Consideration, Comparables and Compensation under the Electronic Communications Code

By Kirk Reynolds QC

Introduction

1. This article is a revised version of my paper delivered as part of the Falcon Chambers Zoominar held on 16th June 2020. It is concerned with consideration, comparables and compensation under the new Code. These topics are connected.

2. "***Consideration***" is the rent payable by the operator to the site provider (called "the relevant person" in the paragraphs of the Code from which I will quote). It is assessed by the UT when it has made an order under para 20 requiring a "relevant person" to agree to confer a code right on the operator or to be otherwise bound by a code right which is exercisable by the operator. (The whole tone of the Code is neatly encapsulated in the Orwellian concept of a Court *ordering* a person *to agree*!) Para 23 sets out the terms of this imposed agreement, so as to give "effect to the code right sought by the operator with such modifications as the court thinks appropriate". Para 23(3) provides that 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". Para 24, which I will later consider in detail, asks and then answers the question: "How is consideration to be determined under paragraph 23?".

3. The expression "***Comparables***" is not to be found in the new Code itself but is a piece of valuer's jargon. It is short for "comparable transactions" and underpins the comparative method of valuation, which is widely used in open market valuations of freehold and rental transactions. I will devote special attention to comparables here, because one of the main problems which site providers encounter, when seeking to prove to the satisfaction of the UT what is the amount of the consideration payable, is the unusual way in which the comparative method needs to be applied in order to respect the parameters laid down by the Code.

4. Finally, "***Compensation***" is treated together with consideration, because the power of the UT to award a sum by way of compensation under para 25(1) and para 84 has been relied upon by site providers in an attempt to "top up" what they consider to be the inadequate amount of consideration which can be obtained from the UT under para 24.

Before the New Code

5. Before I get into the nitty-gritty, I need to say something about the Code itself. (Of course, I mean the new Code which replaced the old Code as from 28th December 2017.)

6. The first point to make about the new Code is one which will have become blindingly obvious to all of you in your day to day dealings with it. The principles which lie behind it are radically different from what went before. Just as Russia had its October Revolution in 1917, the world of telecoms had its December Revolution in 2017.

7. To go back to Pre-historic times, when the first mobile phone networks were starting to be established, everything was done by agreement. An operator found a promising site, approached the owner of the land or building in question, and did a deal. A tenancy agreement or licence agreement would be granted, and the "rent" or "licence fee" would be agreed. In principle this consideration, being fixed by the application of market forces, reflected the respective bargaining strengths and market knowledge of the parties, the importance to the operator of securing the particular site, and the opportunity which the approach gave to the property owner of obtaining an income from what might be a useless scrap of land on the edge of a large estate, or part of the windswept roof of a council block. To some property owners it may have seemed that they had found a crock of gold at the end of the rainbow. Often these agreements contained provisions for review of the rent or licence fee, the valuation basis of which was more often than not some kind of open market value, or RPI indexation, whichever was the great.

8. When the old Code was introduced, it took effect as a form of security of tenure, prolonging the originally agreed relationship, albeit subject to some interference by the Court. The old Code required the Court to determine the amount of consideration by awarding a sum which appeared to the Court to "have been fair and reasonable if the agreement had been given willingly". As the UT noted in the Islington case[1], para [55]: "in practice consideration was rarely determined by the Court but was agreed at levels

[1] EE Limited and Hutchison 3G UK Limited v London Borough of Islington [2019] UKUT 53 (LC) (Martin Rodger QC, Deputy Chamber President and A.J. Trott FRICS). I am grateful to my co-lecturer, Wayne Clark, for his summary of the valuation methodology laid down by the UT in this important case, which I have attached as an Appendix at the end of this article.

which reflected the value to the operator of the use of the land for its apparatus".

Of course, in most cases, the parties themselves anticipated what the Court might decide by themselves agreeing a consideration acceptable to each of them. This too would have approximated a rent agreed in the open market, albeit under the shadow of the old Code.

The New Code

9. Then the Revolution occurred. In the place of security of tenure, which only kicked in at the expiry of rights already agreed voluntarily by the site provider in the first place, the new Code introduced a form of compulsory acquisition. This was accompanied by a revolution in the policy underpinning the quantification of the consideration payable upon the compulsory grant of Code rights. The way that matters developed was explained by the UT in the Islington case, paras [56] and [57], which I will briefly summarise here.

10. The Mensheviks, in the unlikely guise of the Law Commission, recommended only limited changes to the valuation provisions of the old Code to eliminate any ransom element. But the Bolsheviks, in the even more unlikely guise of the Department for Culture Media & Sport, favoured violent revolution. They said:

> "It is quite clear that the cost for "rents" in the telecommunications industry are [sic] 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. This is a rate that is more relevant to the nature of modern digital communications infrastructure roll out, and will work to encourage greater investment and improved network coverage".

This policy was carried through (albeit somewhat clumsily) into the drafting of the new Code, to which I now turn.

11. Para 24(1) provides that "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 agreement to confer or be bound by the code right (as the case may be)".

As the UT commented in the Islington case, "in some ways this is a surprising formulation", because a "market value" is "usually understood to be the value or price agreed on between a willing buyer and a willing seller in an arm's length transaction after proper marketing". But, as the UT notes, paragraph 24(1) focuses on "the value of the agreement to only one of the parties – the seller (referred to as the relevant person)". However, the UT swiftly moves on to explain the answer to this apparent conundrum as follows:

> "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. 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."

12. However, a somewhat different signal is given by para 24(2) which provides that:

> "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 *to 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
> (c) on the basis that the transaction was subject to the other provisions of the agreement imposed by the order under paragraph 20."

As the UT points out, this is given a quite different "signal" to that given by the earlier provision. The references to a "willing buyer" and a "willing seller" in an "arm's length transaction" in which both parties act "prudently and with full knowledge" follow closely the definition of Open Market Value for freehold sales and rents to be found in the RICS "Red Book". Furthermore the introduction into the new Code valuation criteria of a specific transaction on a particular date and terms gives what the UT described as "an entirely conventional shape to the exercise which must be undertaken". As they point out, this "requires the assumption of a transaction, whether or not one would happen in reality. The transaction is to be assumed to take place in the open market with all the features present in that market in reality – as explained by Hoffmann LJ in IRC v Gray [1994] STC 360 (a case concerning valuation for capital transfer tax)".

13. However, it will be noted that all this is made subject to sub-para (3). This tilts the "entirely conventional shape" of the exercise back to one which conforms with the revolutionary policy enunciated by the Government. Sub-para (3) provides that:

> "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 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;
> (c) 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."

As the UT correctly comments, these assumptions, in particular "are absolutely critical to the outcome" of the valuation. The assumption, which is conveniently described by the UT as the "no-network" assumption, is further explained in para [68] as follows:

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

14. Real life case studies of how these various provisions might play out are to be found in the facts of the Islington case and the Compton Beauchamp case[2], both decided by the UT, to which I now turn.

Comparables

15. In the Islington case the site in respect of which Code rights were to be imposed was part of the flat roof of a ten-storey block of flats belonging to the Council. In the Compton Beauchamp case the site in respect of which rights were sought was a small area of land on the edge of an arable field next to a cutting on the main Didcot to Swindon railway line. For a number of years a telecommunications mast had stood on a concrete base in a fenced compound on the site. In both cases the UT had to consider a number of valuation approaches put forward by the respective valuers who between them employed a number of imaginative, and in some instances far-fetched, attempts to carry out a valuation which complied with the new Code.[3] I will describe, in outline, each of these approaches (including those which are not, strictly speaking, approaches which adopt the comparative method) before looking at the remarks which the UT made in relation to each of them, which are very instructive.

16. It is interesting to note the vast chasm which stretched between the valuation figures propounded on behalf of the operator and the site provider in each case.

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[2] Cornerstone Telecommunications Infastructure Limited v Compton Beauchamp Estates Limited [2019] UKUT 107 (LC) (Martin Rodger QC, Deputy Chamber President, and P.D. McCrea FRICS).

[3] No criticism is intended of any of these valuers, who faced the Herculean task of valuing rights without any clear guidance as to how to do so, based on very problematical evidential materials on which to base their conclusions.

In Islington a figure of £2,551.77 per annum had originally been offered, a position from which the operator generously did not resile even though the valuation figure eventually put forward by its expert under the new Code was £1 per annum. The site provider's valuer arrived at a valuation of £11,000 per annum (or £13,250 per annum if four dish antennae were permitted). Both experts sought to support their valuation figure, or alternative figures, by various methods.

In the Compton Beauchamp case the operator's expert calculated that the consideration payable for the whole of the proposed 10-year term should be £26. The site provider's expert put forward a figure of £9,500 per annum assuming that the other terms put forward by the operator were imposed by the UT, but a lower amount of £4,300 per annum on the basis of more conservative terms derived from the OFCOM standard form of agreement.

In both cases, therefore, the operator's expert said that the value of the rights applying the methodology mandated by the new Code was virtually nothing, whereas the site provider's expert supported a significant figure, albeit one which was not enormous, payable on an annual basis.

17. In the Islington case the operator's principal valuation was based upon his view that there was no market at all for the rights other than for telecommunications purposes, since the only other use being made of rooftops in the vicinity was of one roof used as a garden, and one used as the site for some solar panels, neither of which would command a rent. It followed that, applying the no-network assumption, there would be no bidders in the market for the acquisition of the rights. Although he accepted that it had to be assumed that a transaction would take place, the

consideration for such a transaction would be nominal. This resulted in his £1 valuation. In the alternative, two indirect valuation methods were put forward. One, which he called "the basement approach", adopted the rating convention of zoning rental values and applying a percentage discount to less valuable parts of the premises. From local retail rating assessments he deduced that basement storage in the locality was worth 5% of Zone A retail accommodation. To calculate a suitable figure derived from basement storage values to be applied to the roof, however, it was necessary to apply a further discount of 80%. Unsurprisingly, this also resulted in a nominal figure.

His alternative approach, based on car park values, required a discount of 99% to take account of the obvious difficulties in parking cars on an inaccessible rooftop. This also supported his valuation of £1.

18. Although notionally based on comparables to which massive discounts were applied, both these valuation methods put forward by the operator's valuer seem to me to be based fundamentally upon the valuer's firm belief that the sites had no value to any user other than an operator, and that the no-network assumption therefore inevitably had the effect of depriving any alleged comparable of any applicability to the valuation of Code rights. Although he had to accept that a transaction would take place, that could only result in a nominal value.

19. Unsurprisingly, the site provider's valuer approached matters somewhat differently. He identified what he was valuing as being "the right to reserve space on the roof for the apparatus to the exclusion of all other parties, including the [Council], together with a right to carry out all other

associated activities required to install, inspect maintain adjust, alter repair, share and upgrade electronic communications apparatus". He suggested that there was a value to the willing seller below which the seller would not deal. As to the assessment of this "value to the seller", it was the Council's expert's view that this could best be assessed by referring to transactions for the grant of such rights in the very early days of mobile communications (the 1990s). These admittedly historic values (which he himself had negotiated in-house with various operators) had resulted in annual rents of £6,000 or £7,000 with periodic reviews. The UT , which was understandably somewhat puzzled by this approach, observed that it seemed to be based upon the proposition that these very early transactions were in effect agreed in a no-network world, because the site providers at those times were ignorant of the true value of the rights which they were granting. Taking these 30-year old rents as comparables, they obviously had to be updated in some way for the passage of time up to the present day. This was done by indexing the historic figures for inflation. After carrying out a number of adjustments this resulted in the ultimate valuation figure put forward of £11,000 or £13,250 per annum. An alternative approach was put forward based on the value of storage space. Although it was acknowledged that there was no relevant direct comparable for open storage, an analogy could be drawn with rents charged for garages and open car parking spaces which would result in a rental value of £10,500 per annum.

The UT also found that method to be unconvincing.

20. In the Compton Beauchamp case the operator's valuer described his principal approach as "pro-rata existing use". He took the freehold capital value of arable land in the district as his starting point, which he then

decapitalised to give a notional annual equivalent, and then assumed that a small parcel of land would have the same value per square metre as a much larger block. The UT criticised the valuer's valuation both because it sought to derive a rate from transactions in which hundreds of acres of land changed hands to a very small parcel, and also because the yield applied seemed inappropriate to the determination of rent under the Code. More interestingly, quite apart from these technical difficulties, the UT expressed the more fundamental criticism that the approach overlooked other wide issues which would be taken into account by willing parties. They observed that, standing back from the figures, the amount suggested seemed unreasonably low. The UT also observed that there was force in the landowner's valuer's evidence that "many rural landowners have well founded reservations about allowing an operator to have relatively unrestricted access over their land", exemplified by examples experienced in practice owing to breaches of bio-security, operators' vehicles becoming stranded, or interference with sporting rights. The UT concluded that the "tiny sums" suggested by the operator's valuer failed to take into account "the understandable reluctance of rural landlords to keep control of their land to the extent that entry into an agreement for Code rights is likely to entail".

21. However, the UT was equally critical of the site provider's valuer's "discounted network" valuation. This involved applying a series of discounts and adjustments to the headline rental values which could be deduced from a range of evidence. The establishment of those headline rents involved reliance on three groups of comparables. *The first group* consisted of "network" comparables, involving agreements for telecommunication uses. In order to reflect the "no-network assumption" a discount of 35% was applied, based on discounts for restraints one sort of another allowed by

Courts or arbitrators in a variety of reported cases involving lease renewal or commercial rent review. The UT said that it did not consider this approach to be convincing. *The second group* of comparables comprised agreements under the new Code. The UT criticised this on the basis of the sparsity of evidence, noting that the details were "sketchy" and the results "inconsistent". However, the UT made a comment of more general importance which will no doubt be seized upon by valuers seeking to establish a significant value even in the no-network world. The UT said that agreements under the new Code "are market evidence of the value of Code rights and *if it could be demonstrated in the future that such transactions were agreed having regard to the statutory assumptions, or if a coherent basis for adjustment could be suggested*, then such evidence *might be persuasive*". The approach was rejected in the instant case, however, because the valuer "was not able to provide the required level of detail and was forced instead to make an arbitrary deduction in an attempt to reconcile the evidence with the no-network assumption".

22. Another encouraging comment was made by the UT when discussing *the third group* of alleged comparables relied upon by the site provider's valuer. These were based on transactions in respect of rights granted for purposes which were not telecommunication purposes, but were similar purposes – weather stations, air-traffic control stations and the like. The UT commented that "this sort of evidence has the advantage that it does not require adjustment to reflect the no-network assumption. It might therefore also be useful". They added that "its value is likely to increase if it can be shown that the reference land may realistically be of interest to those types of user".

23. In conclusion the UT in the Compton Beauchamp case observed that "we hope that the evidence presented in future references involving rural property will focus more closely on specific transactions in relevant comparable situations".

Reflections on the use of Comparables

24. So far I have looked at the two key UT cases where the attempted use of the comparative method had limited success, and provoked critical comments from the UT which, although they were as constructive as they could properly be, reveal the UT to be unimpressed by the evidence put before it. I will now stand back from the cases, and set out some propositions of my own, based upon my own experiences with the comparative method in other areas, which may be of assistance.

(1) Although the comparative method is not the only available method of quantifying rent (and therefore also consideration payable under the new Code), it is generally regarded by valuers as the most sophisticated tool available when they are seeking to give effect to the multifarious different factors which, in combination, make up the value of a particular site valued for a particular purpose.

(2) In the particular case of consideration quantified under para 24 the extensive importation of concepts and principles borrowed from the Red Book defining Open Market Value has been described by the UT as being "the conventional shape of valuation" mandated by the principles set out in para 24. Comparables would almost always be used for a Red Book valuation.

(3) The criticisms made by the UT in the cases do not amount to a rejection of the comparative method. They are confined to the

technical deficiencies of the various approaches taken by the valuers, the quality of the evidence offered to support the valuations, and the use of transactions which, to put it frankly, were simply not comparable in terms of property, date, or use. The great flexibility of the comparative method, allowing fine adjustments to be made by way of discounts or uplifts for the presence or absence of various features, therefore inevitably ended up as massive deductions which, in truth, amounted to admissions that the so-called comparables were not comparables at all.

(4) The fundamental flaw which recurred in most of the examples displayed by the two cases was the inability of the comparative method to deal with the no-network assumption. The ingenious valuations put forward by the valuers either failed entirely to respect the no-network assumption, or drove the valuer to base the valuation on transactions which had no similarity whatsoever to what was being valued.

(5) A possible approach may be to use the comparative method in relation to transactions which themselves already incorporate the no-network assumption. An example of such a transaction would be a real-world agreement between an operator and a site provider, made with full knowledge by both parties that, if they could not agree a figure, the consideration would be determined by the UT on the basis of the para 24 criteria. Such negotiations would take place "under the shadow of para 24", as it were, and it might be possible to accept the figure agreed by knowledgeable parties as truly reflecting the full extent of the no-network assumption, while also truly reflecting all the other relevant features of the value to the operator of the grant of Code rights.

(6) A similar line of thought leads me to wonder whether, over time, there may come into existence a corpus of reasoned decisions by the UT (or higher Courts) which themselves could be treated as comparables to be used in other cases. I am, of course, aware that there is a rule of evidence restricting the admissibility of decisions by Courts or arbitrators or independent experts as comparables in valuations of other property, but I wonder whether an exception might be made for UT decisions under para 24. An analogy might, perhaps, be drawn with the position under the old Rent Acts, where it was not unusual for fair rents to be determined by the Rent Officer principally on the basis of other fair rents determined by other rent officers, or, on appeal, by the Rent Assessment Committee. Those decisions were taken to represent a true picture of rents in the locality fixed accordingly to the statutory criteria.

25. Those are only a few tentative reflections of my own: how this will all develop, only time will tell.

Compensation

26. I will conclude by referring very briefly to the Compensation which the UT can award under paragraph 25(1) and para 84. Various heads of compensation can be claimed by the site provider, including a claim for diminution in the value of the land arising from the grant of the rights. In the Islington case the claim included compensation for disturbance during the installation works, for noise and nuisance, for additional wear and tear on the roof, for the purchase of certain safety equipment, and periodic payments for a variety of safety checks and management costs, as well as a contribution towards the general maintenance and repair of the building.

Whether such sums can be recovered in any particular case will depend, of course, upon the evidence, but, in principle, such sums can be awarded.

However, a courageous attempt in the Islington case to include, as a head of loss for which the site provider ought to be compensated, the effects of the no-network assumption itself was rejected by the UT. They said at para [133]:

> "We acknowledge that, in practice, the valuation assumptions required to be made when assessing the amount of consideration payable prevent the site provider from realising the true value of its land. In reality, the site provider is prevented from realising 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 purposes 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 [on behalf of the operator] 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."

27. Thus it appears that, although the right to compensation will often result in the site provider receiving, in addition to consideration, substantial payments into the future to compensate it for loss, the bold attempt by the site provider to take back with the left hand that which the right hand has taken away will be doomed to failure.

APPENDIX

1. The valuation methodology provided for by the **Islington** decision is as follows (references are to paragraphs in the judgment):

    (1) the basic measure of consideration is that stated in paragraph 24(1), namely "*the market value of the relevant person's agreement to confer or be bound by the code right*" (para [61])
    (2) paragraph 24(1) does not require an unconventional approach to determining market value given the terms of paragraph 24(2) (para [63])
    (3) The valuation criterion is of a specific (hypothetical) transaction in the open market and that requires an assumption of a transaction, whether or not that would happen in reality (para [64]).
    (4) The market has all the features present in that market in reality. (para [64]).
    (5) The conventional shape of the valuation is subject to the series of assumptions provided for in paragraph 24(3).
    (6) The most significant assumption is the "no network" assumption provided for in paragraph 24(3)(a) (para [66]).
    (7) It is a question of fact what use may be made of the site on the terms imposed (by the Tribunal) having regard to the no network assumption (para [70]).
    (8) In principle the no-network assumption must permit some notional relaxation of contractual terms which would otherwise limit the permitted use to statutory Code purposes only. (para [70]).
    (9) The fact that there may be only one bidder in the market does not mean that the price agreed will necessarily be a nominal one. (para [84]).
    (10) The concept of floor level consideration (i.e. consideration below which the willing seller would not transact) is flawed; it must be assumed that a transaction will take place.
    (11) 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. (para ([91]).

2. Finally, under paragraph 24 it is clear that one is valuing the terms of the Code agreement imposed and not simply the Code rights provided for in it e.g. those rights under paragraph 3. This is clear from paragraph 24(3)(c).