UPPER TRIBUNAL (LANDS CHAMBER)

: LC-2022-170

Royal Courts of Justice,
London WC2A

4 July 2022

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATION CODE – INTERIM RIGHTS – costs – usual practice explained

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN:

EE LIMITED AND HUTCHISON 3G UK LTD

Claimants

-and-

HSBC BANK PLC

Respondent

Re: The Maybird Centre,
Birmingham Road,
Stratford-Upon-Avon
CU37 OHZ

Martin Rodger QC, Deputy Chamber President

Heard on 17 June 2022 via CVP

James Tippler, instructed by Winckworth Sherwood LLP, for the claimants
Jonathan Wills, instructed by Bryan Cave Leighton Paisner LLP, for the respondent

No cases are referred to in this decision:

1. A hearing of this reference under paragraph 26 of the Electronic Communications Code took place on 17 June 2022 attended by Mr James Tippler on behalf of the claimant telecommunications operators and Mr Jonathan Wills on behalf of the respondent site provider. In the reference the claimants sought the right to go on to land belonging to the respondent at the rear of The Maybird Shopping Centre, at Birmingham Road, in Stratford-Upon-Avon to undertake surveys to ascertain whether the land would provide a suitable site for its electronic communications apparatus.

2. Before the hearing the parties had agreed the terms of an order imposing an agreement on them for interim rights pursuant to paragraph 26 of the Code. At the conclusion of the hearing I made an order imposing that agreement on the parties.

3. The only live issues at the hearing concerned compensation and costs.

4. I gave directions that the claimants should pay compensation to the respondent under paragraphs 25 and 84 of the Code equal to its reasonable transaction costs, which are to be determined by the Tribunal if the parties are unable to agree. I directed that the Claimants were to make a payment on account of that compensation in the sum of £12,500.

5. I also ordered that the claimants should pay the respondent's costs of the reference, which I summarily assessed on the standard basis in the sum of £15,000.

6. I have been asked by the parties to explain my reasons in writing, and I am happy to do so in order that that the Tribunal's approach to costs in cases of this sort should be more widely known.

7. There was no issue over the respondent's entitlement to its reasonable transaction costs (i.e. the costs of negotiating and completing the agreement, as opposed to the costs of participation in the reference and preparing for the hearing before terms were agreed); those transaction costs are to be agreed or determined by the Tribunal.

8. As for the costs of the reference itself, most references under paragraph 26 of the Code for the imposition of an agreement conferring interim Code rights to enable operators to conduct surveys of potential telecommunications sites are resolved by consensus, without the need for a hearing. Often parties file an agreed form of order which they invite the Tribunal to make, including in it an agreement that there shall be no order for the costs of the reference.

9. It should nevertheless be appreciated that the costs of references under paragraph 26 are in the discretion of the Tribunal. Where parties have not agreed that there should be no order for costs the Tribunal's usual order in such cases is that the operator should pay the site provider's costs, which will then usually be summarily assessed. This case is no exception.

10. The Tribunal's usual order reflects the principle that the costs of a reference are necessary because interim Code rights cannot be conferred by agreement but may only be imposed by order of the Tribunal. Statutory rights of compensation may also only be conferred by order of the Tribunal. The costs incurred by a site provider in a reference

made necessary because an operator wishes to have a Code right to undertake a survey ought not in principle to fall on the site provider.

11. The Tribunal's usual order also reflects its practice in other circumstances where, in the public interest, powers of compulsory acquisition are exercisable on terms to be determined by the Tribunal. The costs incurred by claimants in establishing the amount of compensation to which they are entitled following the compulsory acquisition of their land are part of the expense that has been imposed on them by the acquisition. For that reason, the Tribunal will normally make an order that the costs incurred by a claimant who is awarded compensation should be paid by the acquiring authority (see paragraph 24.2 of the Tribunal's Practice Directions).

12. In this case the respondent was prepared, at all times, to allow the claimants to have access to its land to undertake surveys. For reasons which were not explained, the claimants ignored the terms of the draft agreement proposed by the respondent and commenced this reference without responding to them. That is an additional reason why the respondent should have its costs of the reference.

Martin Rodger QC,

Deputy Chamber President

4 July 2022

Right of appeal

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