

Summary

The new Electronic Communications Code (**New Code**) came into effect on 28 December 2017 and cases are starting to filter through, as the Upper Tribunal (**Tribunal**) and courts decide how the New Code is to be interpreted. This case is the first decision on the meaning and effect of the **consideration** and **compensation** provisions of the New Code.

Facts

EE Limited and Hutchison 3G UK Limited (**Claimants**) currently have communication apparatus on the roof of Leroy House, a block of flats adjacent to Threadgold House and owned by The Mayor and Burgesses of the London Borough of Islington (**Respondent**). Planning permission has been granted for the redevelopment of Leroy House, which will require the removal of the Claimant's apparatus and the loss of the site. Consequently, the Claimants have proposed to use Threadgold House for the siting of its apparatus as an alternative location. Prior to the New Code, the parties had actually negotiated and agreed in principle terms on which the Respondent would permit the use of the site at Threadgold House.

The Tribunal had to determine whether interim rights should be granted to operators where the landowner wishes to redevelop the building on which their equipment is currently situated. The focus was on the consideration and compensation elements of the claim.

Consideration Issue

- Before the New Code, parties were free to negotiate and agree the amount that should be paid by the operator for rights to use land for communication equipment. If this could not be agreed, the courts had the power to confer those rights on an operator and determine the terms on which they could be exercised. However, cases referred to the courts were very rare.
- Paragraph 24 of the New Code sets out a valuation criteria for any application made. It states that the amount of consideration payable by an operator under an order made under paragraph 20 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."
- In this case, the Claimants proposed the payment of £2,551.77 per annum. This was said to match or exceed the figure, which would result from an application of the paragraph 24 valuation criteria. The Claimants evidenced the fact that the rooftop of Threadgold House had a nominal rental value and asserted that the consideration should actually be a nominal sum of £1 per annum. They also concluded that there was no market for the rights other than for telecommunications purposes.

- The Tribunal ordered that consideration should reflect the Respondent's expenses of running the building and keeping the communal areas of Threadgold House in good repair. They ordered that the consideration should be £2,551.77 per annum and not the nominal sum as originally proposed.

Compensation Issue

- Under paragraph 84 (2) of the New Code, the Tribunal has the power to order payment of compensation for any loss or damage that has been sustained or will be sustained by that person, as a result of exercise of the code right to which the order relates. The power to award is very flexible.
- In this case, the Respondent argued that it was entitled to compensation for **expenses, diminution in the value** of the land and **costs of reinstatement**. It asserted that it was entitled to compensation to reflect the income that it would have received from the rooftop site on Threadgold House if it were to let to another operator outside of the New Code.

– Expenses

The Tribunal said that there was no dispute about the Respondent's entitlement to "reasonable and valuation expenses in connection with agreeing the New Code agreement." This included costs incurred in seeking to agree terms for a new agreement, but did not include costs incurred in resisting the imposition of the agreement or attempting to compromise it.

They were also entitled to compensation for the temporary use of its land at ground level (and, possibly, the undemised area of the roof).

– Diminution in value

The Tribunal recognised that the valuation assumptions required when assessing the amount of consideration payable prevented the site provider from realising the true value of its land. However, that did not give rise to a loss for which compensation is payable under paragraph 84 of the New Code.

It was also said, however, that if diminution of the value of the land could be shown to be diminished to a greater extent than had been reflected in the assessment of consideration, it would be a separate claim that may have been admissible.

– Costs of reinstatement

The Tribunal felt that it was unnecessary to deal at any length with this aspect of the compensation claim, because the draft agreement included a provision for the tenant to remove all of its equipment from the site at the end of the term and make good to the reasonable satisfaction of the landlord "any damage whatsoever caused thereby."

Lessons to Learn

1. **Always comply with directions** – The Respondent was debarred from adducing further evidence as they failed to respond to draft proposed terms of the agreement tendered by the Claimant. In this case the Tribunal made it clear that it expects parties to co-operate and act sensibly on the question of terms and that failure to engage with directions will have consequences in future.
2. **Code agreements can take the form of a lease** – Terms can be incorporated into a lease and do not need to take the form of a separate agreement.
3. **Consideration** – Any valuations should take payments for services into consideration. It should not be part of the compensation.
4. **Public interest** – The Tribunal focused on the public interest in that there will be a need to impose these types of agreements on “unwilling parties” in future, regardless of whether that agreement is less favourable than a commercial negotiation.

Developments and Forthcoming Cases

Cornerstone Telecommunications Infrastructure Limited v The University of London [2018] UKUT 0356 – This was another substantive decision under the New Code, where the Tribunal held that its powers to impose an agreement for access extended to agreements solely for interim access. This case is currently being appealed in the Court of Appeal so it will be one to watch out for.

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