NEW ENIGMAS UNDER THE CODE

The Electronics Communications Code one[1] year on

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by

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Introduction

1. The new Electronic Communications Code ("ECC") is now a year and three months old. In that period, it has produced more reported cases than the old Electronic Communications Code managed to produce in its lifespan of 33 years. Whether that means one or the other has been more successful, I will leave up to you to decide.

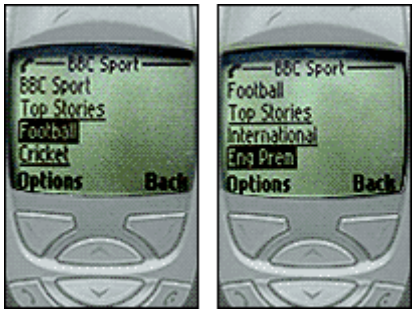
2. The purpose of this workshop is to give you an overview of what issues have cropped up under the ECC, and how those issues have been approached by the Upper Tribunal (Lands Chamber), which is the "Court" for the purposes of ECC. It will seek to flag up to you issues that have not yet been resolved.

3. The talk may pick up some further decisions that have appeared between the writing of this paper and the delivery of the talk.

ECC: A Refresher

4. ECC is a bespoke statutory code that is intended to further the Governmental policy of facilitating the roll-out of electronic communications systems across the United Kingdom.

5. This is a fast-moving sector, and one only needs to consider what must be a contender for the most successful handset of all time – the classic Nokia 3310 (launched September 2000 with global sales of 120 million units). This phone had a reputation for durability rivalled only by the Toyota Hilux. It had a stop watch, a calculator and Snake II. Some phones (like the 3330 in 2001) could access the internet, through WAP (Wireless Application Protocol) technology; it was not a great success and was re-christened "Worthless Application Protocol" and "Wait And Pay". When you handset finally did download the data, what you go looked a bit like this (BBC Sport, 2005):



6. We finally moved from GSM/2G (allowing text messaging, picture messaging), through to 3G (allowing mobile internet access, fixed wireless internet access,

video calls and mobile television, first available commercially in 2003 through H3G) to 4G. 5G is now in the offing, and we now expect our phones to stream HD movies, send photos, stream music and podcasts, do our shopping and control our central heating. That requires data and network capacity, and hence mast sites. Although policy steps have been taken to reduce interaction between operators and private land owners – with the advent of site or network sharing – the Government has pursued a policy of rolling out networks which continues unabated, and is, at least for a week or two, also mandated by the Digital Single Market project of the European Commission and Parliament.

7. The ECC was drafted against that dynamic background, and it is meant to make roll-out easier. However, this has not been possible without causing friction between operators and landowners, as anyone who is involved will know. This paper explores three new areas of dispute that have arisen in recent cases, to illustrate how the ECC works.

Interim Rights – Your Flexible Friend?

8. Paragraph 26 of the ECC states:

(1) An operator may apply to the court for an order which imposes on the operator and a person, on an interim basis, an agreement between them which—

(a) confers a code right on the operator, or

(b) provides for a code right to bind that person.

(2) An order under this paragraph imposes an agreement on the operator and a person on an interim basis if it provides for them to be bound by the agreement—

(a) for the period specified in the order, or

(b) until the occurrence of an event specified in the order.

(3) The court may make an order under this paragraph if (and only if) the operator has given the person mentioned in sub-paragraph (1) a notice which complies with paragraph 20(2) stating that an agreement is sought on an interim basis and—

(a) the operator and that person have agreed to the making of the order and the terms of the agreement imposed by it, or

(b) the court thinks that there is a good arguable case that the test in paragraph 21 for the making of an order under paragraph 20 is met.

9. So: instead of going for an all-singing and all-dancing code agreement with continuation rights under Part V of the ECC, it is possible instead for the operator to seek to impose, or for the parties to agree to the imposition of (see paragraph 26(3)(a)), a time-limited code agreement. That agreement can be limited by reference to a particular period (paragraph 26(2)(a)) or up to the occurrence of an event (paragraph 26(2)(b)). This must be made following the giving of a notice under paragraph 20(2). The Tribunal then *may* make an order on the basis of what has been agreed, or if the "imposition test" is met. This is that the Tribunal is satisfied that there is a "good arguable case" that the paragraph 21 test is met.

10. The question that has arisen is, can this power be used as a free-standing power, or can it only be used in conjunction with an application for final rights under paragraph 20?

11. The **arguments for** paragraph 26 ought to be construed as a free-standing power of the Tribunal which can be, but need not be, exercised in conjunction with a paragraph 20 full-blooded application are as follows:

    a. *The Text of Paragraph 26:* There are two points of construction to note in relation to how paragraph 26 works:

        i. Nothing in paragraph 26 requires there to be a final rights claim on foot – there is provision in paragraph 25 that the interim right comes to an end if a paragraph 20 application is not granted before the date or event specified in the agreement (see paragraph 26(7)(b) and (8)), so that, if an order is made (or agreement is ultimately reached), the interim right merges into the final right – but it is not a jurisdictional prerequisite that such rights be sought.

        ii. It is open to the parties to agree that an interim right should be granted, though it would seem that the Tribunal is not bound simply to rubber-stamp what they have agreed (which may be what the "*may*" at the beginning of paragraph 26(3) means.

    b. *The Text of other Parts of the ECC:*

        i. After paragraph 26 comes paragraph 27, which deals with temporary rights – those are rights to electronic communications apparatus which are already on-site. In relation to such apparatus, temporary rights can be sought to bridge the gap to a new agreement (whether imposed or voluntary). In the context of that paragraph, the temporary right must be sought as part and parcel of the claim for final rights, and must be sought in the notice seeking final rights (paragraph 27(1)(b)). Such a requirement is notably missing from paragraph 26.

ii. Some code rights, which can be sought on an interim or a temporary basis, are a “one shot deal”. Tree lopping is a code right under paragraph 3(i). Of course, that can be a long term right to manage trees on a wooded estate. Or it could be a one off cutting or lopping necessary only to be undertaken once, perhaps in connection with establishing lines of sight. Once that right has been sought on an interim basis, and exercised during the currency of the interim right, there may be no need to seek it on a final basis. The same may be true of a particular access right, for instance to neighbouring land. Given that such rights are spent in the interim period, and given that there may be no need for those rights to be translated into final rights, it seems that there is no need for the final rights to replicate the interim rights sought. If there is no such need, why (if there is no need for more than interim rights) ought it not to be open to an operator to seek rights on a purely interim basis?

c. *Utility:* the ECC is there to facilitate roll-out of infrastructure. That is what it has been designed to do. There is a real advantage to securing interim rights if all that is needed is a time-limited right to use a particular site – this is because, on expiry, the provisions of Part V are bypassed and the site provider has an automatic right to access remove under Part VI (see paragraph 26(8)). It is therefore a way of avoiding both the continuation of code agreements under Part V, and the need to specify statutory grounds for termination in such a case – in both instances, a considerable advantage to the site provider, given that this part of the Code imposes an 18 month notice period which is much longer than the 28 day periods under paragraphs 20 and 21 of the old Code. When would such a right be useful? It is easy to imagine real situations where an interim arrangement might be sought – by agreement or imposed because the operator does not need an all-singing all-dancing Part IV code agreement:

i. Sites pending development or infrastructure improvements – an operator may only need access for a time limited period until another site is live, or may need a temporary site to allow roof repairs or development. In such a case, a site provider would be well advised to agree on an interim rights basis, as otherwise there is a risk that a Part II agreement with Part V continuation might have been entered into – much to the site provider’s detriment.

ii. Short-term event sites – if a music festival, or a major sporting or other event, takes place, there may be tens of thousands of people concentrated in an area requiring internet access. In such a case only an interim right may be required as the event may only last a few days. Again to require a full Part II agreement in such a case, with Part V protecting an operator who may require no such protection, may be overkill. Again, an interim right might therefore be just the thing.

12. The **arguments against** are as follows:

    a. *The Name*: an interim right usually connotes that something is to follow. An interim injunction, or an interim charging order, are converted into something. The label therefore suggests that the paragraph 26 application is parasitic. On the other hand, the paragraph contemplates that there might not be a paragraph 20 application at all (and not just one which has failed – see paragraph 26(7)).

    b. *The Test:* "good arguable case" is an interim remedy test, and will only be tested finally at the stage of final relief. If a right is imposed on an interim basis using that test, then there has not been a full trial. On the other hand, the Tribunal retains a general discretion as to whether or not to impose an interim right under paragraph 26, and the Tribunal will be able to ensure, in exercising that discretion, or specifying the "event" or other terms, that the site provider is adequately protected.

13. In *Cornerstone Telecommunications Infrastructure Ltd v The University Of London* (ELECTRONIC COMMUNICATIONS CODE – CODE RIGHTS – access to buildings) [2018] UKUT 356 (LC),[2] the Upper Tribunal considered that the arguments for were correct. The Deputy President, Martin Rodger Q.C., explained at paragraphs [96] – [99] that

> *96. The sense in which the word "interim" is used is explained in paragraph 26(2); the circumstances which will end the interim rights are not limited by reference to a determination or agreement under paragraph 20, they are expressed much more generally as the expiry of a specified period or the occurrence of a specified event.*
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> *97. The fact that a notice complying with paragraph 20(2) must be served does not import a requirement that permanent rights must be sought in that notice, or in another served simultaneously. On my reading of the Code it is not right to regard the giving of a notice under paragraph 20 as a step which implies an intention to seek permanent rights. A notice under paragraph 20(2) is a precondition of any application for Code rights, whether permanent, temporary or interim; it is the mechanism for initiating the statutory procedure whatever rights are sought. The terms of the notice are not limited by paragraph 20(2) and need not seek permanent rights; they may include a proposal that the rights are to be on a temporary or interim basis and, in the latter case, will no doubt specify the event or period for which they are sought. For the same reason nothing of relevance to this question can be read into paragraph 26(5), which allows the Tribunal to make an order in a case of urgency even though the period specified in the paragraph 20 notice has not elapsed.*

[2] https://www.bailii.org/uk/cases/UKUT/LC/2018/356.html ; the decision is presently subject to appeal.

98. Nor does the adoption of the test for permanent rights in paragraph 26(3)(b), to be satisfied on a "good arguable case" basis, suggest that the same qualifying test must necessarily be intended to be satisfied to the full standard of proof on some subsequent occasion.

99. Paragraphs 26(7) and (8) give a site owner the right to require the removal of apparatus if the period specified in an interim rights order has expired or the specified event has occurred "without (in either case) an agreement relating to the code right having been imposed on the person by order under paragraph 20." Mr Clark relied on these provisions as demonstrating that an application under paragraph 26 was intended to be conducted in tandem with an application under paragraph 20, but that is to read too much in to them. The only purpose served by sub-paragraphs (7) and (8) is to confirm that the right of removal is exercisable in accordance with Part 6 of the Code on the expiry of interim rights. If an order imposing permanent Code rights has been made under paragraph 20 the operator will be in a position to rely on those rights for the retention of its apparatus, as paragraph 26(7)(b) implicitly recognizes. These provisions do not introduce a condition, absent elsewhere, for the making of an application or the imposition of an agreement.

[…]

103. The absence of qualifying conditions for the making of an application under paragraph 26 is in contrast to the requirements of paragraph 27(1) which must be satisfied before the opportunity to seek temporary rights will be available at all. The conditions in paragraph 27(1) require that a paragraph 20(2) notice be served which not only seeks rights under that paragraph but " also requires … agreement on a temporary basis", thereby making it clear that, using Mr Clark's expression, temporary rights are "parasitic" on a request for permanent rights. Paragraph 27(3) identifies the objective of temporary rights as being the maintenance of the operator's network "until the proceedings under paragraph 20" are determined and clearly contemplates that such proceedings will be pursued. Nothing remotely comparable is to be found in paragraph 26.

Terms and Upper Tribunal Powers – What's the Limit?

14. So much for interim rights- what are the powers of the Tribunal when one gets there? Are the Tribunal's powers limited as to what terms can be imposed, or does the Tribunal have powers in principle to impose a wide range of terms?

15. The starting point is to understand the various stages in which terms come into play under Part IV:

Paragraph	Provision
20(2)	"*The operator may give the relevant person a notice in writing—* (c) *setting out the code right, and all of the other terms of the agreement that the operator seeks*" The opening gambit is therefore the operator's.
20(3)	The Tribunal can be applied to if (inter alia) *"the relevant person does not, before the end of 28 days beginning with the day on which the notice is given, agree to confer or be otherwise bound by the code right*" If the relevant person does agree, then the agreement takes effect as a code agreement. So, for instance, if the relevant person (being the person whose agreement is sought, or sought to be dispensed with) agrees on reflection to the offer made in the paragraph 20 notice, then that agreement (and all the terms that were asked for) appear to take effect as a code agreement.
23(1)	"*An order under paragraph 20 may impose an agreement which* *gives effect to the code right sought by the operator with such modifications as the court thinks appropriate.*" So, the Tribunal can modify the terms upon which the code right is being sought. It may decide that the terms are too one-sided, or that the relevant person requires a particular form of protection.
23(2)	*"An order under paragraph 20 must require the agreement to contain such terms as the court thinks appropriate, subject to subparagraphs (3) to (8).*" The Tribunal can therefore require appropriate terms to be inserted into an agreement. In practice, this has been achieved by requiring the passing of a travelling draft between the parties (much as one would see under the Landlord and Tenant Act 1954), and a schedule of agreed and disagreed terms. The Tribunal does not take kindly to failures to negotiate the terms without prejudice to other contentions that the parties wish to make.
23(3) – (8)	The Tribunal *must* have regard to the following *(3) The terms of the agreement must include terms as to the* ***payment of consideration*** *by the operator to the relevant person for the relevant person's agreement to confer or be bound by the code* *right (as the case may be).* *(4) Paragraph 24 makes provision about the determination of consideration under sub-paragraph (3).* *(5) The terms of the agreement must include* ***the terms the court thinks appropriate for ensuring that the least possible loss and damage is caused by the exercise of the code right*** *to persons*

	who— *(a) occupy the land in question,* *(b) own interests in that land, or* *I are from time to time on that land.* *(6) Sub-paragraph (5) applies in relation to a person regardless of* *whether the person is a party to the agreement.* *(7) The terms of the agreement* ***must include terms specifying for how long the code right conferred by the agreement is exercisable****.* *(8) The court must determine whether the terms of the agreement* *should include a term—* *(a)* ***permitting termination of the agreement*** *(and, if so, in what circumstances);* *(b)* ***enabling the relevant person to require the operator to reposition or temporarily to remove the electronic communications equipment to which the agreement relates*** *(and, if so, in what circumstances).*

16. If, one could ask, it is open to the parties to contract in the widest possible terms and thereby create a code agreement under Part II, which should the Tribunal *in principle* not enjoy the same width of discretion under Part IV, but subject, of course, to the statutory requirements that Part IV imposes, namely to ensure that the terms are "*appropriate*", do the least possible damage, and so on. The **arguments for** a wide power in principle, albeit limited by the words of paragraph 23, therefore emerge out of the text and scheme of paragraphs 20 and 23. Further, this is supported by the terms of Law Com 336. The ECC is not a Law Commission Bill – the Law Commission did not draft anything. Therefore, there is not the same close connection between the ECC and the Law Commission Report as there is, for instance, in relation to the Land Registration Act 2002. However, it is clear that a number of Law Commission proposals were in fact adopted, and it is apparent from Law Com 336 that it would be open to negotiate a full-blooded lease, and for the Tribunal to impose one: see in particular paragraphs 4.44 and following, and the recommendation at 4.53. If a lease is to be imposed, then for that arrangement to work it seems sensible that the terms of that lease ought to reflect current commercial practices.

17. The counter-argument that has been put is that the Tribunal should, under a compulsory purchase regime, impose the least possible burden on the land owner – a principle which it will be noted exists in paragraph 23(5) of the ECC already. The other counter-argument is that terms ought to be directly related to the code rights granted.

18. The Tribunal has answered the question of principle about whether or not a lease can be granted in line with Law Com336. The possibility of a grant of a lease on an *interim* basis was recognised in *EE Ltd & Hutchison 3G UK Ltd v London Borough Of Islington* (ELECTRONIC COMMUNICATIONS CODE – INTERIM RIGHTS) [2018] UKUT 0361 (LC),[3] at paragraph 42, and confirmed in the "final rights" decision of *EE Ltd & Anor v London Borough Of Islington (Electronic Communications Code – Consideration – Compensation – Inner London residential rooftop site)* [2019] UKUT 53 (LC).[4] As the Deputy President explained at paragraphs [44] and following of the latter case:

> *[44] At one end of the spectrum Code rights may involve going on to land for a short period to cut back trees or to carry out a survey (which was the full extent of the Code right sought in Cornerstone Telecommunications Infrastructure Ltd v The University of London) for which it would not be necessary to acquire an interest in land. At the other end Code rights may involve keeping cabinets, masts and other electronic communications apparatus installed on land for a period of years, thereby effectively excluding the owner of the land from the area required. It may not be essential that such extensive rights be granted by lease, but the evidence of practice under the old code demonstrates that it will often be convenient.*
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> *[…]*
>
> *[46] The starting point of our analysis is the absence of any express restriction in Part 4 on the type of agreement by which Code rights may be imposed. Because of the variety of circumstances in which rights may be required we do not consider it significant that the Code lacks any specific reference in Part 4 to rights being conferred by the grant or imposition of a lease. That is true both of Part 2 and of Part 4, and it is common ground that a consensual agreement to confer Code rights may take the form of a lease. In any event, it is not the case that the Code does not refer specifically to Code rights being conferred by lease. Part 5 of the Code contains termination and modification provisions which apply to agreements under Part 2. Those provisions are subject to paragraph 29(2) which specifically exempts "a lease of land in England and Wales" if its primary purpose is not to grant Code rights and if it is a lease to which Part II of the 1954 Act applies.*
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> *[47] The absence of any express statutory restriction on leasing is all the more telling when two relevant circumstances are borne in mind: first, that leases were commonplace under the old code (many of which remain in existence); and, secondly, that the Digital Economy Act 2017 recognises that Code rights may be granted by an agreement which, but for the introduction of section 43(4) of the Landlord and Tenant 1954 Act*

[3] https://www.bailii.org/uk/cases/UKUT/LC/2018/361.html
[4] https://www.bailii.org/uk/cases/UKUT/LC/2019/53.html

(by paragraph 4 of Part 2 of Schedule 3 to the 2017 Act), could be a tenancy to which statutory security of tenure under Part II of the 1954 Act would be capable of applying. By providing that a tenancy granted for the primary purpose of conferring Code rights will not be a tenancy to which Part II applies, Parliament has further confirmed that Code rights may be the subject of an agreement which creates an interest in land. Having done so in paragraph 29 of the Code and by amendment to the 1954 Act, we regard it as inconceivable that Parliament would have conferred power on the Tribunal to impose agreements without being specific about any limitations on that power or distinctions it intended between rights conferred under Part 2 and those imposed under Part 4.

Consideration – The Price is Right?

19. The provisions that have caused perhaps the most excitement are those relating to consideration payments.

20. Under the Old Code, a market of sorts had established itself. In a study commissioned by DCMS, a firm called Nordicity set out some sample rates from a small sample of agents which established a range between £3,500 to about £12,000 per annum, depending on location (greenfield vs urban rooftop).[5] However in my view it very difficult to draw firm conclusions about the market under the Old Code. This is for two reasons: first, the provisions of the Old Code were basically ignored for the purposes of assessing rents for mast sites, and the market that established itself almost by convention bore little to no relation to any statutory valuation hypothesis. Secondly, the comparables that were available were patchy, and more often than not a specialist valuer would have a private treasure trove of comparables that were not available to the other side. In many cases, it was difficult to assess the comparable transactions for reasons of confidentiality.

21. When the Law Commission grappled with this topic, it took the view on consultation that there needed to be reform of the consideration payable (CP205, 6.42 and following).[6] Following consultation on a "no-scheme" basis, the Law Commission received 76 responses of which ¾ opposed the no scheme valuation methodology.[7] This led the Law Commission to conclude that market value was the way forward, and the recommendation was made at paragraph 5.83 that

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[5] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/270165/Wayleave_Economic_Analysis_2013_10_23.pdf, esp. at page 15; see also the responses to the Law Commission consultation, https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/cp205_electronic_communications_code_compilation_of_responses_cover_and_contents.pdf

[6] https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/cp205_electronic_communications_code.pdf

[7] Law Com 336 at 5.35.

"*We recommend that the measure of consideration payable under the revised Code to those against whom an order is made for the imposition of Code Rights should be the market value of those rights, using the definitions in the "Red Book" (RICS Valuation – Professional Standards), modified so as to embody the assumptions: (1) that there is more than one suitable property available to the Code Operator; and (2) that the Code Operator does not have the entitlement to upgrade or share apparatus, or to assign the Code Rights, conferred by the revised Code in accordance with our recommendations at paragraphs 3.24 and 3.51 above."*

22. However, this analysis did not ultimately carry the day, and instead DCMS expressly reverted to the Law Commission's own "no scheme" valuation basis when considering the reforms in May 2016:[8]

> Recognising the ever more central role of digital communications in maintaining the UK's economic competitiveness and helping people connect to each other, the new ECC will make major changes to the way land is valued. There will be a shift to a "no scheme" regime for valuing land. This will continue to ensure that landlords get fair payment for their land, but also explicitly acknowledges the economic and social value to all of society created from investment in digital infrastructure. Vi. In this respect, communications providers in both fixed and mobile markets will have similar rights to utilities companies, reducing their rental expenditure and creating greater incentives for investment, including in areas where costs have previously been prohibitive. This will, of course, be a major change and we expect the communications providers to work closely with landowners to ensure a smooth transition to the new, more efficient and equitable system that puts the needs of UK consumers first.
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> […]
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> The Government is therefore proposing that the revised code should limit the value of consideration by changing the basis of valuation to a "no scheme" rule that reflects the underlying value of the land. This is a rate that is more relevant to the nature of modern digital communications infrastructure rollout, and will work to encourage greater investment and improved network coverage.

8 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/523788/Electronic_Communications_Code_160516_CLEAN_NO_WATERMARK.pdf, pages 5 – 6 and 15.

23. When introduced, the Bill compared with what became paragraph 24 read as follows:

As Introduced	As Enacted
23(1)The amount of consideration payable by an operator to a relevant person under an agreement imposed by an order under paragraph 19 must be an amount or amounts representing the market value of the relevant person's agreement to confer or be bound by the code right (as the case may be). (2) For this purpose the market value of a person's agreement to confer or be bound by a code right is the amount that, at the date the market value is assessed, a willing buyer would pay a willing seller for the agreement— (a)in a transaction at arm's length, (b)on the basis that the buyer and seller were acting prudently and with full knowledge of the transaction, and ©as if the transaction were subject to the other provisions of the agreement imposed by the order under paragraph 19. (3)**The market value—** **(a)must be assessed on the basis of the value of the right or agreement to the relevant person, and**	24 (1) The amount of consideration payable by an operator to a relevant person under an agreement imposed by an order under paragraph 20 must be an amount or amounts representing the market value of the relevant person's[9] agreement to confer or be bound by the code right (as the case may be). (2) For this purpose the market value of a person's agreement to confer or be bound by a code right is, subject to sub-paragraph (3), the amount that, at the date the market value is assessed, a willing buyer would pay a willing seller for the agreement— (a) in a transaction at arm's length, (b) on the basis that the buyer and seller were acting prudently and with full knowledge of the transaction, and I on the basis that the transaction was subject to the other provisions of the agreement imposed by the order under paragraph 20. (3) The market value must be assessed on these assumptions— (a) that the right that the transaction relates to does not relate to the provision or use of an

[9] This puzzling phrase is explained by the Upper Tribunal in EE (final rights decision) at paragraph [62]: " *The underlying reason for expressing the measure of value by reference to only one of the parties may have been a wish to signal at an early stage an intention to borrow a fundamental principle from the field of compensation for compulsory purchase known as the "value to the owner" principle or the "no-scheme" principle. The most important feature of this principle is the requirement that any value attributable solely to the scheme of the authority which proposes to acquire land compulsorily must be left out of account when determining the compensation payable to the owner of the land, also known as the Pointe Gourde principle (Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands [1947] AC 565). The owner of the land is to be compensated for what he has lost without regard to additional value which the owner was not in a position to realise, and which only attaches to the land because of the intention of the authority with compulsory powers to use the land for its chosen purpose. There are several references in the DCMS ministerial statement to the incorporation of the "no scheme" principle into the valuation of consideration payable under the Code, and the reference in paragraph 24(1) to the market value of the relevant person's agreement to confer or be bound by the code right carries echoes of the same approach.* "

(b)must not be assessed on the basis of the value to the operator of the right or agreement or having regard to the use which the operator intends to make of the land in question. (4)The market value must be assessed on the assumption that— (a) there is more than one site which the operator could use for the purpose for which the operator intends to use the land in question (whether or not that is actually the case), and (b)paragraphs 15 and 16 (assignment of code rights and upgrading and sharing of apparatus) do not apply to the code right or any electronic communications apparatus to which the code right could apply. (5)The terms of the agreement may provide for consideration to be payable— (a)as a lump sum or periodically, (b) on the occurrence of a specified event or events, or ©in such other form or at such other time or times as the court may direct.	electronic communications network (b) that paragraphs 16 and 17 (assignment, and upgrading and sharing) do not apply to the right or any apparatus to which it could apply; I that the right in all other respects corresponds to the code right; (d) that there is more than one site which the buyer could use for the purpose for which the buyer seeks the right. (4) The terms of the agreement may provide for consideration to be payable— (a) as a lump sum or periodically, (b) on the occurrence of a specified event or events, or I in such other form or at such other time or times as the court may direct.

24. Despite some stylistic changes, it will be seen that from the point of introduction the “no scheme” philosophy was a feature of paragraph 24, and that the Law Commission’s valuation hypothesis had not been adopted.

25. The interpretational difficulty that this presents is that the opening wording of paragraph 24 is “market value”, but the valuation hypotheses to which the reader is directed to have regard are not. This has resulted in some lively on-line debate, for the most part good-natured. What is the impact of this hypothesis on rents for mast sites? Has the bottom truly dropped out?

26. The difficulty arises because the right for which market value is to be assessed is a right in relation to inert apparatus, located on land with no functionality in providing an electronic communications network, with no scarcity, but in all other respects apparently resembling a code right. Looked at from that point of view,

the direction that there be a market value and a willing set of parties to a transaction might therefore be little more than the usual rent review speak for making plain to the reader of paragraph 24 that a transaction has to be take place, and has to be valued, no matter how unappetising the transaction may be in the real world – the willing landlord and tenant are, in such a case, simply a guarantee that a hypothetical transaction will occur (but do not furnish a lively market for such a right): see *Telereal Trillium v Hewitt (Valuation Officer)* [2018] EWCA Civ 26,[10] and the cases there cited. This is made explicit at paragraph [83] of the *Islington* case:

> Where a commodity which, in reality, nobody would bid for, is to be valued the requirement to assume that a transaction will take place does not oblige the valuer to assume additionally that the market in which that transaction occurs is a competitive one. As Hoffmann LJ emphasised in *IRC v Gray*, there is nothing hypothetical about the market in which the assumed transaction takes place. The valuation hypothesis is a tool for ascertaining the value of the commodity in the market as it actually exists, subject only to the assumption, which may be contrary to reality, that there is at least one willing buyer in that market. It is therefore essential to consider the true state of the market and to recognise that the notional willing buyer embodies the actual level of demand for the commodity which is assumed to be on offer.
>
> *[84] … [t]he fact that there may be only one bidder in the market does not mean that the price agreed will necessarily be a nominal one.*
>
> *[…]*
>
> *[87]* Nevertheless, if the characteristics of the premises mean that, in reality, nobody would pay anything for them, the correct conclusion may be that their market value is nominal. The consequences of an absence of demand for particular premises other than from the assumed willing buyer have been considered by the Court of Appeal in a number of rating valuation cases.
>
> *[…]*
>
> *[91] We consider that it would therefore be wrong to approach the assessment of consideration either on the basis that the absence of competition must necessarily result in only a nominal value, or on the basis that the assumption of a willing buyer must necessarily result in a figure which is more than nominal. The value of the land to the willing buyer will depend in every case on its characteristics and potential uses, and not simply on the number of potential bidders in the market.*

27. How, then, does a valuer go about discharging the valuation instructions under paragraph 24? The Upper Tribunal has assisted is with the decision in relation to

[10] https://www.bailii.org/ew/cases/EWCA/Civ/2018/26.html

final rights in *EE Ltd & Anor v London Borough Of Islington*.[11] First and foremost, one begins with the open market, as conventionally understood, and requires the assumption of a transaction. The decision then goes on to record that:

> *[65] The making of assumptions, often contrary to the true facts, is a familiar technique in valuations of all sorts. In the case of the Code the matters which must be assumed are absolutely critical to the outcome.*

28. As we can then see, the formula as enacted requires a series of assumptions to be made under paragraph 24(3).

> *[66] The* ***first assumption*** *is the most significant, namely that the right that the transaction relates to does not relate to the provision or use of an electronic communications network. We will refer to this as the "no-network" assumption. We prefer this to the expression "no-scheme" used in the DCMS Ministerial statement but which is not found in the Code itself. There is a clear analogy between the two concepts, but the indiscriminate use of an expression which carries so much baggage from the world of compulsory purchase would risk importing with it features which cannot be assumed to have any place in the assessment of consideration under the Code.*
>
> *[67] It will be remembered that Code rights are rights for the statutory purposes to install and keep installed (etc) electronic communications apparatus. Electronic communications apparatus is described in paragraph 5(1) as apparatus or structures designed or adapted for use in connection with the provision of an electronic communications network, or for sending signals by means of such a network. The statutory purposes are defined in paragraph 4 and include, in relation to an operator, the purposes of providing the operator's network.*
>
> *[68]* ***The obvious purpose of the no-network assumption is to exclude from the assessment of consideration any element of value attributable to the intention of the operator to use the site as part of its network.*** *The assumption gives effect to the policy expressed in the ministerial statement that the fair return to the site provider "should not, as a matter of principle, include a share of the economic value created by very high public demand for services that the operator provides****". The presence in the market of operators who might wish to use the site to provide a network must therefore be ignored, and the price which***

[11] https://www.bailii.org/uk/cases/UKUT/LC/2019/53.html

such operators would in practice offer for the site must not be taken into account in assessing consideration.

29. The next assumption is as follows (para [69]):

> *The **second assumption** (paragraph 24(3)(b)) is that paragraphs 16 and 17 of the Code do not apply. These provisions render an agreement void to the extent that it prevents or limits the assignment of a Code agreement or the sharing or upgrading of apparatus. The lease in this case contains no effective restriction on assignment or sharing and we heard no evidence or argument on the second assumption; we therefore prefer to postpone consideration of its meaning and effect until another occasion.*

30. The third assumption is at para [70]:

> *The **third assumption** (paragraph 24(3)©) is that the right in all other respects corresponds to the Code right i.e. the right which is being imposed under paragraph 20. It has already been provided by paragraph 24(2) that market value means the amount which would be agreed for rights conferred on the same terms as are provided for by the agreement being imposed, and it may therefore be that this assumption adds nothing of substance. It will be a question of fact in each case what use may be made of the site on the terms imposed, having regard to the no-network assumption. In this case the agreement to be imposed includes a covenant by the operator not to use the site other than for the permitted use of providing the networks of its shareholders. Despite the narrowness of the permitted use both parties approached the issue of valuation on the assumption that the rooftop site could be used for open storage. Once again, in this case we heard no evidence or detailed argument about paragraph 24(3)*(c) *and we have reached no final conclusion on its potential effect, but **we agree with the parties' implicit acknowledgement that the no-network assumption must permit some notional relaxation of contractual terms which would otherwise limit the permitted use to statutory Code purposes only. In principle, therefore, we do not think it is impermissible to have regard to rental values achieved for other uses** even where the only permitted use under the imposed agreement is a Code use.*

31. Finally, at [71],

> *The **final assumption** in paragraph 24(3)(d) is that there is more than one site which the buyer could use for the purpose for which the buyer seeks the right. The effect of the assumption is to neutralise any monopoly of sites which may exist in reality and to eliminate any impact on value attributable to scarcity or undersupply of land suitable for the purpose for which the buyer wishes to take it. It has not been suggested that this assumption is of significance in the present case.*

32. How, then, did the Tribunal consider these assumptions operated? In *Islington*, the premises were a residential block. There was no real comparable evidence, and the Tribunal did not consider that a roof-top site could be valued by

reference to basement storage rates. As there was no market, there was consideration of £50 payable. However, that was not the end of the story. There were also services at the building which would benefit an operator, and those were best paid for annually as consideration. Thus the Tribunal held that (at [101]):

> *[Both experts] considered that it would be appropriate for the claimants to make a contribution towards the respondent's expenses of running the building and complying with its obligations as a payment to reflect its usage of the building. We agree. Both parties approached this topic as an aspect of compensation but we consider it more appropriately viewed in this case as relevant to the assessment of consideration for the rights conferred and obligations assumed under the agreement imposed. One consequence of treating the provision of services as a matter for compensation would be to increase the opportunity for disagreement with resulting unnecessary costs. The total sums involved are likely to be small and we consider that reasonable parties would wish to wrap them up in a single annual occupation payment for that reason.*

33. As a result, it rejected the following alternative bases of valuation:

    a. It was not permissible to introduce value by the back door by requiring the operator to pay to use the apparatus (there being a right to install etc, but not an express one to use).

    b. Old Code comparables could not be used.

    c. What can be termed the Linda Evangelista approach to valuation – that the site provider would not "get out of bed" for less than a certain amount, and that the valuation required the hypothetical valuation to reach the tipping point at which the site provider was persuadable, was also rejected.

    d. Future equipment rights should not be valued.

34. As the Tribunal explained:

> *[94] We do not accept Mr East's summary of what is to be valued under paragraph 24 as comprising the right to carry out all the activities required to install, inspect, maintain, adjust, alter or repair electronic communications apparatus, but not the right to provide or use it. That approach fails to give effect to the no-network assumption that the right that the transaction is concerned with does not relate to the provision or use of an electronic communications network. The rights to be assumed are the same rights as those actually imposed, but the purpose for which they are notionally granted is to be assumed to have nothing to do with the provision or use of a network.*

[95] Nor do we obtain any assistance from Mr East's reliance on transactions under the old Code. To use them as comparables would be contrary to the no-network assumption since they evidence the value of rights to provide and use an electronic communications network. They are also open to a number of further objections: they were based on a different statutory valuation hypothesis, i.e. consideration was to be fair and reasonable; secondly, they are historic values, the most recent transaction having taken place in March 1999 and the earliest in March 1992; thirdly the use of indexation over such a long period is wholly unreliable; and fourthly they were limited by Mr East to transactions in which the site provider was not represented and assumed to be ignorant of the true value of the rights being granted, which is contrary to the requirement of paragraph 24(2)(b) that market value be assessed on the basis that the buyer and seller act prudently and with full knowledge of the transaction.

[96] We think Mr East was wrong in principle to approach the valuation on the basis that there was a certain amount that would have to be paid in consideration before the willing seller would entertain entering into any agreement, which he described as "floor level" consideration. That assumption compromises the requirement to assess market value as between a willing buyer and a willing seller in an arm's length transaction. It must be assumed that a transaction will take place. As Donaldson J put it in F R Evans at 193: "We are not interested in the possibilities of a failure to reach agreement. They do not exist." The need to assume a transaction is not consistent with the hypothesis that one party has a limit unrelated to the value of the property beyond which it will not budge and which might prevent such a deal taking place – that is a description of an unwilling seller.

[97] We also reject Mr East's suggestion that an increased level of consideration should be determined to reflect the acquisition of a right to install up to three additional dish antennae in future. To value that right by reference to the benefit which might accrue to the claimants would be contrary to the no-network assumption under paragraph 24(3)(a)

35. Importantly, the Tribunal also decided that the site provider could not then seek to obtain compensation for loss of an alternative bargain under the compensation provisions. As paragraph 24 sets a "market rate" for the code right, that means that, if the ECC is to be interpreted as a unitary scheme, it must be assumed that the granting or imposition of a code agreement does not damage the reversion. The Tribunal explained at [133] and following that that

We acknowledge that, in practice, the valuation assumptions required to be made when assessing the amount of consideration payable prevent the site provider from 22ealizing the true value of its land. In reality, the site provider is prevented from 22ealizing that portion of the value of its land which is attributable to its suitability for use in connection with the provision of a telecommunications network. But that does not give rise to a loss for which compensation is payable under paragraph 84. For the purpose of the Code,

including for the purpose of determining whether a compensatable loss has been sustained, consideration determined in accordance with paragraph 23 must be taken to be the market value of the rights conferred. We agree with the submission made by Mr Read that it was not Parliament's intention to treat entry into a Code agreement (or the imposition of one) as, without more, an event giving rise to loss or damage.

[134] To the extent that the value of the site provider's land is diminished as a consequence of the rights granted (for example because the site provider no longer has the same freedom to use the site as it had before) we consider that is capable of being fully reflected in the consideration payable under paragraph 24. If it could be shown that the value of the land had been diminished to a greater extent than had been reflected in the assessment of consideration a separate claim may be admissible […].

[135] Although none were suggested in evidence, there might nevertheless be circumstances in which the fact that the rights are to be used for the purpose of providing an electronic communications network (a fact disregarded in assessing compensation) could cause a diminution in the value of the land. It might also be possible that circumstances occurring at a later date may result in an additional loss not anticipated when consideration was assessed. If such diminution could be shown to have been sustained in future we think it likely that an additional claim would be admissible in principle, but the evidence in this case does not establish any such loss and we reach no firm conclusion on that question.

OLIVER RADLEY-GARDNER
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