UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2019] UKUT 164 (LC)
UTLC Case Number: TCR/28/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE – code rights – application to confer code rights on operator in respect of existing mast site – whether site owner intends to redevelop land and would be prevented from so doing if rights conferred – site owner proposing to remove existing monopole mast and construct own taller lattice mast for establishment of fixed wireless access broadband service over landed estate and to be made available to mobile network operators – business plan – held no firm, settled and unconditional intention to redevelop – paragraph 25(1) of Schedule 3A to the Communications Act 2003

BETWEEN: **EE LIMITED AND HUTCHISON 3G UK LIMITED**

Claimants

and

SIR JAMES H E CHICHESTER
JOHN R WESTMACOTT &
SOTIRIOS T F LYRITZIS

Respondents

AS TRUSTEES OF THE MEYRICK 1968 COMBINED TRUST OF MEYRICK ESTATE MANAGEMENT

Re: Telecommunications Site Cat Plantation,
Ringwood Road,
Hinton,
Hampshire.

Judge Elizabeth Cooke and A J Trott FRICS

Sitting at Royal Courts of Justice

on
26 February 2019 – 1 March 2019

Graham Read QC and Shaen Catherwood for the claimants, instructed by DWF LLP
Alan Maclean QC and Jonathan Wills for the respondents, instructed by Fladgate LLP

The following cases are referred to in this decision:

Betty's Cafes Ltd v Phillips Furnishing Stores Ltd [1959] AC 20
Cardiff City Council v National Assembly for Wales and Malik [2007] 1 P & CR 9
Cunliffe v Goodman [1950] 2 KB 237
EE Limited and Hutchison 3G UK Limited v Mayor and Burgesses of the London Borough of Islington [2019] UKUT 53 (LC)
R (Robert Hitchins Ltd) v Worcestershire County Council [2015] EWCA Civ 1060
S Franses Ltd v Cavendish Hotel (London) Ltd [2018] UKSC 62

Introduction

1. Both the Claimants are mobile telephone network operators. They are competitors, but they share infrastructure, such as masts and cabinets, in many locations. They seek to acquire rights pursuant to Schedule 3A to the Communications Act 2003, known as the Electronic Communications Code ("the Code"), over land owned by the Respondents. The land is a mast site at the Cat Plantation on the Respondents' Hinton Admiral Estate in the New Forest in Hampshire. The Respondents are not willing to confer those rights on the Claimants and therefore the Claimants have made an application to this Tribunal.

2. The matter was assigned to the special procedure and a number of directions have been given since the application was made in May 2018. It was listed before us for a four day hearing commencing on 26 February 2019. The issues in dispute are:

a. Should any of the rights sought by the Claimants be imposed on the Respondents?

b. If so, which ones and what other terms should be imposed?

c. What should be the consideration and compensation?

3. It was clear at the outset of the hearing that the volume of evidence was such that four days would be insufficient. We heard evidence on the first of those three issues and received written closing submissions afterwards; this is our interim decision on the first issue only, and only insofar as we are asked to consider the Respondents' reliance upon paragraph 21(5) of the Code. Following this decision, there will have to be a hearing to resolve any further dispute on the first issue, as well as the second and third issues.

4. At the hearing the Claimants were represented by Graham Read QC and Shaen Catherwood of counsel, and the Respondents by Alan Maclean QC and Jonathan Wills of counsel; we are most grateful to them all for their helpful arguments. The hearing took place in February, and written closing submissions were provided to us on 12 March 2019.

5. The case raises an interesting question about paragraph 21(5) of the Code, which enables occupiers of land to resist the imposition of rights under the Code ("Code rights") where they intend to redevelop the land in question and cannot reasonably do so if Code rights are granted. It represents a pragmatic response to the needs of landowners, and a recognition that there are circumstances in which the landowner's right to use land as he or she chooses should take priority over the need of the public for "access to a choice of high quality electronic communications services" as paragraph 21(4) puts it. So a landowner with serious plans for example to build housing on a field should not be prevented from doing so by being forced to have a mobile phone mast on part of the site.

6. However, the Respondents in this case plan to redevelop the mast site by putting up their own mast in place of the Claimants'.

7. It is unlikely that the Law Commission contemplated redevelopment of this nature when it recommended a provision to the effect of paragraph 21(5). Under the scheme recommended by the Law Commission, such a redevelopment would have made no financial sense. Under that scheme the landowner would have been receiving a market rent for the site, even though the mobile operator would provide its own mast, so it would have been pointless and uneconomic for the landowner to install their own. But under the Code as enacted the landowner receives consideration that is likely to be considerably lower than the market rent previously payable (*EE Limited and Hutchison 3G UK Limited v Mayor and Burgesses of the London Borough of Islington* [2019] UKUT 0053 (LC)). Code rights cannot be obtained over electronic communications equipment such as a mast since it is excluded from the definition of "land" (paragraph 108 of the Code); therefore a landowner who provides their own mast cannot be subjected to Code rights, can demand whatever consideration they choose, and impose whatever terms they wish. At the heart of the present case is the question whether the Respondents have a settled intention to carry out this redevelopment and, if so, whether their motive is to prevent the Claimants from claiming Code rights. If so, does that motive prevent them claiming the protection of paragraph 21(5)?

8. In the paragraphs that follow we set out first the factual background insofar as it is not in dispute, and then describe the Respondents' redevelopment plan. We explain the relevant law, and then turn to the issue we have to decide.

The factual background

9. The Respondents are the trustees of the Meyrick 1968 Combined Trust ("the Trust"), and the registered proprietors of the subject mast site. The Trust is one of several legal entities holding land and businesses upon trust for the Meyrick family. Among the Trust's properties is the Hinton Admiral Estate ("the Estate"), an area of some 5,600 acres, owned by the family for some 300 years along with the Gervis Meyrick Estate in Bournemouth and the Bodorgan Estate on Anglesey. About 250 people live or work on the Estate, which comprises farmland, forest, some houses, two hotels (one of which has closed), some commercial premises and about 150 acres devoted to solar panels.

10. Mr George Meyrick is a beneficiary of the Trust and describes himself as the "Principal" of the Estate; he is also the chairman and director of Meyrick Estate Management Ltd, the company that manages the Estate. In effect the Estate is run by Mr Meyrick, along with Mr Jeremy Hinton and Mr Liam Aggett who are employed by the management company as Development Director and Estate Manager respectively. We say more later about the role of the Respondents themselves as trustees. Mr Meyrick says that since he took on the role of Principal in 2010 he has sought to breathe new life into the Estate, broaden its activity beyond its traditional focus on letting houses and farmland, and take greater control over the Estate and its assets.

11. The Claimants occupy four mast sites on the Estate. Each site has been leased to them by the Respondents, but the leases have all now expired (and all were excluded from the protection of the Landlord and Tenant Act 1954). Running north to south, the sites and the dates on which the leases expired are as follows:

Forest Lodge	22 August 2016
Hinton Park	21 May 2016
Cat Plantation	26 September 2017
Scout Hut	29 September 2008

12. The first three sites listed above are close to the A35; the Scout Hut is in the Highcliffe area of Christchurch. The Cat Plantation site is described by the Respondents as being "close to the core of the Estate" (Statement of Case, paragraph 7). The Claimants share a mast at each site; at Forest Lodge and Scout Hut there is also a mast owned by Cornerstone Telecommunications Infrastructure Ltd ("CTIL") and used by Vodafone and O2. The tallest of the existing masts is the CTIL mast at Forest Lodge, being 25m high; the Claimants' mast at that site is 15m high, and the rest are between those two heights.

13. Negotiations for new ten-year leases of the sites took place in 2016, and continued into 2017. The Claimants say that they were willing to conclude new leases under the old Code[1], and at the rates payable under the old Code, prior to the coming into force of the Code on 28 December 2017. Heads of terms were agreed between the parties and a draft agreement was circulated in November 2017. On 4 December the Respondents sought to add to the agreed terms a further clause to the effect that at the end of the term the Claimants would remove all their equipment from the site unless by that date the Respondents had asked them not to do so. In that event the Claimants were to sell their apparatus at market value to the Respondents. The Claimants did not agree to this, and negotiations came to an end.

14. On 29 March 2018 the Claimants served a notice upon the Respondents under paragraph 20 of the Code stating the Code rights they wanted, and in the absence of agreement they commenced proceedings in the Tribunal on 14 May 2018. The Respondents' statement of case, dated 11 July 2018, stated that they resisted the Claimants' application on the basis that they planned to redevelop the site, and invoked paragraph 21(5) of the Code.

The Respondents' redevelopment project

15. Central to our decision is the Respondents' stated wish to redevelop the Cat Plantation site. Here we set out what it is said that they intend to do (leaving aside for the moment whether that is truly their intention).

16. Although the Respondents' plans have clearly been developing over time, essentially there have been two versions of their scheme. The first ("the original scheme") was outlined in their Statement of Case and set out in more detail in Mr Meyrick's first witness statement, and its financial basis was elucidated in the business plan disclosed (following an order for specific disclosure) on 12 December 2018 though other earlier evidence referred to such a plan. The second

[1] Schedule 2 to the Telecommunications Act 1984

("the current scheme") is as disclosed in Mr Meyrick's fourth witness statement dated 15 February 2019 and the revised business plan exhibited to it and he gave more information about it in the course of cross-examination. The constant factor in both versions of the scheme is the removal of the Claimants' 22.5m monopole mast from the Cat Plantation site, and the installation of a 35m lattice mast capable of supporting not only mobile phone antennae belonging to the Claimants and to other operators but also the apparatus required for fixed wireless access broadband ("FWA") to serve the Estate.

17. The original scheme involved the following steps:

a. The existing monopole masts on all four sites, including the two CTIL masts, were to be removed.

b. New lattice masts were to be put up on all four sites, all higher than the existing masts.

c. The 35m lattice mast at the Cat Plantation would support dishes for the transmission of FWA, supplemented by relay dishes at the other three sites, for the benefit of the Estate and neighbouring areas. The FWA transmission at the Cat Plantation would be able to use the existing fibre infrastructure at that site.

d. The Claimants and other mobile network operators ("MNOs") (in particular Vodafone and O2) were to be invited to place their antennae on the four new masts, below the FWA dishes.

18. The original scheme necessarily involved the provision of temporary masts at or near each site to host the Claimants' and other operators' antennae when the current masts are taken down and before new masts are put up.

19. In summary, six masts would be replaced by four taller ones; the additional height would take the new masts above the tree canopy and make possible the FWA service (which requires a line of sight connection to the property served). The Respondents say that the Estate would benefit from a better broadband service as well as a wider choice of mobile service, thus improving the service available to residents but also, and crucially, bringing benefits to business, in particular the East Close Hotel (paragraph 17(6) of the Respondents' Statement of Case).

20. The business plan for the original scheme shows how this would be financed. The cost of building the four masts and communications cabinets is said to be £323,000. Rental income from the four mobile operators on the four sites is predicted to be £96,000 in 2019, rising to £173,638 in 2043. Non-mobile rentals are predicted to be initially £2,000 pa, rising to £3,617 in 2043.

21. The current scheme responds to three important developments. The first is the grant of planning permission on 4 February 2019 for the 35m lattice mast at the Cat Plantation site. The second is the Claimants' expressed intention (in witness statements served in November 2018) that they will not place their antennae on the Respondents' mast. The third is the agreement reached

(subject to contract) with Wessex Internet Ltd ("Wessex Internet") to install FWA equipment on the Cat Plantation Mast and provide a superfast broadband service for the Estate.

22. Mr Meyrick's evidence in cross-examination was that there is no need for all four sites to be redeveloped together; the Cat Plantation site can go ahead alone. The current scheme is therefore for one site. It has a rather more certain basis than did the original scheme, in that planning permission for the Cat Plantation site is no longer an unknown, and a broadband provider stands ready – although is not yet contractually bound – to provide the service that the Respondents want. Set against that is the Claimants' expressed unwillingness to participate.

23. The new business plan exhibited to Mr Meyrick's fourth witness statement of 15 February 2019 sets out the financial basis of the current scheme in three alternative forms, assuming respectively that no, one or two[2] MNOs would put their antennae on the Cat Plantation site. As before, the Trust will pay for the building of the mast which is said to be £69,500[3] plus fees. If the mast is occupied by one or two MNOs there would be an additional cost per cabinet of £7,500 plus fees. The Trust would also pay for the installation of Wessex Internet's equipment (£9,000[4]) and underwrite the cost of the delivery of the broadband service until break-even point is reached after 18 months. The rental income to be received from the MNOs is reduced because only one mast is now included in the appraisal. Such income varies from zero on the first scenario to £25,476 pa from year 3 on the third scenario. On the plus side, the provision of two free broadband connections by Wessex Internet for the Estate is valued at £5,400 in 2020 and £10,800 pa thereafter. Rental income from Wessex Internet, including the value of the two free commercial broadband connections and allowing for savings in leased line costs to the Estate Office, is projected to be £6,516 in 2020 and £21,553 in 2044.

The law

24. The Code governs the legal relationship between MNOs and those who occupy the land that those operators need to use.

25. Section 106(3)(a) of the Communications Act 2003 provides that the Code shall have effect "in the case of a person to whom it is applied by a direction given by OFCOM." We refer to such persons as "Code operators". The Claimants are both Code operators.

26. Paragraph 3 of the Code sets out the Code rights which can be conferred on a Code operator by an occupier of land, or imposed upon the occupier in default of agreement. In summary, they are rights to install and keep equipment on land and to carry out works on land. Typically the equipment consists of masts, cabinets and other apparatus. Paragraph 5 of the Code defines "electronic communications apparatus" ("ECA") as "apparatus designed or adapted for use in connection with the provision of an electronic communications network." Code rights can be

[2] From year 3.
[3] Equipment £30,000 plus installation £39,500
[4] Less savings of £2907 for the Estate Office leased line installation costs

obtained over land, and paragraph 108 of the Code states that "land' does not include electronic communications apparatus".

27. Where a Code operator wants Code rights over land and cannot obtain them by agreement, it may apply to the Tribunal for an order under paragraph 20; paragraph 23 enables the Tribunal to make an order conferring those rights upon the operator together with such terms as it thinks appropriate. The legal test to be satisfied before such an order can be made is set out in paragraph 21 of the Code:

> "(1) Subject to sub-paragraph (5), the court may make an order under paragraph 20 if (and only if) the court thinks that both of the following conditions are met.
>
> (2) The first condition is that the prejudice caused to the relevant person by the order is capable of being adequately compensated by money.
>
> (3) The second condition is that the public benefit likely to result from the making of the order outweighs the prejudice to the relevant person.
>
> (4) In deciding whether the second condition is met, the court must have regard to the public interest in access to a choice of high quality electronic communications services.
>
> (5) The court may not make an order under paragraph 20 if it thinks that the relevant person intends to redevelop all or part of the land to which the code right would relate, or any neighbouring land, and could not reasonably do so if the order were made."

28. The Respondents resist the imposition of Code rights on the basis of paragraph 21(5). They say that they intend to redevelop the land in question, and could not do so if the Claimants get Code rights. If we find that that is correct, then Code rights cannot be imposed. Otherwise the Respondents can resist the imposition of Code rights only if we find in their favour on the second condition, in paragraph 21(3); they accept that the first condition is met because they can be adequately compensated in money (Respondents' skeleton argument paragraph 31), although of course the level of that compensation is not agreed. We did not hear argument about the second condition, and unless the Respondents concede that point it will have to be considered at a later hearing.

29. We heard evidence only about whether the Respondents can bring themselves within paragraph 21(5), and there is more to say about the legal background to that provision.

30. The Respondents say, as we outlined above, that they intend to redevelop the Cat Plantation site by putting up a new mast. It will be a taller mast so as to be able to support the provision of FWA for the Estate. That cannot be achieved if the Claimants' application succeeds, because among the Code rights that the Claimants want is the right to keep their equipment on the site, and the Respondents' plan involves the removal of the Claimants' mast. They say, and we accept, that planning restrictions would make it impossible for them to put up a new 35m mast for broadband

alone, alongside the existing mast at the Cat Plantation. So we accept that the redevelopment, under the original scheme or the current scheme, could not reasonably be carried out if the Claimants were granted the Code rights that they seek.

31. The more difficult issue under paragraph 21(5) relates to the Respondents' intention to redevelop. The Claimants say that in considering whether the condition in paragraph 21(5) has been met, the Tribunal is bound by the case law relating to section 30(1)(f) of the Landlord and Tenant Act 1954. That provision is one of the grounds on which a landlord may recover possession of business premises at the end of the term, despite the security otherwise offered to business tenants under the 1954 Act (where the parties have not contracted out of that security). Section 30(1)(f) enables a landlord to oppose the grant of a new business tenancy on the following ground:

> "that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding."

32. The terms are therefore very similar to those in paragraph 21(5), allowing for the fact that Code rights need not necessarily be conferred in a lease but may amount to an easement or a contractual licence, or may relate to a temporary matter such as lopping trees. So wider language is used in paragraph 21(5) than in section 30(1)(f); the relevant person can resist if he or she cannot reasonably carry out the redevelopment "if the order were made" rather than "without obtaining possession of the holding". But the core idea is the same.

33. The connection with section 30(1)(f) is apparent from the terms of the Law Commission's recommendation, at paragraph 6.110(3) of its report *The Electronic Communications Code* (Law Com No 336, 2013), that it should be possible for the site provider to resist the imposition of code rights on the grounds that he or she:

> "intends to redevelop all or part of the land on which the apparatus is sited, or neighbouring land, and could not reasonably do so unless the Code Rights are brought to an end".
>
> The footnote to that paragraph reads "Compare section 30(1)(f) of the Landlord and Tenant Act 1954".

34. On the basis of that connection Mr Read QC argued that the Tribunal is bound by the case law relating to section 30(1)(f). He says, first, that in order to establish an intention to redevelop, the Respondents must meet the well-known two-stage test established in *Cunliffe v Goodman* [1950] 2 KB 237, which was expressed as follows by Asquith LJ (at 253):

> "An "intention" to my mind connotes a state of affairs which the party "intending" … does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition."

35. So there has to be a subjective intention; the landlord (in the context of the Landlord and Tenant Act 1954) must decide to bring about the redevelopment; there is also an objective element, in that there must be a reasonable prospect of the landlord being able to do so. As Lord Sumption put it in *S Franses Ltd v Cavendish Hotel (London) Ltd* [2018] UKSC 62, at paragraph 8, section 30(1)(f) involves a two-stage test:

> "The landlord had to prove (i) that it had a genuine intention to carry out qualifying works; and (ii) that it would practically be able to do so."

36. In *S Franses Ltd* the landlord admitted that his only purpose in carrying out the redevelopment was to recover possession from the tenant. The Supreme Court held that a conditional intention of that nature is insufficient to meet the test in section 30(1)(f). Lord Sumption said at paragraph 19:

> "… the landlord's intention to demolish or reconstruct the premises must exist independently of the tenant's statutory claim to a new tenancy, so that the tenant's right of occupation under the new lease would serve to obstruct it. The landlord's intention to carry out the works cannot therefore be conditional on whether the tenant chooses to assert his claim to a new tenancy and to persist in that claim. The acid test is whether the landlord would intend to do the same works if the tenant left voluntarily."

37. Likewise, say the Claimants, the Respondents cannot satisfy the requirements of paragraph 21(5) if their intention to redevelop is conditional on whether the Claimants assert their claim to Code rights. The acid test is whether the Respondents would intend to do the same works if the Claimants did not seek Code rights.

38. For the Respondents, Mr Maclean QC resisted this. He pointed to the different terms of section 30(1)(f) of the 1954 Act and of paragraph 21(5) of the Code and says that their different wording indicates that they are very different provisions. That is clearly not correct. Paragraph 21(5) was explicitly modelled, by the Law Commission, on section 30(1)(f); the difference in wording is trivial and is dictated by its context (see paragraph 32 above). However, we agree with Mr Maclean QC that the case law associated with section 30(1)(f) is not binding authority in the context of the Code and of paragraph 21(5). Clearly the Code, new as it is, must be looked at with a clean slate and as a fresh start. The principles applicable to the 1954 Act should be adopted where they are relevant, although we are mindful of the need to be aware of the different context in Code cases. Not all principles will be relevant and the factual background will have an effect on this; issues of timing, for example, need to be carefully considered. But we accept (as the Respondents themselves argue) that where intentions have changed over time it is the intention at the date of the hearing that is relevant: *Betty's Cafes Ltd v Phillips Furnishing Stores Ltd* [1959] AC 20. And it makes obvious sense to adopt the test imposed in *Cunliffe*. Parliament's intention would be frustrated if the defence in paragraph 21(5) could be made out where the relevant person did not have a firm intention to carry out the redevelopment plan, or where the plan was not something that that person has a reasonable prospect of being able to bring about of their own volition.

39. The test in *S Franses Ltd* is likewise equally relevant. The Respondents' stated intention is not to remove the tenant and retain possession of the site, as it was in *S Franses Ltd*; it is to get possession, redevelop, and then allow the Claimants back in on the Respondents' own terms. If

their intention to do so is only to prevent the acquisition of Code rights, then that is an intention to frustrate a central policy of the Code. Just as an important policy of the Landlord and Tenant Act 1954 is to confer a benefit on business tenants in the form of the new tenancy and the continuance of possession, the policy of the Code is to enable Code operators to acquire Code rights and to do so at a price calculated on the basis of assumptions that are favourable to them. A redevelopment conceived purely to prevent the acquisition of Code rights, which the relevant person would not pursue if Code rights were not sought, will not satisfy the test in paragraph 21(5) for the reasons given by the Supreme Court in *S Franses Ltd.* Such an intention is not the unconditional intention that Parliament sought to protect.

40. Accordingly, whether the Respondents wish to build a mast or a housing estate, they can resist the Claimants' application only if they can demonstrate both that they have a reasonable prospect of being able to carry out their redevelopment project and that they have a firm, settled and unconditional intention to do so. If they intend to do so purely in order to prevent the Claimants from getting Code rights then they will fail.

Can the Respondents rely on paragraph 21(5) of the Code?

41. In the light of that two-stage test we can now consider the Respondents' case and their reliance upon paragraph 21(5). In doing so we have to consider the evidence given by the witnesses.

42. For the Claimants we heard evidence from the following witnesses of fact: Mr James Allerton, the Estate Manager of MBNL (which is a joint venture company owned jointly by the Claimants and which manages some 20,000 sites occupied by one or both of the Claimants); Ms Suzanne Copeman, Head of Deployment and Sites Management for Hutchison 3G UK Ltd; and Mr Scott McGimpsey, Head of Mobile Property and Assurance for EE Ltd. The Claimants relied also on the following expert witnesses: Mr Colin Virtue BA (Hons), DipTP, MRTPI, Executive Director of Pegasus Group, on planning matters; and Mr Mark Keenan CEng, MIStructE, MIET, Chief Executive Officer of Real Wireless Limited, on technical telecommunications matters[5].

43. For the Respondents we heard evidence of fact from Mr Meyrick, Mr Hinton and Mr Aggett. The Respondents relied on the expert evidence of Mr Haydn Morris, MRTPI, Director of HMPC limited, on planning; and of Mr Bob Cushing, Commercial Director of Bridge Fibre, on technical telecommunications matters.

44. So far as concerns the Respondents' ability to put their project into effect, we have no doubt that all the witnesses of fact for the Claimants and the Respondents gave evidence honestly and described matters as they saw them. When it comes to the Respondents' intention, however, we are less than confident in the accuracy of the Respondents' witnesses of fact. We accept what they say about their priorities and their wish for control over the Estate's property, but as will be seen

[5] Mr Robert French of the Pegasus Group was also called to give evidence about landscape and visual impact assessments for the Cat Plantation and Scout Hut sites but was not cross-examined by the Respondents since Mr Virtue adopted these documents and was cross-examined about them.

we find that a number of matters cast doubt about what they say about the Respondents' intentions and motivation; accordingly we find that Mr Meyrick, Mr Hinton and Mr Aggett were less than candid about the Respondents' intentions. It is in this context that we have to look at the expert evidence about telecommunications. Mr Cushing very candidly deferred to Mr Keenan on the subject of radio mast technology and, as we explain further below, we found Mr Keenan's evidence overall considerably more convincing.

45. We now turn to the two issues on which the Respondents' case on paragraph 21(5) depends.

(1) Do the Respondents have a reasonable prospect of carrying out the current scheme of redevelopment?

46. This is the objective limb of the test. We must decide whether the Respondents have a reasonable prospect of putting the current scheme into effect. We have to make a finding about likelihood. There is no need for us to find that the Respondents *will* be able to make it happen, but (as has been said in the context of section 30(1)(f) of the Landlord and Tenant Act 1954), there has to be a real, not merely a fanciful, chance of their being able to do so. The Claimants have sought to cast doubt on that in view of the need for co-operation from others, the need for planning permission, and the financial cost of the redevelopment, and we look at those challenges in turn.

The need for co-operation

47. The original scheme was for the demolition of six masts and the re-location of mobile antennae on to the Respondents' masts. Not only the Claimants but also CTIL would have been invited.

48. The Claimants have made clear their position about this. In their written evidence Mr Allerton, Ms Copeman and Mr McGimpsey said that it was unlikely that the Claimants would wish to use a mast owned by an unregulated party, and that they would be particularly unwilling to come on to the Respondents' masts. Instead they were looking for alternative mast sites. There was a range of reasons for this. An unregulated site provider is not familiar with the needs of the industry (in contrast to dedicated telecoms site providers such as Arqiva) and that, as Mr Allerton puts it, may have an adverse impact on the operators' ability to make the best use of the sites. An unregulated site owner can charge whatever rent it wishes, without regulation; it can charge extra for access; it can impose further charges for the upgrading of equipment. In this particular case it appeared that the Respondents would be charging considerably more than the Claimants had paid previously; and the Respondents' business plan, produced after these witness statements were made, did indeed show that the Claimants would be paying considerably more rent for the use of the Respondents' masts than they had paid under the old Code. Mr Allerton and Mr McGimpsey refer to a monopoly – the Respondents take issue with that term because they say that they would be inviting a range of operators on to the masts, but of course the monopoly referred to is control of the mast (which is exactly what the Respondents say they want) and control, without regulation, of pricing.

49. There are issues of trust between the parties. The negotiations for new leases of the sites came to an abrupt halt at the end of 2017 when the Respondents introduced a new term at the last minute, which Mr Allerton says had not been suggested before, and which would have ensured that at the end of the new lease the Respondents, if they wished, could purchase the Claimants' equipment. The Claimants were unwilling to put themselves in a position where it would have become impossible for them to acquire Code rights once the new leases expired. There have also been difficulties with access to the sites. Mr Allerton's and Mr McGimpsey's evidence is that on a number of occasions in 2017 and again in 2018 access to the masts was required for repair and for upgrade, and was refused. Indeed it was this refusal that they say prompted the issue of a paragraph 20 notice asking for Code rights. Access is now being allowed for maintenance, but upgrading has been delayed on more than one of the masts.

50. It is said further disquiet arises because of the Respondents' behaviour at their property on Anglesey, run by Bodorgan Properties Ltd. Mr McGimpsey says that the existing mast at Bwlan Farm was removed by the Claimants' then agents at the site, Arqiva, with a view to installing a new mast, and that the Respondents would not allow Arqiva back on to the site. Instead they put up their own temporary mast, without discussing it with the Claimants and without planning permission. The Claimants have been invited to use the new mast but have not done so because they do not want to install equipment on a temporary mast and then have to take it off and move to a permanent one. The Respondents' account of this incident is very different; Mr Hinton explained that the Claimants' lease had expired and that they were not entitled to put up a new mast, and so were asked to leave when they attempted to do so. Mr Hinton characterises the Claimants' behaviour as "extremely aggressive". The Respondents have now (a matter of days before the hearing before us) applied for planning permission for a new mast at Bwlan.

51. In cross-examination Ms Copeman explained that the Claimants' concerns about using an unregulated operator's mast were operational as well as commercial, and were considered over a 20 or 25-year term. It was suggested to her that the Claimants' unwillingness to use the Respondents' mast amounted to cutting off their nose to spite their face, but she rejected that description. She stressed the problems with access in the past, and the concerns about future difficulties with access and upgrading, which would remain within the Respondents' control, as well as the prospective doubling of the rent.[6] She rejected the idea that it would be simpler and more commercially attractive – and easier to justify to shareholders – to place antennae on the Respondents' masts than to seek sites elsewhere, particularly if those sites were in less favourable locations. The point was not the immediate expenditure, but the overall operational prospects for the site.

52. We do not have to decide whether all the Claimants' concerns are justified, for two reasons. First, if we were considering the original scheme, the issue would simply be whether there was a reasonable prospect that the Claimants would participate, as the scheme required. If there was no reasonable prospect of that participation, that would have been significant whether it was for good or bad reasons.

[6] See paragraph 80 below. The rent for the Cat Plantation site would be £12,000 per annum; it was £6,192 under the old lease.

53. But second, the current scheme does not require the Claimants' co-operation. The Respondents say that they intend to go ahead with the Cat Plantation mast whether or not the Claimants, or indeed CTIL (for Vodafone and O2), decide to take up the offer of space for their antennae.

54. We accept the Claimants' evidence that they are not willing to share the Respondents' mast at the Cat Plantation. But that sharing is not necessary for the current scheme as the Respondents describe it and as the new business plan (at least in its first form) sets out. The Respondents say that they are prepared to go ahead with the Cat Plantation site alone, and whether no, one or two MNOs join in. As a result this may now be a much-attenuated project, and it may lead to the removal of mobile broadband coverage for most of the Estate; the Claimants say that they are looking at other locations for their masts, and the quality of coverage that will then be available is as yet unknown. Be that as it may, the current scheme does not require the co-operation of the Claimants or of any other MNOs, and so the Claimants' evidence on this point does not cast doubt on the Respondents' ability to put the scheme into effect.

55. For completeness we note that there is no evidence as to whether or not Vodafone or O2 would be willing to participate in the current scheme. Mr Hinton said at paragraph 23 of his first witness statement that contact had been made with CTIL on a without prejudice basis. Mr Meyrick in his fourth witness statement (paragraph 9) confirmed that a meeting had taken place and disclosed the minutes, which reveal that the meeting was not without prejudice. The minutes also reveal that the meeting was inconclusive, with representatives of CTIL saying that they preferred to use their own masts but agreeing to consider how CTIL might work with the Estate, and Mr Hinton confirming that the Estate "would not collect rent and would resist major upgrades taking place on either [CTIL] site until terms had been agreed." We find it difficult to describe that as progress and we do not consider there is any evidence that CTIL would place its antennae on the Respondents' new mast at the Cat Plantation site.

The need for planning permission

56. The construction of each of the four masts under the original scheme constituted development that required planning permission under the Town and Country Planning Act 1990 ("the 1990 Act"). The four sites are within the areas of three different local planning authorities: the New Forest District Council (Cat Plantation), Christchurch Borough Council (Scout Hut) and the New Forest National Park Authority (Forest Lodge and Hinton Park). Four applications for planning permission were submitted in the autumn of 2018.

57. Mr Virtue for the Claimants produced two expert reports in which he set out and explained his opinion that none of the planning permissions would be granted; Mr Morris for the Respondents produced two expert reports explaining why, in his opinion, each application would be successful.

58. But two important events make most of their evidence irrelevant. First, on 4 February 2019 planning permission was granted for the mast on the Cat Plantation site by the New Forest District Council. Second, the Respondents are no longer putting forward the original scheme in which each

of the four sites was an integral part of the redevelopment. The current scheme as described in paragraphs 21-23 above is for the new mast on the Cat Plantation site to go ahead alone, whether or not the other sites get planning permission. We are therefore concerned with one site only. Evidence as to the likelihood of planning permission being granted for the masts at the Scout Hut, Forest Lodge and Hinton Park is irrelevant to the current scheme; so is the fact that the application in respect of Forest Lodge has been withdrawn, and the evidence given for the Respondents that it will be re-submitted.

59. As to the Cat Plantation, Mr Virtue in cross-examination made clear his view that planning permission should not have been granted. He gave a number of reasons for this, the main one being that the site is in the Green Belt. There is therefore a presumption that development is inappropriate absent "very special circumstances". It appears that the planning authority took the view that there were such circumstances, because the need for improved broadband and mobile services outweighed the downsides of the development. Mr Virtue, relying for the most part on the expert evidence of Mr Keenan, took the view that the need for, and benefits generated by, the new mast had been exaggerated by the Respondents and that "very special circumstances" did not exist.

60. Whether Mr Virtue is right or wrong about this (and we shall have more to say about the benefits of and need for the current project later), planning permission has been granted, and there had been no application for permission to apply for judicial review at the date of the hearing. The Tribunal will not go behind the grant of planning permission.

61. However, Mr Virtue's opinion in cross-examination, and the argument put forward for the Claimants by Mr Read QC in closing submissions, was that the planning permission cannot be implemented because it is subject to a condition that the Respondents cannot comply with. The planning permission is for "35m high lattice telecommunications mast; equipment cabinet and ancillary development." The permission is subject to a condition that the development is carried out "in accordance with" plans submitted by the Respondents, which show the Claimants' and CTIL's antennae attached to the mast. The Claimants, as we have found, are not prepared to attach antennae to the Respondents' mast and therefore, it is said, the building of a new mast for broadband only, without the Claimants' mobile antennae (and possibly without any other antennae if CTIL does not place antennae on this mast), will be in breach of a planning condition. The planning authority is said by Mr Read QC to be likely to respond by issuing an enforcement notice under section 172 of the 1990 Act (or a Breach of Condition Notice under section 187A of the 1990 Act). An enforcement notice would require the removal of the new mast, unless the Respondents can secure a fresh permission without the antennae pursuant to section 73 of the 1990 Act. And such a permission is unlikely to be granted, because the "very special circumstances" justifying the development would not be made out absent the antennae to provide a mobile phone service.

62. Mr Maclean QC in response says that the condition does not require the presence of the antennae. Therefore the construction of the mast in accordance with the planning permission but without the antennae is not a breach of condition. It is simply an incomplete implementation of the planning permission. It may prompt the local planning authority to issue a completion notice under section 94(2) of the 1990 Act, but such notices are rarely used and would not present a problem to the Respondents because their only effect, if not complied with, would be to render unlawful those

parts of the permission that had not been implemented (*Cardiff City Council v National Assembly for Wales and Malik* [2007] 1 P & CR 9 at paragraphs 26 and 17).

63. We have to decide therefore whether the current scheme will be impracticable because its implementation will involve a breach of a condition of the planning permission.

64. As we noted above, the mobile antennae are not mentioned in the words of the permission, but are shown on the approved plans, and condition 2 of the permission requires that the development be carried out in accordance with specified plans which depict the antennae. So is it a condition of the permission that the Claimants' antennae are placed on the mast?

65. That is a matter of construction of the planning permission. It may at some point be a matter that the local planning authority has to decide, and the Tribunal's view about construction cannot bind the local planning authority (which is not a party to these proceedings). But we have to decide whether on the balance of probabilities the current scheme can lawfully be pursued under the present planning permission.

66. We take the view that it can. The planning permission is for the construction of a mast. That mast must be built in accordance with the approved plans, and if it is built in a different shape or to a different height that will be a breach of condition. There is also permission to position antennae on the mast. We consider that if the planning authority had intended that the mast could not be built unless antennae were positioned on it then it would have said so explicitly, and would have had to give rather more detail in order to be enforceable (for example by stating a time by which the antennae must be placed on the mast). The condition as drafted does not make the presence of antennae a condition of the construction of the mast.

67. It may be that the addition of more antennae than are in the approved plans or of antennae of a markedly different size, would be a breach of condition. But the mere absence of some or all of the antennae would be a failure to do something permitted, rather than the omission of something required, and would not be a breach of condition.

68. Can an enforcement notice be issued in such circumstances?

69. Mr Maclean QC argues that it cannot, citing *R (Robert Hitchins Ltd) v Worcestershire County Council* [2015] EWCA Civ 1060 at paragraph 49:

> "where a development has been begun in accordance with planning permission but has not been completed, section 94 of the 1990 Act permits the local planning authority … to serve a completion notice… That implies that a development may be commenced but not completed yet still remain lawful, since otherwise there would be no need for the notice provisions. The local planning authority could rely instead on its normal powers of enforcement in respect of unlawful development."

70. In response, for the Claimants, Mr Read QC says that the Claimants are ignoring the "holistic" approach to planning law recognised in the same case. He quotes the previous paragraph where it is said:

> "if a building does not accord with the planning permission for it, the whole of that operation is unlawful; so that, if for example, a building is built in a way that departs from the planning permission, the whole building (not just the departure) is unlawful."

71. But that is to take the paragraph out of context; the discussion at that point related to the time within which an enforcement notice could be issued, and to the fact that time does not run against the local planning authority until a building is finished, even if the last stages of the development involved no breach of planning condition. Paragraph 49 itself is perfectly clear – as indeed are the closing words of paragraph 48, where it is stressed that it is not the case that a building that conforms with planning permission is unlawful if it is incomplete.

72. Accordingly we take the view that the Respondents have a planning permission that enables them to carry out the current scheme. The absence of the antennae will not put them in breach of a condition of the planning permission, and they will not for that reason be at risk of an enforcement notice being issued.

The financial viability of the redevelopment

73. The other doubt about the feasibility of the scheme is its financial viability. Both Mr Meyrick and Mr Hinton emphasised in cross-examination that the development of the Respondents' business plan was a dynamic process, subject to change as new information came to light. This meant the business plan was revised during the proceedings.

74. In his first witness statement dated 26 June 2018 Mr Meyrick said that he considered decent broadband to be key to the future well-being and prosperity of the Estate and that he viewed it as essential core infrastructure. He said he had taken professional advice about the feasibility of setting up the Estate's own broadband network, that it would bring several identified benefits and that "the proposed cost of the redevelopment has been estimated and its funding is well within the resources of the Trust". But Mr Meyrick did not support his statement with a business plan. The Respondents' statement of case dated 11 July 2018 again outlined the claimed benefits of the proposed redevelopment at paragraph 17(6) but did not quantify them.

75. It was not until Mr Hinton's first witness statement dated 26 September 2018 that some figures were provided about the costs and revenues for the original four mast scheme. No cost was identified for temporary masts but the cost of installing the replacement masts was said to be £323,000 plus VAT. Annual operation and maintenance costs would be £36,000 and insurance and a decommissioning sinking fund (not costed) taken out. "Market prices" for MNOs to rent space for their equipment on the replacement masts were estimated at £98,000 pa. The financial appraisal was said to indicate an internal rate of return ("IRR") of 17% on investment but that did not reflect the main benefit of an improved broadband service to the whole of the Estate. The financial appraisal itself was not attached to the witness statement. It was not until the Tribunal

ordered specific disclosure that copies of the advice upon which Mr Hinton had relied were disclosed on 12 December 2018.

76. Mr Hinton clarified and expanded upon some aspects of the financial appraisal in his second witness statement dated 30 November 2018. He said, based upon advice received, that a 35m mast would cost £30k and a 30m mast £25k. Installation costs were taken as £39.5k per mast and temporary masts were costed at £20k each. Annual operation and maintenance costs were now said to be £1,000 pa per mast. Total professional fees were approximately £37.4k. Revenue was modelled based on two network sharers per mast, each sharer having six antennae at a cost of £2,000 per antenna. That gave a total of £24k pa per mast or £96k pa in total. The additional revenue of £500 per mast was from the broadband network provider who in addition would offer free broadband connections and services. But there was still no fully costed business plan.

77. A "draft business model" of proposed broadband connectivity was prepared for the Respondents by Bridge Fibre Ltd on 9 November 2018. This assumed an initial take up of 90 residential and 10 commercial broadband connections, rising to 250 and 50 respectively in year 5. Revenue from these connections would rise from £50.4k in year 1 to £180k in year 5. In cross-examination Mr Hinton said this was not the Estate's model and he had not relied upon the connectivity rates given. His financial appraisal did not refer to the number of users because the Estate would not benefit directly from additional connectivity.

78. Mr Meyrick explained that the Estate had approached Bridge Fibre (Mr Cushing) and also Wessex Internet to advise on the proposed development. Wessex Internet submitted an initial business case in July 2018 which was disclosed in redacted form (excluding financial details) in August 2018. The unredacted version was not disclosed until 12 December 2018 following the Tribunal's direction. Wessex Internet said that a full fibre deployment was "unlikely to ever be commercially viable" and recommended deploying a hybrid network of fibre and FWA. It provided indicative initial costs and revenues which showed "initial backbone infrastructure investment" of £90k - £100k excluding mast costs. The income projections were based on 90 users (assuming 100% take up by the 40 tied estate properties and a further 50 non-estate properties) and showed a free cashflow (before mast rental) of £18k pa. The business case concluded that the project would be commercially viable for Wessex Internet provided the capital investment was not expected to be recouped from project income. Most of the capital investment would be funded through a combination of Gigabit Broadband Voucher Funding (provided by the government to help businesses connect to FTTP or hybrid broadband services)[7] and third party contributions with any shortfall (unspecified) being underwritten by the Estate.

79. A fully costed business plan, taken over a 25-year project period, was eventually disclosed on 12 December 2018. This showed an IRR of 24% which was higher than the previous figure of 17% given by Mr Hinton in his first witness statement. Mr Hinton said the inputs were the same but described the plan as a work in progress and said that he was not proficient with the Excel spreadsheet that he had used. We note the following key inputs to the business case model:

[7] https://www.ispreview.co.uk/index.php/2018/03/government-launch-67m-uk-gigabit-broadband-voucher-scheme.html

(i) Mobile (mast) rental: £96k pa (£24k per mast);

(ii) Non-mobile (broadband) rental: £2k pa (£500 per mast);

(iii) Operating costs: £5,730 pa in total;

(iv) Mast equipment cost: £30k for the Cat Plantation mast, £25k for each of the other three. Total cost: £105k;

(v) Mast installation cost: £39.5k each, total £158k;

(vi) New coms cabinets: £15k each, total £60k;

(vii) Professional fees: £37,393

(viii) Temporary mast: £25k

The total costs were £385,393 for the four-mast project.

80. The Claimants note that the original business plan depended crucially upon the rent payable by the MNOs, which is 98% of the total. But Mr Thornton-Kemsley, in his first report for the Respondents, amended aspects of Mr Hinton's plan, including the assumption that CTIL would wish to share the Cat Plantation site. The proposed rent to be charged to the Claimants (£12,000 pa at Cat Plantation) was far more than the rent payable under the old code (£6,192 pa), the rent proposed for a new lease when negotiations ceased in November 2017 (£7,000 pa) or the figure of £6,500 pa proposed by the Respondent's own valuation expert. The Claimants say the Respondents' business plan is just a mechanism for ensuring that the mast sites are removed from the scope of the Code and for the Respondents to extract ransom rental payments. Mr Hinton was unable to cite another instance where a wholesale infrastructure provider such as Arqiva had attempted to remove a MNO's existing mast only to replace it with one of their own simply to force the MNO to pay higher prices. The notion would be unacceptable to the Government and Ofcom and would be a colossal waste of resources.

81. For the Claimants both Mr McGimpsey and Mr Keenan thought the Respondents had considerably underestimated the cost of installing the masts. Mr Keenan estimated the overall costs of the Respondents' scheme to be £0.6m to £1m. Several cost items had been overlooked, e.g. the need to replace the four masts sequentially rather than concurrently given the assumption of only one temporary mast; the need to upgrade the existing fibre feed to the Cat Plantation mast; and the need to site the temporary mast away from where the new masts would be constructed.

82. A week before the hearing Mr Meyrick submitted a revised business plan assuming the provision of the Cat Plantation mast only. The plan was divided into three parts, with each part based on a different assumption about how many MNOs would occupy the mast, i.e. none, one or two sharers. Apart from the same levels of direct income as adopted previously, Mr Meyrick also allowed for the benefit of two free commercial 1GB connections from Wessex Internet (£5,400 pa each, receivable in full as from year 3) and the cost saving of a shared leased line to the Estate office (£616 pa from year 1). Such benefits were not identified or quantified in the previous business plan. The cost of the mast and its installation was said to be £69,500 with the cost of

broadband infrastructure just over £6,000 and a cabinet another £7,500. Total costs including fees were £79,743 for the broadband only (no MNO) option. For the other two scenarios (one and two MNO sharers) a cost of £10,000 was allowed for a temporary mast, half of the previous estimate.

83. The Claimants say that Mr Meyrick's revised business plan was submitted entirely in response to the Claimants' case once the Respondents realised they were very unlikely to get the income they thought they would from either the Claimants or O2/Vodafone. The revised plan was not a genuinely intended development of the Respondents' business case and had introduced benefits that had always existed but were only now being recognised. The alleged savings on the "free" broadband lines were subject to availability and to the Estate paying the installation costs and were dependent upon Wessex Internet reaching a breakeven point. These benefits could only be received once (if at all) and so none of the other three sites could be completed unless the MNOs were prepared to pay the substantial rents demanded by the Respondents.

84. We share the Claimants' scepticism about the development of the Respondents' business plan. The Respondents were persistently reluctant to disclose their financial appraisals and did not do so absent specific directions from the Tribunal. We are satisfied that the business plans that we have seen have been prepared upon optimistic assumptions as to costs, income and other benefits. They are not consistent and have clearly been prepared "on the hoof" in response to the Claimants' case as it has been revealed to them. We do not think the Respondents have established the financial viability of their project in either its extended (four mast) or reduced (one mast) forms.

85. Nevertheless, so far as financial resources are concerned we accept the Respondents can fund the redevelopment. The business plan for the original scheme proved to be over-optimistic, in view of the Claimants' unwillingness to participate, and the new business plan envisages far more modest revenues even with the free broadband factored in. But on the other hand the evidence for the Respondents is that they have considerable resources, much of it in the form of liquid funds or readily tradeable assets. (Mr Meyrick said in cross-examination that group turnover was £15m pa.) No doubt has been cast on that by the Claimants. Mr Haydn Morris' comment in the witness box had the ring of truth: "The Respondents can fund any number of masts if they so choose". The current scheme is essentially unprofitable and requires a financial contribution from the Respondents that might deter a less determined landowner, but if the Respondents have set their hearts on the redevelopment scheme then it is clear that money is no object.[8] Whether they have indeed set their hearts on it is a different question which we explore below.

86. Accordingly we find that the first limb of the two-part test is satisfied; with planning permission granted, and their substantial resources, the Respondents have a reasonable prospect of being able, by themselves and without the need for the co-operation of others, to bring about their redevelopment scheme.

[8] "If the landlord is genuine in his intention and has the ability and financial means to bring it about, the fact that the proposed scheme is not financially viable is irrelevant." *The Renewal of Business Tenancies* (5th Ed) Reynolds and Clark, 7-157.

(2) Do the Respondents have a firm, settled and unconditional intention to put their current scheme into effect?

87. In examining the second of the two limbs prescribed in *Cunliffe v Goodman* [1950] 2 KB 237 we begin by voicing a serious misgiving.

88. The Respondents are the registered proprietors of the land of which the Cat Plantation is part, and the landlords under the expired lease of the site to which we referred above (paragraph 11). They are the trustees of the Meyrick 1968 Combined Trust, which is just one of the legal entities that, according to Mr Meyrick, make up the Estate. Yet they appear to have taken no active part in the proceedings. None of the Respondent trustees made a witness statement. There is no record of any decision of theirs, whether about the Claimants' request for Code rights, the redevelopment scheme in its original form, or the current scheme. It was not suggested to us that the Respondents had seen the latest version of the business plan. Mr Meyrick in his second witness statement (dated 26 September 2018) at paragraph 16 said that the three trustees have each confirmed to him their decision to redevelop the Cat Plantation site, two by telephone and one in person. He explained that the Estate has "a very condensed structure", that he works with Mr Hinton and Mr Aggett and speaks to the trustees on the telephone. Management is "nimble". There is no paper record of the trustees' decisions.

89. Mr Meyrick's evidence (at paragraph 74 of his second witness statement) is that the Respondents are "in effect non-executive" and meet annually. We are unfamiliar with the concept of a non-executive trustee. Mr Meyrick says (paragraph 1 of his first witness statement) that he is "a principal beneficiary of the Trust", and Mr Maclean QC in closing says that Mr Meyrick and his father are the sole beneficiaries of the sub-fund of the Trust that owns the four mast sites. So we take it that the Respondents are not bare trustees and do not hold as nominees for a sole beneficiary.

90. In his written closing submissions Mr Maclean QC suggests that Mr Meyrick has a close working relationship with the trustees, and that he "spoke to each of them to confirm their intentions", but that is not what we understood him to say. His evidence was that the trustees act only on advice. He says (at paragraph 8 of his first witness statement) that decisions of the Trust are made either by the trustees on the recommendation of the Estate Management Company, or by the Estate Management Company itself where it enjoys delegated powers. The Estate Management Company is Meyrick Estate Management Ltd, of which Mr Meyrick is the chairman and director. It has not been suggested that the Estate Management Company enjoys delegated powers in relation to the redevelopment of the Cat Plantation site. Therefore on Mr Meyrick's evidence the Respondents must have made their decisions, and formed their intention to redevelop, on the recommendation of the Estate Management Company; yet no minutes of directors' meetings are available for that company, despite the clear requirements of the Companies Act 2006, section 248. And while the Respondents themselves have no obligation under the Companies Act 2006, if the evidence given for them is that they act on the recommendation of the management company, it is surprising that there is no record of those recommendations.

91. On that basis alone it is arguable that the Respondents' case could fail. There is no evidence that the Respondents themselves have any intention to do anything, nor that the directors of the Estate Management Company have recommended any course of action to them. Mr Meyrick himself appears to be the only source of intention within the body of legal persons that he says comprise the Estate, and we struggle to see how the Respondents, as trustees, can be said to be forming any intentions of their own. But that might be seen as a technical and unsatisfactory basis for the dismissal of the Respondents' case. For present purposes we assume in the Respondents' favour that Mr Meyrick's intentions are their intentions, and that if he has a settled and unconditional intention to proceed with the redevelopment plan then so have they, and conversely that if he has not then they have not.

92. Turning then to the Respondents' intention, on that basis, we have to look at the evidence given by Mr Meyrick and his colleagues.

93. In summary, they say that their primary concern is the welfare of the Estate and the ability to control the land within it and specifically the masts. They say that their priority in conceiving the original scheme and the current scheme is to provide decent broadband coverage for the Estate, which they say currently it lacks, and they say they have evidence of that lack. They point to the professional team they have assembled in order to install the new mast and to set up the FWA, and to their agreement (albeit not yet contractual) with Wessex Internet.

94. The Claimants' view is that the scheme, in its original and current forms, has been concocted purely to prevent their getting Code rights, but that the Respondents do not in fact intend to carry it out.

95. We accept that it is important to the Respondents to have control of the Estate; we accept that it is important to them, for the sake of Estate residents but more importantly for the businesses on the Estate, to have a good internet connection as well as good mobile phone coverage (although these ostensible benefits were not factored into their business plan). These are perfectly reasonable priorities for a landowner. But we do not believe that they intend to put into effect the current scheme. We take the view that it was put together in response to the Claimants' application for Code rights and in order to prevent their getting those rights, but that the Respondents have no serious intention to carry it out. That would have been our view of the original scheme, and our view is reinforced by the last minute move to the current scheme. We reach that conclusion on consideration of:

a. the timing of the redevelopment plans;

b. the Respondents' failure to explore alternative options;

c. the evidence about the utility of the scheme; and

d. the financial viability of the current scheme.

96. Indeed, on two occasions the Respondents' witnesses spoke frankly to third parties about the motivation for the redevelopment. In Mr Morris' email to the Christchurch and East Dorset Council dated 28 June 2018 (referring in particular to the Scout Hut) he stated:

> "Changes to the Telecommunications Regulations will result in a new commercial relationship between the landlord and the operator with reduced control for my client. In response [the Respondents want] to replace [the mast] with a similar structure owned and erected by the Estate."

97. Mr Morris there makes a clear statement about his clients' motivation. In cross-examination Mr Meyrick sought to distance himself from that statement, and was evasive in answering questions about it. In August 2018 Mr Hinton was in correspondence with Dael (a mast and infrastructure adviser to the Estate) about the cost of cabinets, and said

> "We want to invite the operators to put their equipment inside our box so that they don't have code rights for the cabinet!"

98. Again, the motivation is clear. Mr Maclean in closing sought to persuade us that Mr Morris' email is not to be regarded as a "smoking gun", betraying the Respondents' real intentions. We take the view that both these communications do just that, revealing the truth in unguarded moments. But we prefer to base our conclusion on the more objective evidence of the factors listed above, and we look at them in turn in the following paragraphs.

(a) The timing of the redevelopment plans

99. First, we consider the way that information emerged about the Respondents' redevelopment plans.

100. As we have already observed, the leases of all four sites have expired. Mr Allerton's evidence about the course of the negotiations for the renewal of the leases, during 2016 and 2017, is unchallenged save in one respect (see below), and the correspondence that he has exhibited to his statement supports what he says. He explained that from May 2017 the parties concentrated on the Hinton Park site, putting the other three on hold with the intention of agreeing one set of terms and then carrying those terms across to the other leases. Mr Allerton says that most of the terms were agreed by the end of September 2017, including the rent and the length of the new term; the Respondents' wish to impose access charges was something of a sticking point. But heads of terms were agreed and the Respondents instructed their solicitors to draft the lease on 10 November 2017.

101. Towards the end of 2017 it became clear that the new code was going to come into force and that its terms were likely to result in significantly lower costs to MNOs. Nevertheless the Claimants decided to pursue negotiations already commenced under the old Code, rather than delay matters pending the new legislation.

102. As we have already explained, on 4 December 2017 the Respondents then endeavoured to introduce a clause that was so unacceptable to the Claimants that negotiations came to a halt (see paragraph 13 above).

103. The one challenge to Mr Allerton's evidence about the negotiations is Mr Meyrick's evidence in his second witness statement that he "became increasingly reluctant" in the course of 2017 to renew the existing mast site lease. In his third witness statement he referred to his discussion in 2017 and early 2018 with "a good friend who runs a leading rural broadband service provider", who helped him understand business models for such providers and how the friend's business was working with estates. In cross-examination he gave more detail about this, explaining that the thought process started when the internet stopped working at the Respondents' Bodorgan estate on Anglesey. The Respondents therefore procured a microwave link from the mainland. In October 2017 the owner of Wessex Internet – who we take it is the "good friend" referred to in the witness statement – came to investigate the possibilities of FWA on Anglesey. He and Mr Meyrick had a conversation about the Hinton Estate and about what could be achieved there, and as a result "at that stage I was beginning to think about using FWA" on the Estate.

104. When pressed about this in cross-examination Mr Meyrick pointed out that the Respondents were willing to grant the leases provided they got control back in ten years' time, as the final "deal-breaker" clause would have provided; but he said he was not involved in the negotiations. We accept Mr Allerton's evidence, supported as it is by copies of correspondence. There is no sign of reluctance until the final "deal-breaker" demand on the Respondents' part, and that is inconsistent with Mr Meyrick's evidence about his thinking in the autumn of 2017.

105. Significantly, at no time during the negotiations in 2017 was there any mention of a plan for redevelopment on the Respondents' part; nor, if we have understood correctly, during the subsequent correspondence between the parties in the early part of 2018 when the Claimants re-opened negotiations. The first that is heard of re-development is in Mr Meyrick's first witness statement of 26 June 2018, made after the Claimants had commenced these proceedings.

106. What Mr Meyrick says about conversations on Anglesey may well be true. We have no reason to doubt that he was trying to improve the broadband for Bwlan and that the owner of Wessex Internet may at that stage have introduced to him the idea of a similar package for the Hinton Estate. That does not mean he had any intention in the autumn of 2017 of taking that up. We find as a fact that heads of terms were agreed for the new leases as Mr Allerton says, and that had the Respondents' new clause been accepted in early December 2017 they would have granted new leases of all four sites at that stage. We draw the obvious conclusion that they would have been willing to do so because leases would have given the Respondents a rent commensurate with the consideration payable under the old Code. Only when that deal slipped from their grasp, just at the point when the Code came into force, did the redevelopment idea surface.

107. We draw the same conclusion from the changing form of the redevelopment plans.

108. We summarised, above (see paragraphs 21-23), the original scheme and the current scheme. The Respondents' plan appears to change in response to vicissitudes; whenever it becomes clear that an element that was initially an important aspect of the plan is not going to happen, the scheme is re-shaped. Initially, the idea was that all four MNOs would place their antennae on the Respondents' masts. The Claimants do not wish to do so, and the meeting with CTIL (for Vodafone and O2) was inconclusive. The current scheme is just for FWA, and the

MNOs presumably are expected to leave, and to withdraw the mobile telephone coverage that is supposed to be important to the Estate. To support this new model a new business plan has been produced, shortly before the trial, in which rental payments by MNOs no longer feature. We have discussed this in paragraphs 73 to 86 above and have made clear our scepticism about the viability of the scheme.

109. The Respondents' willingness to change their plans in an attempt to overcome difficulties in the original scheme is evidence not of dynamic or "nimble" business planning but of a determination to produce a scheme that will enable the Respondents to resist the grant of Code rights to the Claimants.

(b) The Respondents' failure to explore alternative options

110. For the Claimants it is pointed out that the Respondents appear to have launched into a plan of their own for the delivery of better broadband without first contacting the Claimants (or indeed CTIL, which has two masts on the Estate) to explore alternative ways of doing so.

111. It is the unchallenged evidence of Mr Allerton, Ms Copeman and Mr McGimpsey for the Claimants that the Respondents have never expressed to the Claimants dissatisfaction with the mobile phone signal or with the broadband on the estate; nor have they asked if they could place FWA apparatus on the existing masts or co-locate their own masts on the current sites. As Mr McGimpsey put it:

> "If the situation was as bad as [the Respondents' witnesses] seek to suggest, I find it very surprising that no approach at all was made to the Claimants before the Respondents decided on their current rather drastic scheme…"

112. Had they been approached, they say, it would have been possible to investigate the potential for extending the current mast with a view to providing FWA, without the need to demolish a serviceable mast and to put the Claimants to the expense of erecting a temporary mast before they move on to the new one. Alternatively they could have discussed co-location, that is, the installation of a new mast alongside the current one.

113. For the Respondents it is said, in particular by Mr Meyrick, that the Claimants are not interested in upgrading the mast infrastructure on the Cat Plantation site, that they want to prevent anyone else from doing so, and want to keep the site to themselves, and that that is why the Respondents must develop their own infrastructure so as to improve broadband provision to the Estate and allow far more sharing of infrastructure than is currently possible. In any event the Respondents' position (unsupported by evidence) is that it would be impossible to install their equipment on the Claimants' existing masts; whether or not that is true we find it significant that they have never asked the Claimants about this. Nor did they explore co-location; their position is that it would not be possible to get planning permission for additional masts but, again, the significant point is that the conversation never took place.

114. Second, as to their willingness in general to share infrastructure, the Claimants point out that their existing leases from the Respondents prohibit sharing. In any event no-one has asked to share. They say that there is in fact a well-developed practice of sharing infrastructure among competing MNOs. It is the Claimants' practice, on receipt of a request to share, to carry out a survey at the requesting operator's expense to determine whether sharing is practicable and then to reach an agreement where possible. But no such request has been made.

115. Equally, no such conversations took place with CTIL. The very recent meeting with CTIL (paragraph 55 above) was a discussion of the Respondents' scheme; there was no exploration of alternatives before the Respondents decided upon their scheme.

116. Mr Keenan has also pointed out that the Respondents have not engaged with the Hampshire Superfast Broadband project, whose aim is to increase the Superfast Broadband coverage to at least 95% of Hampshire. Mr Cushing's report states that that project has nothing further to offer, because cabinets have already been upgraded, and that "if a property does not currently have Superfast it is unlikely that they will get it for some years to come." But he has not supported that view with evidence. Mr Keenan's view is that that is not so, and has produced material from the project website showing areas of the Estate that will receive faster broadband in 2019. At paragraph 40 of his witness statement he says:

> "The Hampshire Superfast Broadband Programme is investing heavily to extend coverage to 97.4% of premises in Hampshire, At least 10,000 additional premises across the county will be able to access superfast services by the end of 2019."

117. We regard Mr Keenan's evidence as the more reliable on this point, since he has supported his view with evidence from the project website. Even if he is wrong, the fact remains that there has been no discussion with the Hampshire Superfast Broadband project to check what remains to be done and what improvements might yet be made without the need to for the Respondents to embark on their expensive and dramatic plan.

118. We take the view that if the Respondents' priority was the delivery of better broadband, they would first have contacted the established providers already present on the Estate. They would have ascertained first what could be done at reasonable cost, and by means with proven effectiveness, by those who are in the business of providing mobile phone and broadband services. They would have pursued those discussions and eliminated other options before expressing a firm commitment to a redevelopment that involves the waste of serviceable masts, and huge expense for the Respondents and the Claimants.

119. As it is the Respondents composed their original scheme without any consideration of easier options. Mindful of their duties as trustees, or simply as sensible landowners, if their priority was better broadband they would not have chosen an expensive and wasteful option without first opening conversations to make sure that they could not improve broadband by other and less expensive means. Nor would they be doing so by a method that now looks likely to involve the loss of mobile phone signal from most of the Estate.

(c)The evidence for the utility of the Respondents' schemes

120. Broadband on the Estate is currently provided both by the mobile phone networks and by the BT Openreach fibre service, the latter being a fibre-to-the-cabinet ("FTTC") service which is reliant on copper wiring for transmission from cabinet to premises. It seems to be uncontroversial that mobile broadband is not the best way to provide a fast service, being designed with relatively low capacity for users on the move, and that the best way to provide superfast broadband is by means of fibre-to-the-premises ("FTTP"). But this is not always easy to provide in a rural environment with remote dwellings. The Respondents' plan is to provide FWA from masts, which requires fibre to the mast (already present at the masts on the Estate) and a line of sight connection to the recipient building where it is received on an external dish.

121. It is the Respondents' case that mobile phone reception and broadband speeds on the Estate are poor, and that their scheme is the answer to these difficulties. They say, and we accept, that fast broadband is essential for business; they are particularly concerned about broadband for the Estate office, and for the two hotels on the Estate (one of which is closed but is said to be about to be re-opened), and also about the potential for future business lettings. The Respondents' focus is therefore broadband (see Mr Meyrick's first witness statement, paragraph 26 ff) but it has been a part of their case from the outset that mobile reception is also poor (Mr Aggett's and Mr Hinton's first witness statements, and Mr Meyrick's second statement).

122. The Claimants say that the Respondents have not demonstrated the need for better mobile phone services or for better broadband, and that even if there were such a need the Respondents' scheme would not be the best solution.

123. The Respondents' evidence for what they say about mobile connectivity is anecdotal – for example, Mr Aggett says that the patchy signal means that lone workers out of doors have to come into the Estate office. Mr Keenan for the Claimants comments that the mobile signal is likely to be variable, and to depend upon the particular network being used in different areas; but he has commissioned "drive testing" (using a specially equipped vehicle) from Real Wireless to test the mobile reception. The results of that test are set out in Mr Keenan's report in some detail, and supported by data from the Ofcom report *Connected Nations Update* (Spring 2018) and from the Ofcom website. Mr Keenan concludes that mobile services on the Estate are generally at an acceptable level.

124. We prefer Mr Keenan's conclusion to the assertions made for the Respondents, because it is supported by evidence. We are also impressed by Mr Keenan's analysis of the way to improve mobile coverage, which he has explained is not necessarily improved by higher masts (which may generate more interference) but rather by increasing the number of mobile cells in an area. The Respondents have not addressed that evidence. But in any event the state of mobile coverage, and the way to improve it, have become irrelevant. The current scheme is for the new mast at the Cat Plantation to operate with or without the presence of mobile antennae. In other words the Respondents are content to contemplate the removal of mobile services from the Cat Plantation site when the current mast is removed. So we turn to the evidence for the need for improved broadband and of the way to solve the problem if there is one.

125. Broadband speed is measured in megabits per second (Mbps). There is some disagreement between the expert witnesses as to what is regarded as an acceptable speed for domestic and commercial use. Mr Cushing for the Respondents says that speeds of under 10 Mbps are classed as basic "in current terminology"; that the Government's target for residential broadband is 30Mbps and for business 100 Mbps. We have not been told how realistic those targets are at present in areas such as the Estate.

126. The Respondents presented empirical evidence of the need for better broadband on the Estate. It is introduced in Mr Aggett's witness statement, where he says that he and his colleagues commissioned a survey from Bridge Fibre to map the speed of broadband across the Estate. This is Mr Cushing's work; he explains in his reports that he mapped the availability of fibre across the estate using the Openreach website, surveyed the masts, and carried out drone surveys to establish the available lines of sight. But Mr Cushing has not gathered data relating to broadband coverage across the Estate. Instead, this has been obtained by a questionnaire exercise undertaken by Mr Aggett (with the assistance of a student doing work experience), which Mr Cushing regards as "important" (his second report paragraph 2.13).

127. Mr Aggett explained that in the summer of 2018 584 questionnaires were sent out by the Estate office to properties across the Estate (and some adjoining areas). Recipients were asked what was the current download speed at the property, and whether if a better service was offered the occupier would be interested in taking it up. Mr Aggett says that 54 responses were received (that is, a 10% response rate), and of those he says (his paragraph 21.1) that 98% would consider a new broadband provider.

128. The first point to make about the questionnaire is that it was distributed after Mr Meyrick had made his first witness statement, and therefore after the point when – according to Mr Meyrick – a decision had been taken to embark on the original scheme of redevelopment. Accordingly the Respondents must have formed their intention before this evidence became available, and we find this troubling. Evidence that is sought in order to justify a conclusion upon which the author has already decided is not being sought with an open mind and may not be objectively analysed.

129. Equally troubling is the fact that the responses to the questionnaire are not consistent with Mr Aggett's evidence. This was not immediately apparent since his witness statement exhibited what he described as a summary of the responses. The full schedule of responses was submitted to the planning authority in support of the application for planning permission, and so the Claimants were able to obtain a full copy of the survey from the planning office. From that copy it can be seen that the "summary" was simply an extract of seven responses from the first page of the document. The full results were put to Mr Aggett in cross-examination. It was pointed out that whereas his witness statement says that download speeds vary from 40 to 0.6 Mbps and his "sample" does not show speeds above 40 Mbps, instead the full results include speeds of 100, 84 and 82 Mbps. It was put to him that 98% of 54 responses would be 52 or 53, but that far fewer than that said they would be interested in a better service. It appears that ambivalent answers (such as "maybe" or "dependent on cost") were reported by Mr Aggett as positive responses, but even that does not account for the 98%. Far fewer than 98% even of the 10% of recipients who responded could be described as positive or ambivalent.

130. Mr Aggett's explanation for this was that the Excel spreadsheet recording the survey results was amended from time to time as more data became available, and that the planning office copy was not the same as the one to which he referred in his witness statement. Endeavours were therefore made at the Tribunal's request to recover the spreadsheet in the version to which Mr Aggett's witness statement referred, and a copy of the schedule as it stood on 7 September 2018 was sent to the Tribunal on 4 March 2019.

131. In his closing submissions Mr Read QC observed that the questionnaire of 7 September 2018 was not substantially different from the one lodged later with the planning authority. Only two more responses were added later; some of the download speeds have changed (it is not known why or how). The claim that 98% of respondents said they would be interested in a better service is no more borne out by the 7 September version than by the later one. The actual question asked was whether the respondent would consider changing providers if a faster, more reliable service was available at a reasonable cost, and 10 answered "perhaps", "maybe" or "possibly"; six expressed conditional interest; one said no.

132. We agree with the Claimants that the questionnaire goes nowhere near justifying the original or the current scheme. We have not made our own detailed analysis of the responses but a rough count indicates that to the question "Do you have problems with reliability or quality" at least as many respondents answered "no" as "yes". As we noted above, this evidence has been produced to justify the alleged intention, rather than having been sought at an early stage to inform a decision-making process. Accordingly the construction put upon these data for the Respondents does not bear scrutiny.

133. For the Claimants, Mr Keenan has researched download speeds for the properties surveyed by the Respondents by making enquiries of BT Openreach and using data on BT's website. His results show that speeds in many of the properties are higher than those reported by the Respondents. He notes that some of the properties are subscribed to the standard broadband service rather than the higher-priced higher speed fibre broadband service. He acknowledges that service is variable, but says that this is due in part to the variable state of the copper infrastructure (from cabinet to premises) and in part to the tariff to which the customer has signed up.

134. We conclude that the Respondents have not shown that there is an Estate-wide problem with poor broadband. Their evidence does not demonstrate it, and Mr Keenan's evidence – however imperfect, and he acknowledges that the service is variable – is of better quality than the data that the Respondents have to offer.

135. We have to go further than that and say that the responses to the questionnaire have been misrepresented by the Respondents not only to the Tribunal but also to the local planning authority.

136. To see that, we have to look at the part played by Mr Haydn Morris in the planning process. He appeared as the expert witness for the Respondents, and has therefore asserted that he is independent and has put his duty to the Tribunal above his commitment to his clients; but he acted as planning consultant for the Respondents in the process of application. He has confirmed, and we accept, that he did not have a conditional fee arrangement with the Respondents. But we think

that his two roles, as planning consultant for the Respondents and as expert witness to the Tribunal, have placed him in a difficult position. In his second report he identifies with the Respondents, speaking of "our approach" (paragraph 3.4.6) and referring to the Respondents and himself as "we" (further subparagraphs of 3.4). In his dealings with the planning authority Mr Morris was acting for his clients, and his priority was to obtain the permission.

137. In his letter dated 25 September 2018 to the New Forest District Council, enclosing the application for the Cat Plantation, Mr Morris said "A questionnaire was sent out to 350 properties on or near to the Estate asking about residents' broadband experience and of the 52 responses so far, 50 of them said that they have poor broadband and they would like to hear more about an improved offering". That was untrue, both as to the number of questionnaires sent out and as to the responses. In his further letter of 7 December 2018 he said that the new mast "will enable … Vodafone and O2 to install their equipment at Cat", without adding that they had not at that stage been invited to do so and that there was no evidence that they would wish to do so. He also referred in that letter to the Estate's "very large portfolio of non-domestic buildings". He conceded in cross-examination that there were 20, together with the Estate office and a hotel. He went on to say that in responding to the questionnaire "25 premises confirmed that they would like an alternative broadband service" which, again, is untrue.

138. We referred above (paragraph 59) to Mr Virtue's concern that the "very special circumstances" required to justify development in the green belt had not been demonstrated and his opinion that planning permission should not have been granted. Without analysing the whole of Mr Morris' correspondence we can say that we have serious concerns that his enthusiasm for his clients may have overtaken his objectivity.

139. The timing of the development of the Respondents' original scheme, and their failure to discuss alternatives first with the MNOs already operating on the Estate, has led us to the view that the scheme was put together in response to the claim for Code rights. Evidence was then obtained in order to justify it. That evidence does not justify it, but it was misrepresented, first to the local planning authority and then to the Tribunal.

140. Moreover, Mr Keenan has persuaded us that even if there is a problem with broadband across the Estate, the Respondents' scheme is not necessarily the way to solve it. We mentioned above (at paragraph 116) the Respondents' failure to engage with the Hampshire Superfast Broadband project; Mr Keenan has explained the approach taken by that project and others run by BT. FWA is regarded, according to Mr Keenan, as a temporary solution pending the roll-out of FTTC and FTTP. Because it is temporary, there is a preference for using existing masts and buildings to provide FWA, rather than purpose-built masts. Mr Meyrick laid great stress upon the government's *Future Telecoms Infrastructure Review* which mentions the need to use hybrid fibre-wireless solutions rather than waiting for fibre to reach remote properties. We do not think that this is inconsistent with what Mr Keenan says; he agrees that FWA may be an interim solution in some areas where other methods are uneconomical, but does not agree either that it is needed on the Estate or that, if it is, the removal of the Claimants' masts and the building of new infrastructure is the way to provide it.

141. Mr Cushing has not answered this analysis, relying instead on Mr Aggett's survey for evidence of need and on the capacity of higher masts to provide a line of sight for FWA. His assertions about the failings of the Hampshire Superfast Broadband project are unsupported by evidence. Accordingly we prefer Mr Keenan's evidence for the utility of the scheme to that of Mr Cushing. In closing Mr Read QC quoted Lord Sumption in the *S Franses Ltd* case at paragraph 21:

> "… although the statutory test does not depend on the objective utility of the works, a lack of utility may be evidence from which the conditional character of the landlord's intention may be inferred."

142. We draw the obvious inference; we take the view not only that the Respondents' intention is conditional, but also that it is not a serious intention. The evidence about the cost and viability of the project confirms that view, as we now go on to discuss.

(d) The financial viability of the current scheme

143. In paragraphs 73 to 86 we discussed the viability of the current scheme, and we do not need to repeat here the figures we have already set out. We concluded that the Respondents have not established their project is financially viable in any of its forms. But the unchallenged evidence is that the Respondents have the financial resources to put it into effect, even if the Claimants' higher estimate of costs is correct.

144. But would they do so? We find this implausible. The Respondents are trustees, and we assume in their favour that they will not wilfully waste money. There is very limited evidence of need for the current scheme; there are no precedents for removing serviceable existing masts and replacing them in these circumstances; and serious doubts have been raised as to whether, even if needed, the current scheme would provide an effective broadband service for the Estate. To pursue a scheme that is not financially viable would be a waste of money. It is not an effective way to provide broadband, and it would lead to the loss of the mobile signal for a large part of the Estate, unless and until the Claimants find alternative mast sites. We are not persuaded that the Respondents have so much money to spare that they can – consistently with their responsibilities as trustees – squander it in this way.

Conclusion on paragraph 21(5)

145. We have found that the Respondents are able to bring about their redevelopment plan, through sheer weight of resources. But it is not a viable plan. It involves the loss of mobile coverage for much of the Estate, in exchange for the provision of FWA broadband. The importance of broadband, to modern homes and businesses is not in dispute, but the evidence for the need for new provision on the Estate is far from convincing. Even if there is a need, there is considerable evidence that this is not the only way to meet it, nor indeed the best way. The current scheme is even more seriously uneconomic than was the original scheme.

146. We find it wholly implausible that the Respondents, as trustees with fiduciary duties to their beneficiaries (and also as landowners who claim to be committed to the welfare of their land and their tenants) would waste their resources on it. In reality the redevelopment plans are conceived in order to defeat the claim for Code rights. Even if we are wrong about the Respondents' intention, their motivation is perfectly clear.

147. Accordingly they cannot rely on paragraph 21(5) of the Code.

148. A further hearing will be listed to address the outstanding issues between the parties.

Dated: 9 July 2019

Judge Elizabeth Cooke

A J Trott FRICS