

UPPER TRIBUNAL (LANDS CHAMBER)



UT Neutral citation number: [2020] UKUT 0341 (LC)
UTLC Case Numbers: TCR/36/2020, TCR/52/2020

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE – COSTS – Code agreements imposed following dispute over terms and consideration – neither party wholly successful – whether either should be entitled to an order for costs

APPLICATIONS FOR COSTS OF REFERENCES UNDER SCHEDULE 3A TO THE
COMMUNICATIONS ACT 2003

Between:

CORNERSTONE TELECOMMUNICATIONS
INFRASTRUCTURE LIMITED

Claimant

and

LONDON & QUADRANT HOUSING TRUST

Respondent

Re: Maple House,
3 Bournemouth Road,
London, SE15 4BH

Martin Rodger QC, Deputy Chamber President and Mrs D Martin MRICS FAAV

1. By its decision handed down on 14 October ([2020] UKUT 282 (LC)) the Tribunal imposed an agreement under the Electronic Communications Code on the parties to this reference. The agreement confers Code rights on CTIL over L&Q's Maple House, and is for a term of ten years at an annual consideration of £5,000, with an additional £3,068 compensation. Most of the terms of the agreement were settled consensually, either before or during the hearing, and the Tribunal was required to resolve disputes over the terms concerning equipment rights, upgrading, and sharing.
2. The proceedings had commenced on 2 March 2020 when CTIL made a reference asking the Tribunal to impose an agreement for interim rights under paragraph 26 of the Code. On 16 April 2020 CTIL made a second reference seeking the imposition of an agreement under paragraph 20 of the Code for a term of ten years. At a case management hearing on 23 April the Tribunal imposed an agreement for interim rights, on terms which had by then been agreed, and on the basis that the consideration payable would be determined at the final hearing of the references, which were consolidated.
3. The parties have now exchanged submissions on costs. Each party invites the Tribunal to make an order for costs in its favour. The sums involved are substantial. In total CTIL incurred costs exceeding £300,000 while L&Q's costs were more than £150,000.
4. By section 29, Tribunals, Courts and Enforcement Act 2007 and subject to the Tribunal's procedure rules, the Tribunal has full power to determine by whom and to what extent the costs of proceedings in the Tribunal are to be paid. The types of case in which this power may be exercised are limited by rule 10 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, but rule 10(6)(e) confirms that costs may be awarded in proceedings under the Code.
5. No special rules apply to the costs of references under the Code.
6. The principles which the Tribunal applies when making orders for costs are identified in paragraph 24.10 of the Tribunal's recently revised Practice Directions, published on 19 October 2020, which so far as relevant provides:

The Tribunal's power to award costs is discretionary, and it will usually be exercised in accordance with the principles applied in the High Court. The general rule is that the successful party ought to receive their costs from the unsuccessful party. [...] The Tribunal will have regard to all the circumstances of the case, including the conduct of the parties; whether a party has succeeded on part of their case, even if they have not been wholly successful; and admissible offers to settle. The conduct which may be taken into account will include conduct during and before the proceedings; whether a party has acted reasonably in pursuing or contesting an issue; the manner in which they have conducted their case; whether or not they have exaggerated their claim; and whether they have unreasonably refused to engage in ADR or comply with a relevant pre-reference protocol.

7. CTIL asks for an order that L&Q pays its costs of the interim rights reference and 75% of the costs of the main reference. For its part, L&Q proposes that CTIL should be ordered to pay L&Q's costs of both references.

TCR/52/2020 – the paragraph 20 reference

8. In support of his application that L&Q should pay 75% of CTIL's costs of the main reference Mr Radley-Gardner submitted that CTIL had been the successful party. To the extent that terms had been agreed each party should be responsible for its own costs, but the issues with which the hearing was concerned were mainly resolved in CTIL's favour. Of the three contentious terms, it had successfully resisted an equipment cap and obtained an unlimited right to upgrade; it had secured a limited right to share for any two operators and otherwise as under paragraph 17 of the Code. It had offered consideration of £162.28 with compensation initially at £7,940 later reduced to £4,458,45. Aggregating its first compensation and consideration offer as if payable over ten years it amounted to about £500 a year. The Tribunal had awarded consideration of £5,000, so CTIL's aggregate position had been much closer to the Tribunal's determination than the figure of £16,000 sought by L&Q.
9. Mr Calland sought an order that CTIL pay all of L&Q's costs, or alternatively should pay a proportion of L&Q's costs. That proportion should either be two thirds of the costs incurred in the reference (other than the costs of an application for disclosure which CTIL had already been ordered to pay), or it should be the costs of the consideration issue and half of the remaining costs. Such an order was justified, he submitted, because L&Q was the successful party and because of the way in which the reference had been conducted by CTIL.
10. Mr Calland acknowledged that, in its statement of case L&Q had formally required CTIL to prove that the paragraph 21 conditions were satisfied, but it had never disputed the imposition of an agreement in principle. The mere fact that an agreement had been imposed, as requested by CTIL, was therefore no indicator of success in the reference. The real issues had been about terms, including financial terms. On consideration and compensation L&Q had obtained a substantially better outcome than CTIL had proposed and should be regarded as the successful party because CTIL could have protected itself by making an offer. The Code was still unfamiliar and L&Q could not be criticised for running an unrealistic case while valuation principles were still becoming established. CTIL, in contrast, had offered less than a third of the sum determined by the Tribunal in *Islington*. It had also been unwilling to take seriously L&Q's legitimate concerns about the management of access and upgrading, which were eventually vindicated by the Tribunal's inclusion of a sum to reflect those costs in its assessment of consideration. L&Q succeeded more generally on terms because the final agreement provided it with important safeguards. Mr Calland suggested it was not appropriate to take a mechanistic approach to terms which had been agreed, by considering how many concessions had been made by one side or the other. The outcome on those terms which had remained in dispute until the final hearing was a score draw.
11. Both parties sought to bolster their case by criticising the conduct of the other. Mr Radley-Gardner complained that CTIL had been put to the expense of dealing with

complex evidence from Mr Bodley Scott, in the form of two substantial reports, the thrust of which had already been rejected by the County Court in *Vodafone v Hanover Capital*. That was an additional factor in favour of ordering L&Q to pay a proportion of CTIL's costs. Mr Calland criticised CTIL's approach to the proceedings as high-handed and unreasonable, and gave a number of examples of inefficiency, poor behaviour, unwarranted mistrust of L&Q's motivation, and lack of cooperation. CTIL saw the reference as a test case and devoted huge resources to it, while L&Q had nothing to gain except to protect the safety of the building and its residents.

12. We first consider whether either party can be regarded as having succeeded in the reference.
13. Mr Radley-Gardner rightly accepted that CTIL could not claim to be the successful party simply because an agreement had been imposed, as L&Q had not resisted the claim in principle. Both sides also recognised that neither could claim to have succeeded in relation to terms which had eventually been agreed. That caused them to focus on those terms which the Tribunal had been required to determine. Again, we think that is the correct approach in principle, at least where the number and subject of the agreed changes to the operator's draft have been significant. But that recognition creates a difficulty for the Tribunal. In most Code references the site provider agrees that a Code agreement should be imposed but seeks modification of the operator's standard terms to meet its own concerns or preferences. Negotiations typically go on until the hearing begins, and sometimes continue during the hearing. Normally most terms are agreed, but only after significant costs have been incurred. Those costs are no doubt increased by the fact that negotiations are conducted while each party prepares to present its case to the Tribunal. It is not possible for the Tribunal to know how much time, effort and expense has been successfully devoted to reaching agreement, and how much has been incurred in failing to reach agreement.
14. Nor is it realistic to treat all issues as equally important, or particular issues as equally important to both parties. A Code agreement is inevitably a complex document (although the standard forms used by operators could be considerably simpler than they are) and changes made in one place may make a difference to the practical consequences of other provisions which remain unchanged. In this case, the issues of whether there should be an equipment cap and whether upgrading should be restricted were both of critical importance to CTIL because they concerned its ability to maximise its use of the site and modernise its apparatus. From L&Q's perspective those issues were important for quite different reasons concerning the number and frequency of visits and the variety of contractors who would need to have access to its building. In the end those concerns were ameliorated by limiting the number of operators entitled to share use of the site and by agreement on a stricter access regime. L&Q's success on those issues, either by agreement or by the Tribunal's determination, did not diminish the significance to CTIL of the issues on which it succeeded, but they made the absence of an equipment cap or a limit on upgrading less of a concern to L&Q.
15. For these reasons we do not think we would be justified in treating either party as having succeeded on the disputed terms. In practical terms each achieved most, but not all, of what they wanted to achieve.

16. Nor do we consider that either party can be said to have succeeded on the issues of consideration or compensation. Neither achieved anything like the outcome they had sought. Mr Bodley Scott led L&Q over the top in search of an unrealistic figure with predictable consequences. For its part CTIL offered a provocatively small sum, despite the guidance which the Tribunal had given in *Islington*, with a similarly predictable result. We recognise, however, that Code valuation is unusually artificial and that when the experts wrote their original reports it was still in its relative infancy. Neither expert had the benefit of the County Court's decision in *Hanover Capital* when forming their views.
17. Looking at the outcome in the round, we do not consider that either party can consider itself to have been any more successful than the other. That conclusion points firmly towards making no order as to costs, unless the various allegations of misconduct require a different order.
18. We do not consider that the way this reference has been conducted either requires or justifies an order for one party to contribute to the other party's costs. There is some force in Mr Calland's criticism of CTIL's inflexible approach and its misreading of L&Q's motivation, but we make allowances for the additional pressure which the statutory time limit on determination of Code claims places on all parties, and we note too that the inefficiency and intransigence against which some of L&Q's complaints were directed have already been the subject of adverse costs orders (in respect of an earlier abortive reference and the refusal to disclose the Whitehall agreement). CTIL's main complaint was that, like the Bourbons, Mr Bodley Scott had learned nothing and forgotten nothing, with the result that his evidence was excessively lengthy and repeated a thesis which had already been rejected. We agree that it was excessively lengthy, but we do not think Mr Bodley Scott can be fairly criticised for not anticipating the rejection of his views in *Hanover Capital*.
19. Our conclusion is that no order should be made in respect of the costs of the main reference. That leaves only the interim rights reference.

TCR/36/2020 – the interim rights reference

20. On behalf of CTIL, Mr Radley-Gardner submitted that CTIL should have its costs of the paragraph 26 reference because L&Q had maintained until a late stage that the conditions in paragraph 21 of the Code were not satisfied. It had not finally agreed to the principle of an agreement being imposed until 20 April. L&Q had also put CTIL to the expense of considering detailed evidence dealing with access and safety issues.
21. When L&Q was invited in November 2019 to agree to grant rights over the roof of its building it made clear in a letter from its solicitors of 5 December that it did not object in principle but had concerns about a number of matters. In particular L&Q wished to be reassured about the location of the proposed apparatus and the consequences of installation for its own solar panels which cover most of the roof. It also stated that it had not received the Code notices on which CTIL relied because they had not been sent to its registered office or to its solicitors. As a result, it had not been provided with plans of what was proposed. Nor had L&Q yet taken advice from a telecommunications surveyor because CTIL had refused to provide an undertaking to

pay the costs of such advice when L&Q had requested one on 6 May 2019 (CTIL had been willing to provide an undertaking only that it would make a limited contribution to L&Q's professional costs in the event of an agreement being entered into).

22. We do not think L&Q's requests for details of what was proposed by CTIL and for other information can be characterised as unreasonable. It is true that in its solicitors' letter of 19 March 2020 L&Q stated that it did not "currently" accept that the paragraph 21 conditions were met, but that was on the basis that it could not yet assess the impact of the proposed installation on the safety of its own activities on the roof, not because it had any objection in principle to what was proposed. CTIL seems to us to have misread the letter of 19 March, both in its application for costs and at the time. Its own solicitors were at times unhelpful and obtuse in these exchanges, particularly when it was pointed out to them that the notices which included plans of what was proposed had been misdirected and had not yet been seen by L&Q. They appear to have treated the resulting questions seeking clarification as evidence of resistance to their proposals and responded accordingly.
23. We do not accept that CTIL were put to unnecessary expense by the way L&Q dealt with the application for interim rights. Nor do we think L&Q can be criticised for filing evidence of its own dealing with its concerns, and its doing so did not become unreasonable simply because those concerns were eventually addressed. It was for CTIL to decide what evidence to file with the reference and we do not accept that it was forced by L&Q into a more elaborate presentation of its case that it might otherwise have deployed. Despite the disagreeable tone of the correspondence the parties appear to have been moving closer to a consensus on the terms of an interim rights agreement which undermines the basis of CTIL's application for costs.
24. On behalf of L&Q, Mr Calland submitted that CTIL should be ordered to pay its costs of the interim rights reference. It had presented CTIL with an unnecessarily complex draft agreement which gave rise to a number of points which had to be negotiated away. It had adopted a dogmatic approach which failed to take L&Q's concerns seriously. Most of the disputed points of drafting were resolved in L&Q's favour. In the end very little use had been made of the interim rights and CTIL had only begun work on the roof shortly before the final hearing.
25. We do not think either party should be required to pay the costs incurred by the other in the interim rights reference. We have reached that conclusion for the following reasons.
26. First, and most importantly, it is not possible to regard either party as the successful party on the issue of the disputed terms. The interim rights reference lasted less than two months and in that period the parties were moving towards a consensus on terms which they eventually achieved. Both sides made concessions from their original positions and the final result was a consensus.
27. Secondly, L&Q did not oppose an agreement in principle and once it was sufficiently informed of CTIL's proposals the dispute was entirely about the terms to be imposed. One of those terms was consideration, but that was left unresolved until the final

hearing and we do not take the sum eventually awarded into account when determining the applications for costs of the interim rights reference.

28. Thirdly, an agreement under paragraph 26 of the Code cannot be achieved consensually and can only be imposed by the Tribunal. The reference itself was necessary, whatever L&Q's attitude.
29. Fourthly, the fact that very little use was made of the interim rights which were granted is not a factor to which we give weight. The Tribunal was able to list the final hearing in September, within five months of the agreement for interim rights being imposed. CTIL was on site and making use of the rights before the hearing, and a further three weeks elapsed before the Tribunal's decision conferred paragraph 20 rights. We do not consider that the application for interim rights was wasted.
30. Once again, we are satisfied that the proper order is to make no order in respect of the costs of the reference.

Martin Rodger QC
FAAV
Deputy Chamber President

Mrs D Martin MRICS

3 December 2020