Consideration under the Electronic Communications Code

"Please sir. I want some more…."

Carlos Pierce looks at the recent decision in *EE Limited and Hutchison 3G UK Limited v The Mayor and Burgesses of the London Borough of Islington [2019] UKUT 53 (LC)* *and the industry's thirst for even more clarity on the Code.*

"Please sir. I want some more…?"

For those of you that have seen the 1968 version of the film Oliver Twist. You know what comes next! Harry Secombe's "…MORE….???!!!"

In this article I look at what we learnt from the case and whether in fact, for perhaps different reasons, it has left landowners, and operators, wanting more….

What was the case about?

EE/Three sought rights under the Code to install and operate electronic communications apparatus on the rooftop of a block of flats owned by Islington Borough Council (LBI).

EE/Three previously provided coverage to that area from an adjacent building which was expected to be redeveloped and were seeking to replace their existing site with this one. LBI objected to the grant of Code Rights and the payment being offered.

What key issues did the Tribunal Consider?

The Tribunal had to consider four key issues:

Headline	Issue
Lease v Agreement	Does the Tribunal have jurisdiction to impose a Lease, or can it only impose an agreement (as per the wording in the Code)?
Terms	Failure of LBI to follow the Tribunal's direction and comment adequately on EE/Three's draft Lease meant that the Tribunal had to decide whether to impose the form of EE/Three's lease (without a discussion on terms in the hearing).
Consideration	The meaning of paragraph 24 and how this relates to a Rooftop with no demand in the market and with no direct comparable evidence
Compensation	Valid heads of claim and eligibility under which paragraph of the Code.

Classification: Highly Sensitive

Consideration

Paragraph 24 of the Code sets out how much an Operator should pay for a Code Agreement. This is the amount that a willing buyer would pay a willing seller for the Code Agreement considering various assumptions and disregards.

It is an imaginary scenario, but in the setting of the actual market that exists.

As there was no alternative use for the rooftop EE/Three's expert assessed this at nominal and suggested £1 per annum. LBI took a different approach and arrived at a figure of £13,250 per annum. Their argument that there was a figure below which a seller wouldn't go was rejected by the Tribunal.

The Tribunal confirmed that the nominal value of the Code rights is £50 but arrived at a total Consideration figure of £1,000 per annum to reflect the costs of LBI's expenses of the running of the building from which EE/Three benefitted. This figure was by reference to what the residential tenants in the building paid by way of a service charge.

Although the Tribunal assessed Consideration as £1,000 per annum the sum specified in the Lease will be £2,551.77 per annum – being the sum proposed in the paragraph 20 notice served by MBNL.

Consideration – more than nominal?

Noting the service charge paid by the leaseholders of the flats in this particular building, the Tribunal inferred that an operator would be prepared to pay more than nominal value, to reflect the absence of a service charge in the imposed agreement. The services provided by the landlord would therefore be recouped via additional consideration for an 'all-in' agreement with unsupervised access, like a normal demise. In the words of the judge the operator being able "*to come and go in the same way as a leaseholder of one of the flats…*"

The fact that there was an existing Service Charge in place provided a mechanism for the Tribunal to quantify a figure for those services.

But really what the Tribunal appeared to be doing was wrapping up elements that might have been classed as compensation into one payment.

The judge also said:

"*both parties approached this topic* [i.e. the contribution towards the expenses of running the building/complying with obligations etc.]*…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*"

Classification: Highly Sensitive

and then said that:

"*…the reasonable parties would wish to wrap them up in a single annual occupation payment..*".

Key Decisions

- Consideration:
  - nominal value of Code rights is £50
  - Tribunal arrived at all-in figure of £1,000 per annum for an unrestricted access lease (guided by the existing service charge at the building)
  - Sum specified in the Lease will be the sum proposed in the paragraph 20 notice served by EE/H3G of £2,551.77 per annum.
  - Pre-Code deal agreed in principle (never completed) was £21,000 per annum.
- Form of Agreement:
  - The Tribunal imposed a 10-year Lease on the terms requested by EE/Three.
  - This was because LBI had failed to comment in breach of the direction
- Compensation:
  - LBI failed to make a case for the award of compensation.
  - LBI entitled to its reasonable legal and surveying costs of the agreement, whilst the Operator would be contractually liable for loss or damage caused by the installation of the equipment.
  - Other heads of loss were described by the Tribunal as 'speculative or contingent'
  - LBI can revert to the Tribunal at any time in the future if it can substantiate any true losses or damages (it failed to as part of the hearing).
- The Tribunal christened the phrase 'no-network' rather than no scheme

Compensation

When making an order for a Code Agreement, the Tribunal may order that an operator pay compensation for loss of damage (Paragraphs 25 and 84 of the Code).

The Tribunal did not make an award for Compensation in this case.

In arriving at that decision, the Tribunal dismissed LBI's compensation claims, whilst also stating that arguments from the Operator that compensation was discretionary '*went too far*'.

Classification: Highly Sensitive

The Tribunal spent considerable time in explaining its decision to reject a diminution in value claim resulting from the loss of income that the telecoms site would have produced without the paragraph 24(3)(a) exclusion. The Tribunal didn't think it was Parliament's intention, having established that no additional amount for sharing should be taken into account when calculating consideration, that landowners should recover this 'through the backdoor'.

Compensation for reinstatement was viewed as unnecessary as the imposed code agreement contained a clause requiring this and the Tribunal dismissed other claims for loss or damage where the imposed agreement contained contractual provisions requiring such damage to be remedied.

The Tribunal did however say that the LBI was entitled to its reasonable professional fees incurred in seeking to agree the terms of the Code Agreement and to compensation for temporary use of land for working areas, when the Operators requirements for such became known. The parties can revert to the Tribunal if these figures cannot be agreed. LBI can also revert to the Tribunal at any time in the future if it can substantiate any true losses or damages.

The Tribunal noted that its determination of consideration took into account wear and tear to the common parts, the use of fire safety precautions and a contribution to the cost of future roof repairs.

A claim for loss of 'sharer income' was rejected as double counting and other heads of loss were deemed to be speculative or contingent.

It seems that, for the Tribunal, compensation really means (actual) damage and losses directly resulting from the Operator's use of the site and these must be supported by proper evidence.

Commentary

This was a keenly awaited decision.

It appeared to confirm what many Operators believe that the lack of an alternative use means that the value of the Code rights is nominal. However, the Tribunal appeared to combine, what some purists may deem to be, elements of compensation e.g. the provision of services and access, into an 'all-in' figure.

There is logic in this.

Ideally both an operator and a landowner will want to have one (lump sum or annual) payment for a full package of rights that allows apparatus to be operated from the site and which takes account of the landowner's reasonable costs (if any) of accommodating the Operator.

Classification: Highly Sensitive

And the Tribunal does not want endless claims in its already busy court (room 21!) for compensation claims. So, you can see why it's gone done this route.

Whilst landowners may view this as a win for operators it does start to give all parties greater clarity as to how a Tribunal will interpret the Code. And that must be a good thing.

So, it seems an 'all-in' agreement that includes all the Code Rights, and wraps up consideration, compensation and access into one (lump sum or annual) payment seems to be the way to go. We now have greater clarity…

And Oliver Twist does have a happy ending after all…

Carlos Pierce is Head of Legal projects, Strategy and the Code programme at Cornerstone the UK's leading mobile infrastructure services company set up as a joint venture between Vodafone and Telefónica.

Classification: Highly Sensitive