mast sites is usually led by an operator's need to meet the demands of its customers for network coverage or capacity in a particular area.

69. Mr Stott described the way such agreements are negotiated as "fundamentally different to the process of negotiating lease terms in other property markets." That description was not challenged and it accords with Mr Bodley Scott's evidence. Mr Stott explained what he meant in the following extract from his report:

> "5.3 Generally, most commercial property markets operate in a manner which sees landlords decide to make their property available for use and advertise it to let through various means… for most commercial property markets there is an ongoing demand, which results in prospective tenants putting forward proposals to lease the property.
>
> …
>
> 5.5 In contrast, the process for negotiating terms for telecoms mast sites is quite different and is led by an operator's need to meet the needs of its customers so as to provide network coverage or meet capacity in a particular geographic area. In my experience, the landowner of a site does not offer it to the open market for letting as a mast site but rather an operator identifies a site that meets its requirements and approaches the landowner to seek to persuade them to let it. In other words, where a telecoms operator identifies a gap in their coverage or capacity, a need to upgrade coverage or a need to replicate the coverage of a site that is being lost, they look to identify a suitable site within that vicinity on which to install electronic communications apparatus. Once a site is identified, they then identify the landowner and make contact to instigate negotiations, regardless of whether the owner has marketed the site to let.
>
> 5.6 If the landowner does not consent to entering into an agreement with the operator, the Code provides a mechanism for the Operator to acquire the rights it needs …"

70. Mr Bodley Scott also mentioned that substantial land owners like the Forestry Commission or utility companies sometimes take the initiative by offering packages of

sites on standard terms to operators, but he did not suggest this Site would be offered in that way.

71. Although Mr Stott referred to this market, in which sites may not be openly available to let, as "the "*open market*" in which the Property is let", I did not understand him to adopt a different position from that emphasised in submissions by Mr Jourdan, namely, that the real-world market is not the open market which is required to be assumed by section 34. Mr Jourdan described the transaction which must be assumed as one in which the Site "has been offered to all potential bidders on the terms of the agreed tenancy for a reasonable period." It is clear from the experts' agreement and from the evidence of Mr Stott that those are not the circumstances in which lettings actually take place. Mr Stott said in his report that this was important to his valuation, although it was not obvious how he had taken it into consideration.

The rival valuation approaches

72. Although they both relied on a great deal of evidence and analysis, the fundamental difference in approach between Mr Stott and Mr Bodley Scott can be briefly encapsulated.

73. Mr Stott considered that the rent which would be agreed in the open market on the hypothesis required by section 34 would be based on the value of the Site to the owner, the hypothetical landlord, and would therefore exclude any amount reflecting the fact that it was to be used by an operator as part of a telecommunications network; this reflects the "no network" assumption in paragraph 24 of the Code. Mr Stott did not suggest the section 34 hypothesis included a no network assumption (the experts agreed that it does not, and they are clearly right) but he considered that both the willing landlord and the willing tenant would be aware of the provisions of the Code and would therefore take them into account when assessing the rent for the new tenancy. By this means the Code, and in particular the no network assumption in paragraph 24, would provide the framework for the negotiation.

74. In contrast, Mr Bodley Scott considered that the evidence of transactions completed after the Code, which was consistent with his experience of negotiating them, showed that there had been little or no softening of rents since the days of the Old Code. Rents under the Old Code were not negotiated on the basis of a "no network" assumption, and instead reflected the value of the site to the operator for use as part of its network. Mr Bodley Scott therefore based his valuation on transactional evidence, which he took to be representative of what would happen in the hypothetical negotiation in the open market required to be assumed by section 34.

75. In practice a rent determined on the basis of value to the owner is ascertained by considering the most valuable alternative use that could be made of the property by the owner, which Mr Stott considered was use for car parking. Having researched the rental value of parking spaces in the vicinity, Mr Stott considered the rent of the Site determined in accordance with section 34 should be £1,715 a year if the term was 3 years, as sought by Vodafone. This would reduce to £1,386 a year if the term was ten

years with only the break clauses proposed by Hanover (although he also considered that this figure should be increased by 5% in the absence of a rent review clause).

76. Mr Bodley Scott did not disagree with Mr Stott's assessment of the value of the Site if its rental value was assumed to be its value to the owner (and thus reflecting its value for parking or open storage, rather than as a telecommunications site). He did not accept that an open market negotiation would result in a rent at that level, and considered that the rent ascertained under section 34 should be £8,000 a year. That figure was principally based on evidence of lettings of 13 telecommunications sites completed between January 2018 and July 2019. Two of those transactions were lettings of entirely new sites, with a third being a relocation of a mast to a new position on land belonging to the original landlord. The other transactions were lease renewals, or in one case a rent review; two were lettings to police authorities, who are not operators for the purpose of the Code. Ignoring one conspicuous outlier, the annual rents paid in these transactions fell in the range £4,500 to £8,500, and Mr Bodley Scott took the mid-point of that range, £6,000, as his base line figure. He then made an adjustment by adding £2,000 to this figure to account for what he called beneficial site sharing provisions at the Site, giving his section 34 rent of £8,000.

77. Mr Bodley Scott was relaxed in his use of this quite diverse evidence of comparable transactions and treated it almost all as of equal weight. He did not think the market had moved significantly since the start of 2018, so was untroubled by the lapse in time and made no adjustments to reflect a valuation taking place in mid-2020. Nor did he treat the two new sites differently from existing sites being re-let, although the former provided a much closer comparator for the hypothetical letting of a bare site. There was no evidence about the cost of developing mast sites, nor about whether rents achieved on lease renewal for sites without statutory security of tenure under the 1954 Act (and therefore not benefitting from a disregard of the value of tenant's improvements) differed from rents agreed on sites within the Act. He did not comment on the fact that the lettings of the previously undeveloped sites produced the two lowest rents, £4,500 and £5,000, or that the average of these two rents was 20% lower than the figure he took as his starting point.

78. Mr Bodley Scott was also aware that all of the transactions he relied on had been negotiated and agreed in principle before the commencement of the Code on 28 December 2017, although they were not completed until after that date (in some cases a matter of a few weeks later, but in others up to 18 months later). This was apparent from the leases themselves, each of which included, in one form or another, an express "caveat" recording that the parties had agreed to honour terms previously negotiated, despite the coming into force of the Code, and asserting that the terms "do not set any precedent for the terms which the parties would have otherwise agreed under the new Code". The veracity of these statements is open to question. The evidence suggests that, in some cases at least, terms previously agreed were re-negotiated after the commencement of the Code; it may be that such re-negotiation was usually to modernise the terms by making them consistent with the Code, and often did not result in a change in the rent previously agreed (although Mr Bodley Scott said that in one caveated case in which he had been involved a site sharing payment for a site at Eastleigh had been removed from the lease as part of the renegotiation).

79. The fact that the transactions he relied on had all been negotiated before the Code commenced did not cause Mr Bodley Scott to doubt their usefulness, even in the face of evidence of transactions relied on by Mr Stott which suggested rather lower rents were being negotiated for similar sites after that date.

80. Mr Bodley Scott's evidence was rooted in his experience in the market, negotiating transactions on behalf of site providers (and occasionally tenants, though not the large operators), and he was able to provide much useful information. But the weaknesses in his valuation methodology which I have mentioned above were striking, as was his apparent lack of concern that the more recent transactions identified by Mr Stott might require more detailed consideration than he had given them. In his defence, it is apparent that there is very limited evidence of lettings of new sites (which ought in principle to be the most useful) and that the negotiation of quite modest rents is likely to be undertaken on a fairly rough and ready basis. But having considered his evidence carefully I do not have much confidence that his starting figure of £6,000 is a reliable one for a new letting of a bare site negotiated after the commencement of the Code.

81. Mr Bodley Scott added a further £2,000 to his starting figure to reflect what he called the beneficial site sharing provisions at the subject site. With the exception of the two lettings to police authorities the comparables on which Mr Bodley Scott relied in coming to his base figure of £6,000 were all let on Code terms, and so allow the tenant to share the site with other operators without making any payment to the landlord (referred to as "payaway"). The agreed terms of the new letting of the Site also permit sharing without requiring payaway, which one might have thought meant no adjustment to the comparables was required. But Mr Bodley Scott pointed out that the comparable sites were not in practice shared sites, whereas the Site is shared and hosts apparatus belonging to four operators. Mr Bodley Scott considered that this justified a higher rent than had been agreed for his comparables, and he put the uplift at £2,000.

82. Mr Bodley Scott sought to justify this increase by reference to three new comparables, each a letting of a shared site. But two of these included quite complicated payaway provisions which do not feature in the agreed terms, and the third, a site at Nuffield Hospital in Eastleigh, which Mr Bodley Scott considered a good comparable, suggested an uplift of £1,000, rather than the £2,000 he opted for. He considered the inclusion of triennial rent reviews in the Nuffield Hospital lease justified the differential, but the absence of a rent review clause in the new lease of the Site is already taken account of elsewhere in Mr Bodley Scott's valuation so this explanation did not hold much water.

83. Although Mr Bodley Scott was unable to provide a persuasive, evidence based justification for his quantification of the effect of sharing, his proposition that the ability of the tenant to share a site is likely to result in a higher rental value in the open market is logical and I accept his evidence, based on his own experience, that sites suitable for sharing command higher rents. He explained that significantly more would be paid for an existing site which was already being shared than for an existing site which was not shared, but that the mere potential for sharing (which might never be realised) did not make much difference. That seemed to me to require a much closer analysis of the comparables than they received.

84. While Mr Bodley Scott was able to speak with authority about how transactions are negotiated in the market, his use of transactional evidence was unconvincing and did not support his figure of £8,000 a year. I nevertheless give weight to his view, as that of an experienced agent operating in this market, that a rent more than four times the value of the Site to the owner would be likely to be agreed on a new letting. I have no doubt that Mr Bodley Scott gave his evidence honestly, and that he is genuinely of the view that the Site is worth £8,000.

85. The value of the Site to the owner formed the basis of a separate valuation exercise undertaken by Mr Bodley Scott. That alternative exercise was said to be based on paragraphs 24 and 25 of the Code and proceeded by making a number of unconvincing additions to a rent based on the value of the Site for storage or parking. I do not give weight to that part of Mr Bodley Scott's evidence; it was theoretical and remote from the market practice on which he otherwise relied, and did not survive cross examination.

86. Mr Stott approached the valuation from the perspective of a specialist in compensation for compulsory purchase, rather than as a regular practitioner in the letting of mast sites. He was therefore dependent on his client for evidence of relevant transactions, and his opinion was based on his analysis of those transactions. His report was thorough and well researched, and I have no hesitation in rejecting Mr Lees' suggestion in closing that Mr Stott was a partisan witness.

87. Mr Stott demonstrated the influence of the no network assumption required by paragraph 24 of the Code, which would form the backdrop to negotiations between the hypothetical willing parties, by referring to 11 transactions in which a rent was said to have been agreed on the basis of the existing use of the site in question. Mr Stott's information came from the operators, and it may be that the site providers or their advisers would have analysed the transactions differently, but the material relied on demonstrates that modest annual rents have been agreed on comparable sites, sometimes as low as £300 or £400 a year, but more typically in the range £1,000 to £2,000 a year. Because the rents appear to have been agreed on the basis of existing use value for individual sites, precise comparisons are not helpful, and the broader and more significant point is that the Code's "no network" assumption leads to rents based on value to the owner, or existing use value.

88. Only two of the transactions relied on by Mr Stott were lettings of previously undeveloped sites. One of these was of part of the car park of the Buckley Conservative Club in Flintshire in which an annual rent of £440 was agreed, together with an "expedited completion payment" of £6,000, a contribution to professional fees of £4,000, and a one-off sum of £1,000 for the use of a secure compound for the period of the works. A contribution by the tenant to the landlord's professional fees was made in each of Mr Stott's transactions, and other capital incentives featured in four cases. Mr Stott explained that incentives were not offered in all transactions, but that they may be if there was some special urgency or some other reason why the operator wished to encourage the landlord to close a deal promptly.

89. Mr Jourdan suggested a helpful framework which sought to replicate the factors which would influence the hypothetical parties negotiating a rent for a new letting under the Code; it involved consideration of the following six topics:

(a) The first step would be to assess the alternative use value of the site, which would be equal to the rental value of the holding for the most valuable non-operator use. This would be a matter of evidence and would depend entirely on the location of the property and land values in that location. Parking spaces next to a sports ground or an airport would have a higher value than on an industrial estate.

(b) Secondly, if any additional benefit was to be conferred on the tenant by the letting an allowance would have to be made to reflect it. In one example, the letting of part of a secure car park at the Gillingham Vehicle Testing Centre, internal analysis showed that Arqiva was prepared to pay an additional £1,000 a year for the benefit of a manned security gate.

(c) Thirdly, if the letting would have a greater adverse effect on the willing lessor than the alternative use on which the existing use value was based, this should also be reflected by an adjustment.

(d) Fourthly, consideration would have to be given to the fees payable by the hypothetical landlord for negotiating the rent with the hypothetical tenant's representatives. The evidence demonstrated that operators routinely make a contribution to these on new Code lettings and renewals.

(e) Fifthly, legal fees will be incurred in undertaking the necessary conveyancing following agreement of the rent, and once again the evidence shows that operators usually make a contribution to these.

(f) Finally, consideration would need to be given to the possibility that the hypothetical tenant will pay an additional amount by way of an inducement to secure the letting.

90. Mr Jourdan submitted that a willing landlord and a willing tenant negotiating in the open market would agree a rent based on the first three considerations only. In this case he suggested there was no evidence supporting an addition for the second or third factors, and that a rent based on Mr Stott's existing use value of £1,715, adjusted for duration and the absence of rent review if necessary, was therefore the figure which would be agreed. Mr Stott's figure was based on the Site being capable of accommodating ten parking spaces which would be let for a term of 3 years.

91. I do not consider that Mr Stott was correct in principle to reduce his existing use value from £1,715 to £1,455 a year in the event that the new lease is to be of ten years duration based on the reluctance of a small car park operator to enter into a relatively long commitment. There is no reason why the existing use value should be constrained by features of the new telecommunications letting which would not be replicated if the site was used for car parking. Although the hypothetical landlord is willing to let on the

terms agreed for telecommunications use, he would measure the value of the site (on Mr Stott's reasoning) by the most profitable activity he could conduct from it, and that measurement would not be limited by the terms, or term, of the new letting to the hypothetical tenant.

92. I agree with Mr Jourdan that, in this case, there are no relevant additional benefits or adverse effects not already accounted for in a rent based on existing use value or by the compensation provisions of the new lease, which require to be taken into account.

93. Mr Jourdan accepted that if it was appropriate to take account of professional fees, the annual rental equivalent of the £4,000 paid as a contribution towards the costs of a new letting (based on the Buckley Conservative Club) would be £445 a year, as proposed by Mrs Martin, the assessor. He nevertheless submitted that it would be wrong in principle to make such an allowance where the landlord must be assumed to be willing. The landlord must be assumed to have offered the Site to the market on the terms of the new lease for a reasonable period, and is now negotiating with the hypothetical tenant, who embodies the real demand for the property in the real market, about the rent to be paid for the new lease. In that negotiation, Mr Jourdan submitted, the hypothetical landlord would not expect his valuation or legal fees to be paid.

94. I do not accept this aspect of Mr Jourdan's submission. Where a new letting is imposed by the Upper Tribunal on a reference under the Code the landlord is entitled, as a matter of law, to ask the Tribunal to order a payment of compensation equal to its reasonable legal and valuation expenses (paragraph 84(2)(a)). It is to be expected that such compensation will be ordered as a matter of routine, as it is in compulsory purchase cases, and that expectation is the basis of the universal practice concerning contributions to fees on new lettings and renewals. The willing landlord would be aware both of the right and of the practice, in the same way as it would be aware of the basis on which the Tribunal would assess a rent. Mr Stott's approach to valuation assumes that the parties would conduct their rent negotiation with a view to mirroring the basis of valuation under the Code, and would therefore reach agreement on a rent reflecting the "no network" assumption. For the same reason the parties would agree that, since no fees are in fact to be paid under the terms they have settled on, an equivalent annual allowance ought to be included in the rent. That allowance, as Mr Jourdan agreed, should be £445.

95. The Costs of Leases Act 1958, to which Mr Jourdan referred, would not interfere with such an allowance, since the new tenancy does not include a term requiring the tenant to pay the landlord's costs.

96. Finally, Mr Jourdan submitted, and I agree, that no payment in the nature of an inducement can be taken into account in the hypothetical negotiation. There is no need for such a payment, because the landlord is assumed to be willing to proceed with the transaction at the open market rent.

97. If the only factors to be taken into account were those identified by Mr Stott and Mr Jourdan the hypothetical parties would be likely, in my judgment, to arrive at figure of £2,160, which they would be likely to round up to an annual rent of £2,200 or £2,250.

98. Yet, having considered all of the evidence, I am quite sure that the hypothetical parties would not agree a rent of £2,200 or thereabouts for a letting of the Site on the agreed terms. That is because the process of reasoning which leads to that figure omits one factor which Mr Stott acknowledged in paragraph 5.7 of his report was important to the valuation, but which he then left out of consideration. That factor is that the hypothetical negotiation must be assumed to take place in the open market.

99. For the reasons advanced by Mr Jourdan, which Mr Lees did not challenge, and which I have already accepted, the Site must be assumed to have been exposed to the market for a reasonable period, allowing all those with an interest in acquiring a lease for ten years of a new mast site in this location to express an interest and make an offer to the hypothetical landlord. It is agreed that the hypothetical tenant will be an operator, and it is axiomatic that the successful participant in the open market will be the operator who offers the highest sum in rent.

100. Mr Lees cross-examined Mr Stott on whether he had considered the extent of competition in the market. Mr Stott responded by saying that there were other operators in the market, and that the Site itself is shared. In the real world he thought that operators would not compete with each other for sites, and he was unaware of a situation in which operators bid for the same site. Instead, operators would enter into sharing agreements. He explained that the hypothetical tenant he envisaged was one who had identified the Site as meeting its needs and who had approached the owner and instigated discussions. The hypothetical landlord would probably not have been marketing the site (or at least not for telecommunications use), and the operator would carry out an assessment of rent under the Code and make an offer based on its provisions.

101. The negotiation described by Mr Stott in cross examination mirrored the real-world acquisition exercise he had described in his written evidence. It did not reflect the letting in the open market described by Lord Reid in *Lynall v IRC*. In order to be faithful to the section 34 valuation hypothesis, it is necessary to envisage what would be likely to happen if the Site, in its assumed undeveloped condition, was offered by the landlord to the open market for use as a mast site on the agreed terms.

102. The evidence is that the Site currently meets the needs of four operators in this locality, Vodafone, Telefonica, EE and H3G, each of whose apparatus it currently hosts. There was no evidence about the quality of service which the current users of the Site would be able to provide if it was not operational (as must be assumed). Those same operators have divided themselves into two entities to cooperate in the acquisition and ownership of sites, Vodafone and Telefonica collaborating through their joint ownership of CTIL, and EE and H3G branding themselves as MBNL. The location was described by Mr Bodley Scott as a prominent site in this part of Greater Manchester, and its elevation and the modest height of surrounding buildings explain its attraction. If, as section 34 requires, the landlord is assumed to have offered the Site to the market (rather than, as Mr Stott envisaged, a single operator approaching the owner) it is to be expected that it would be of interest to CTIL and MBNL on behalf of the four operators whose needs it currently satisfies. A third participant in the market, Arqiva, is a provider of infrastructure, rather than an operator in its own right, but the evidence shows that it is

also active in leasing sites. There would therefore be competition from at least two potential tenants of the Site, and possibly more.

103. The introduction of a greater element of competition than exists for individual sites in practice would be likely to push up rental values to a level above existing use value. An operator who stopped negotiating after step five of Mr Jourdan's six steps would be likely to find that a rival would enhance its bid to reflect its own need for the Site, and the potential to extract payment from its competitors for allowing them to share in its use. The presence of competition would not result in the payment of inducements to convert the unwilling to the willing, but would cause the sums which the willing tenant would be prepared to pay, and the willing landlord would expect to receive, to rise to a higher level. Mr Stott's answers in cross examination demonstrated that he had not taken that competition into account.

104. The other evidence as to the effect of competition was limited, but Mr Bodley Scott did explain that where sharing actually exists in practice, landlords have been able to extract higher payaway payments, taking a proportion of the tenant's income from sharing agreements, whereas a theoretical entitlement to share which is not made use of has little impact on value. I infer from that evidence that, as one would expect, a proven need or actual demand for a site enhances a landlord's bargaining position.

105. It is to be expected that, in an open market with more than one potential tenant, the hypothetical willing landlord would refer to sums paid under the old Code as a measure of the value of sites to operators and would be able to negotiate a comparable return. Although limited, the evidence allows conclusions to be reached about the level at which the parties would reach agreement.

106. In the part of his report concerned with interim rent, Mr Stott provided evidence of nine comparable "greenfield" (i.e. ground level rather than roof top) sites mostly in urban or industrial locations in Greater Manchester which had been let, or subject to a rent review, in 2017 before the commencement of the Code. He explained that, in his opinion, these transactions would have been negotiated on the pre-Code value to the operator approach in which the level of rent would be assessed by reference to rents agreed for other sites with similar characteristics. These transactions showed a range of rents between £5,650 and £6,735 a year. Because of its larger size Mr Stott considered that this evidence justified a valuation of the Site, on a value to the operator basis as at 6 June 2017 (the appropriate date for consideration of interim rent) of £6,735. He reduced this figure by 20%, to £5,388, to eliminate what he estimated to be the incentive element in the comparable rents, included to "purchase the willingness" of the site provider, and which had to be left out of account because of the statutory assumption of a willing landlord.

107. Mr Stott's interim rent valuation was by reference to a valuation date more than 3 years ago. Normally such evidence would be too historic to be of relevance to a current valuation. However, there was no evidence that rents assessed on a value to the operator basis have reduced significantly since 2017. For his part, Mr Bodley Scott was content to base his section 34 valuation on rents negotiated before December 2017 and did not

suggest that these needed to be adjusted to reflect changes in the period of almost 3 years since they were agreed; on the contrary he suggested rents had not moved significantly. To a large extent this may simply reflect an absence of relevant transactions, but the current becalmed market is the market in which the hypothetical negotiations must be assumed to take place, and I am therefore prepared to rely on Mr Stott's evidence of 2017 values as relevant to the level of rents which could be achieved in a 2020 open market.

108. Mr Stott's June 2017 value to the operator figure of £5,388 is 10% below Mr Bodley Scott's base line valuation of £6,000. The difference between the two figures derives to some extent from the different comparables they used, but to a much greater extent from their approach to the treatment of incentives. Mr Bodley Scott considered that any incentive element in the rent would be worth £500 a year, which represents just over 8% of his £6,000 (although for reasons I did not understand he considered this should be added to his base figure rather than taken away). I am satisfied that Mr Stott is right in principle to adjust his base figure derived from the real-world evidence to eliminate the incentive element as required by the willing landlord hypothesis. If the same approach is taken to Mr Bodley Scott's figure of £6,000, deducting the £500 which he considered any incentive would be worth, the resulting figure of £5,500 is very close Mr Stott's value to the owner open market basis of valuation. If, on the other hand, Mr Bodley Scott's adjustment of £500 is applied to Mr Stott's base line £6,735, the result is £6,235.

109. As Mr Stott explained, it is not possible to be precise when attributing a value to incentives which vary from letting to letting and about which I have received hardly any reliable evidence. The one piece of evidence which shows a proposed incentive expressed as an annual sum is in Arqiva's May 2019 letting of part of the secure yard at the Gillingham Vehicle Testing Centre. Arqiva's confidential internal justification of the rent of £5,000 a year explained that £900 (18%) was offered as an incentive "to avoid the Tribunal". So called "expedited completion payments" of £6,000 were also paid by CTIL to the Buckley Conservative Club on the ten-year letting of the new site in their car park in October 2018, and on the ten-year renewal of an existing lease of a site at the Phoenix Industrial Estate in Harwich in June 2019.

110. This limited evidence does not include an annualised incentive as low as the £500 figure which Mr Bodley Scott considered appropriate and I think it likely that his estimate of the value of incentives is too low. Mr Stott's base valuation was both more generous to the landlord and less dependent on averaging than Mr Bodley Scott's, and his assessment of the significance of incentives was better supported by the evidence. I feel more confidence in his assessment as a result. On the other hand, it cannot be assumed that all of the transactional evidence includes an incentive element. Mr Stott's information was that incentives were offered in specific circumstances. In an open market negotiation Mr Stott's figure of £5,388 would also be liable to be rounded up and I am therefore content to take £5,500 as the rent which would be achieved in a true open market letting of the Site based on the transactional evidence.

111. That figure needs one further adjustment to take account of the fact that the transactional evidence is of rents for lettings which included periodic rent reviews, whereas the parties in this case have agreed not to include a rent review clause, even if

the term is to be ten years, as I have determined it should be. The rule of thumb employed by Mr Bodley Scott to reflect this difference was to add 1% for each year above a standard rent review interval (which he took to be 5 years). Mr Stott thought a 5% adjustment in total was justified. I prefer Mr Stott's view, which reflects a more typical 5-yearly rent review cycle.

112. Adding 5% to £5,500 produces a rent of £5,775 a year, but I think it more likely that the hypothetical willing parties would agree a figure of £5,750. That is the rent I determine under section 34 of the 1954 Act as payable for the new tenancy of the Site.

113. The rent I have determined is, in the event, a rent based on the value of the Site to the operator, not its value to the owner. That is because I am satisfied that in the open market there would be demand for this site, as demonstrated by the presence of four operators on the current installation, and that that demand would push up the rent to levels reflecting the value of the site to the successful bidder. The same may not be true for sites which satisfy the needs of only one operator and which would not be of interest to competitors. In such cases the fact that negotiations would be conducted against the background of the Code's no network assumption may cause the parties to agree a rent reflecting only the value of the site to the owner and the other considerations which Mr Jourdan identified in his suggested valuation framework.

Martin Rodger QC

21 August 2020