

Consideration / compensation and the approach taken by the tribunal

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Consideration and compensation

- The New Code (sched. 3A of the Communications Act 2003) came into force on 28 December 2017. It includes provisions for consideration and compensation.
- One very significant change from Old Code (sched. 2 to Telecommunications Act 1984) is the basis of assessing consideration.
- Under the Old Code consideration was what would be “fair and reasonable if the agreement had been given willingly.”

Consideration – New Code provisions

- Tribunal is required under paragraph 23(3) to include terms for the payment of consideration.
- By para 24(1), the relevant figure is:
"the market value of the relevant person's agreement to confer or be bound by the code right".
- By para 24(2), this is the amount that:
 - *a willing buyer would pay a willing seller*
 - *for an agreement on the terms imposed under paragraph 20*
 - *in an arm's length transaction*
 - *in which both parties act prudently and with full knowledge."*

Consideration – Code provisions

- Paragraph 24(3) mandates a series of valuation assumptions:
 - (a) **The "no-network" assumption**, namely “that the right that the transaction relates to does not relate to the provision or use of an electronic communications network” (s. 24(3)(a))
 - (b) That paras 16 and 17 of the Code (relating to assignment, upgrading and sharing) do not apply
 - (c) That the right “in all other respects” corresponds to the Code right which is being imposed under para 20
 - (d) That there is more than one site which the buyer could use for the purpose for which the buyer seeks the right (neutralising any monopoly)

Compensation

- Para 25 (“which confers jurisdiction” – *EE v Islington*)

*“(1) If the court makes an order under paragraph 20 the court may also order the operator to pay compensation to the relevant person for **any loss or damage** that has been sustained or will be sustained by that person as a result of the exercise of the code right to which the order relates.*

(2) An order under sub-paragraph (1) may be made—

(a) at the time the court makes an order under paragraph 20, or

*(b) **at any time afterwards**, on the application of the relevant person.”*

Compensation – Code provisions

- Paras 83 to 86 (which provide “more detailed rules” – *EE v Islington*).
- Para 84(2):
 “(2) Depending on the circumstances, the power of the court to order the payment of compensation for loss or damage includes power to order payment for—
 - (a) expenses (including reasonable legal and valuation expenses, subject to the provisions of any enactment about the powers of the court by whom the order for compensation is made to award costs or, in Scotland, expenses),
 - (b) diminution in the value of the land, and
 - (c) costs of reinstatement.”

DCMS Ministerial Statement, May 2016

- New Code "will make major changes to the way land is valued".
- Noted the limited changes proposed by the Law Commission to eliminate any ransom element. The government favoured further reform:

"It is quite clear that the cost for "rents" in the telecommunications industry are significantly higher than those enjoyed by utilities and providers of essential services. Government is also clear that site providers should get fair value for the use of their land, but considers that this 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 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.

Government impact assessment

- Impact Assessment published alongside May 2016 Statement:

“Negotiated wayleave values” (i.e. agreed consideration) expected “to reach an equilibrium at up to 40% lower than current rates.”
- Network providers “will generally want to maintain good relationships with landowners and avoid legal disputes, so they will choose to pay an element of consideration.” For their part, landowners would be encouraged to agree more moderate rates in the knowledge that “if an agreement cannot be made then a court will impose a far lower wayleave settlement.”

EE v LB Islington [2019] UKUT 53 (LC)

- The first New Code case in which the Tribunal has imposed a valuation.
- Application by Operators for code agreement to install equipment at the top of a high-rise block of flats owned by LB Islington.
- At trial, the main issue was consideration / compensation.
- Proposed agreement was 10-year lease. Tribunal agreed to impose a lease.

EE v LB Islington [2019] UKUT 53 (LC)

- Operators' case:
 - Agreed to pay £2,551.77 per annum (value put forward at interim stage)
 - However, argued that true value was nominal
 - no evidence of other valuable rooftop uses in vicinity
 - considered parking or storage values as possible proxies, but discounted down to nominal value due to disadvantages of rooftop.
 - In addition, some element of service charge was reasonable

EE v LB Islington [2019] UKUT 53 (LC)

- Site Provider's case:
 - £11,000, or £13,250 if four dishes were allowed
 - This was based on comparables of very old telecoms agreements, which were said to be agreed when the market was unsophisticated and immature (and then indexed by upto 27 years)
 - Alternatively, £10,500 based on storage value
 - This was calculated by reference to the council's parking and open storage rates
 - Multiple heads of compensation claimed
 - These included alternative use value and service charge

EE v LB Islington [2019] UKUT 53 (LC)

The judgment - Consideration

- Nothing hypothetical about the *market* (*IRC v Gray*) – no requirement to assume competition [83]
- A market with a single bidder does not necessarily yield a nominal value [84] (*F. R. Evans (Leeds) Ltd v English Electric Co Ltd* (1978) 36 P & CR 185)
- The tribunal held at [91]:
 “...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.”

EE v LB Islington [2019] UKUT 53 (LC)

- But what uses must we assume?

“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.” [70]

- 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 [68].
- 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 [70].

EE v LB Islington [2019] UKUT 53 (LC)

- Valuation approach ([95] onwards):
 - Wrong to have regard to old telecoms comparables:
 - contrary to “no network” assumption, different statutory context, old
 - argument that true value not then known is contrary to prudent and knowledgeable assumption at para 24(2)(b)
 - Wrong to assume a “floor level” consideration below which a party won’t deal
 - Wrong to take into account the ability to install 4 dishes vs 1 (contrary to “no network” assumption)
 - Parking and storage comparables do not assist. No demand for such uses.

EE v LB Islington [2019] UKUT 53 (LC)

- Case distinguishable from freehold valuation cases with nominal values
- Parties will be in relationship for a number of years
- Consideration should reflect “risks and obligations” that relationship creates
- The terms contain no service charge and the consideration should take account of that
- Long leaseholders of the flats pay £1,300 service charge
- **Valuation of rights themselves: £50**
- **Consideration payable: £1,000** including a notional service charge

EE v LB Islington [2019] UKUT 53 (LC)

Compensation

- “ power to award compensation is very flexible” [109]
- Rejected the notion that compensation is discretionary ("the court may also order the operator to pay compensation").
- Where loss or damage is sustained we do not consider that the Tribunal could properly refuse compensation
- “Borrow” three conditions from compulsory purchase case of *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 2 A.C. 111:
 - Causal connection, not too remote, mitigate reasonably

EE v LB Islington [2019] UKUT 53 (LC)

- List at paras 84(2) is “not intended to be exhaustive” [117] (*obiter*)
- Rejected idea that compensation payable once only, i.e. when agreement imposed [110-111] (not the natural effect of paragraph 25(1) and it ignores paragraph 25(2)).
- On the facts:
 - Reasonable legal and valuation expenses in connection with agreeing the code agreement.
 - Compensation for the temporary use of its land for a working compound
 - Not entitled to compensation for diminution in value of the land (see [130] onwards]
 - (NB Costs not yet decided)

***Cornerstone Telecommunications Infrastructure Limited v
Compton Beauchamp Estates Limited [2019] UKUT 107 (LC)***

- Telecoms mast in fenced compound at edge of arable field.
- No agreement imposed, so valuation comments *obiter*.
- Existing use value may be an appropriate starting point [107]
- However, it is not appropriate to take a valuation of a large area of land and create a pro-rata valuation for a very small area of land [108] (£2.96 rent per annum proposed by Operators, or £95 including compensation)
- If the rent given by a particular approach appears “improbably high or low”, it is “necessary to ask critical questions”.
- Consequences to parties are relevant, and rural landowners may have reservations as to unrestricted access [110].

Cornerstone Telecommunications Infrastructure Limited v Compton Beauchamp Estates Limited [2019] UKUT 107 (LC) *contd...*

- Landowner suggested £9,500 per annum on the Operators' terms or £4,300 on OFCOM standard terms.
- This was based on three sets of comparables:
 - (1) Agreements for telecoms uses, adjusted “fairly arbitrarily” by 35% to allow for the “no network” assumption
 - (2) Agreements said to have been agreed under the New Code
 - (3) Agreements for similar rights granted for non-telecoms purposes (weather stations, air traffic control stations etc)

Cornerstone Telecommunications Infrastructure Limited v Compton Beauchamp Estates Limited [2019] UKUT 107 (LC) contd...

- The tribunal rejected telecoms comparables as not “convincing” [113]
- As for New Code agreements [114]:
 - It was not known whether there was particular pressure in any given case
 - It was not known if the parties took into account that a tribunal “no network” valuation was the alternative to agreement
 - These would only be persuasive if it is shown parties had regard to statutory assumptions
- The non-telecoms use transactions [115] had the advantage of not needing a “no network” adjustment. Their value would increase if the land “may realistically be of interest to those types of user.” Prospect of planning permission also relevant.

Thank you for listening

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