

EE Ltd and another v The Mayor and Burgesses of the London Borough of Islington [2019] UKUT 53 (LC)

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Facts

The operator (EE) wanted to install and operate electronic communications apparatus on the roof of a block of flats owned by the London Borough of Islington (LBI). As the parties were unable to reach an agreement, EE applied to the Upper Tribunal (UT) to impose on LBI rights under the Electronic Communications Code 2017 (the New Code). The UT imposed an agreement in the form of a ten-year lease.

Issue

What consideration was payable by EE to LBI for the lease imposed by the UT? [The New Code changed the way rights are valued, focusing on the market value that a willing buyer would pay a willing seller in an arms' length transaction in a 'no-network' world (i.e. assuming that the rights do not relate to the provision or use of an electronic communications network)]?

Decision

On the basis of the no-network assumption, the nominal value of the rights themselves was only £50 per annum. However, as LBI will also have obligations under the lease and will have to provide services to the building (there is no service charge), the UT decided that the parties would have agreed an annual rent of £1,000 (although it fixed the rent at £2,552 per annum, as that was what EE had offered to pay).

Points to note/consider

1. The reason this case is significant is because it is the first practical illustration we have of how the New Code may significantly reduce the sums that will be payable to landowners by operators under the New Code (although every case will of course turn on its own facts). The parties had in principle agreed that, under the old 1984 code (which did not value rights using the no-network assumption), the rights were worth £21,000 per annum (the UT made it clear that transactions under the 1984 code were not now useful comparables). Whilst the parties can agree whatever consideration they like where there is a consensual agreement to impose rights under the New Code, the way rights are valued under the New Code (coupled with the threat of an agreement being imposed against its will) will significantly affect a landowner's negotiating position.

2. The UT also ruled on a few other issues in relation to the New Code:

- it had jurisdiction to impose a new lease on the parties (it was agreed that a consensual agreement to impose rights under the New Code could take the form of a lease);

- although there is power to award a landowner compensation under the New Code for any loss or damage sustained due to the exercise of New Code rights (in addition to consideration for the imposed agreement), that compensation cannot include compensation for diminution in the value of a landowner's property simply as a result of the imposition of an agreement under the New Code; and
- once an order for imposing an agreement has been made under the New Code, the operative instrument is the order itself (i.e. there is no need for the parties to enter into any further document).

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