

The New Electronic Communications Code clarified

The Upper Tribunal has recently provided helpful clarification of the workings of several aspects of the new Electronic Communications Code (“**the Code**”) introduced by the Digital Economy Act 2017, which came into force on 28 December 2017.

EE and v LB Islington [2019] UKUT 0053 (LC) concerns the terms on which telecommunications equipment should be installed on the roof of a 10-storey block of flats in Islington. As the Tribunal observed at para. 4:

“This is the Tribunal’s first decision on the meaning and effect of the consideration and compensation provisions of the Code. It also raises a separate point of principle concerning the jurisdiction of the Tribunal to impose Code rights by lease.”

In October 2018, after a contested hearing, the Upper Tribunal made an order under para. 26 of the Code for the grant of interim rights, pending a final hearing (*EE Ltd and another v L.B. Islington* [2018] UKUT 0361 (LC)). The Tribunal then made directions for the preparation for the final hearing. These included a requirement that the claimant provide an electronic draft of the agreement they sought, and that the respondent reply with an amended draft, and so on, until the issues were narrowed, and any remaining points in contention were identified in a joint statement by 19 November 2018. However, instead of complying with these directions, the respondent sought to rely upon a witness statement, which it had produced before the interim-rights hearing, explaining what it objected to in the claimant’s proposals.

By the time of the final hearing, it was not in dispute that an agreement should be imposed giving the operator non-temporary rights to install and maintain its telecommunications equipment on the roof. However, the Tribunal needed to decide the terms of such agreement, and in particular the questions:

- (a) whether the agreement imposed should be in the form of a lease;
- (b) what consideration should be payable under the agreement; and
- (c) what compensation was payable under paras. 25 and 84 of the Code.

The Tribunal also had to deal with the question of how Code rights imposed by the Tribunal are to take effect.

It is important to note that, as this case concerned the imposition of rights on a new site, the Tribunal was under a statutory deadline to determine the application within 6 months of receipt, which deadline neither the parties nor the Tribunal was able to dispense with (see para. 18). That was evidently a significant factor in its decision regarding the consequences of the respondent’s non-compliance with the directions.

The Tribunal's decision

The first thing the Tribunal had to decide was what do to about the respondent's failure to comply with the directions, and to cooperate in the production of an appropriately marked up travelling draft agreement, and a joint statement of issues in contention. The parties ended up agreement virtually nothing. The Tribunal considered that this failure was deliberate, and inexcusable. Accordingly, it debarred the respondent from calling evidence or making submissions on the terms of the agreement, apart from the issues identified above as to the form of the agreement, and the consideration and compensation payable.

(a) Form. The Tribunal decided that it did have the power under para. 23 of the Code to impose an agreement in the form of a lease. As the respondent was not otherwise entitled to contest the terms of the agreement (for the reasons explained above), the only question considered by the Tribunal was whether it had the *jurisdiction* to impose a lease on the parties. The Tribunal referred to its earlier explanation of the structure of the Code in *Cornerstone Telecommunications Infrastructure Ltd v The University of London* [2018] UKUT 0356 (LC), and explained that there was no express restriction in the Code on the type of agreement by which Code rights may be imposed, and that the draftsmen clearly envisaged leases might be granted, because of the provisions dealing with the potential clash with the Landlord and Tenant Act 1954 (which only applies to leases). The Tribunal concluded that it does have jurisdiction under para. 23 to impose leases on the parties.

(b) Consideration. The Tribunal noted that the statement from the promoting department (DCMS) explained that the new Code was intended to make major changes to the way in which land is valued for the purposes of determining the consideration payable for telecoms agreements. To this end the Code makes four valuation assumptions (in para. 24), the most important of which is that the transaction does not relate to the provision of an electronic communications network (the "no-network assumption"). The Tribunal concluded that the consideration which willing parties would agree in that case would be £1,000 per annum, much lower than the £13,250 contended for by the respondent, but also lower than the £2,551 figure proposed in the claimant's statement of case.

(c) Compensation. The Tribunal rejected the separate compensation claim, except in relation to its legal and surveying costs of the agreement, and loss or damage caused by installation.

(d) Mechanism. When does an imposed agreement under Part IV take effect? The parties agreed that the order imposed on them an obligation to enter into an agreement giving effect to the Tribunal's order. The Tribunal disagreed, explaining:

"In our judgment the operative instrument in imposing an agreement under Part 4 of the Code is the order under paragraph 20 itself. We are satisfied that once the order is made an agreement has been imposed and binds the parties without the need for any further document to be executed by them."

Implications?

There seem to me to be at least three important implications of this case.

Firstly, the Tribunal will not tolerate substantial non-compliance with directions, particularly in cases concerning new sites, to which the 6-month statutory deadline referred to above applies. The

Tribunal will expect and require the parties to cooperate in narrowing the issues, and will penalise those parties which fail to do this.

Second, landowners can indeed expect much lower consideration to be payable under Code agreements in the future.

Third, the Tribunal's decision that no instrument containing the imposed agreement needs to be executed is a further reason for taking very seriously the task of producing a single travelling draft by reference to which the Tribunal's order can operate, as the will be the eventual written basis for the terms on which the parties will be operating for the foreseeable future.