

Vodafone Ltd v Hanover Capital Ltd [2020] EW Misc 18 (CC)

The first reported case on how a court determines rent on the renewal of a lease of a telecommunications mast site under the Landlord and Tenant Act 1954 following the Electronic Communications Code 2017 coming into force.

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Facts

The tenant (V) was holding over following the expiry in 2013 of the contractual term of a lease of a telecommunications mast site which was protected by Part 2 of the Landlord and Tenant Act 1954 (the 1954 Act). Following the decision in *Cornerstone Telecommunications Infrastructure Ltd v Ashloch Ltd* [2019] UKUT 338 (LC), the renewal of the lease had to be conducted under the 1954 Act, rather than under the transitional provisions of the Electronic Communications Code 2017 (the Code) (although the new lease granted will not itself have the protection of the 1954 Act and will instead be protected by the Code). The landlord had served a section 25 notice on V stating that it would not oppose the grant of a new lease to V.

The parties agreed all the terms of the new lease with the exception of the rent and the term.

Issues

1. How should the rent be valued under section 34 of the 1954 Act given the 'no-network' assumption in the Code (i.e. rents fixed under the Code ignore the value to the operator of the site and the high demand for telecommunications services and focus instead simply on the value of the site to the landowner)?
(Section 34 requires the court to determine the rent at which the holding might reasonably be expected to be let in the open market by a willing lessor on the terms of the tenancy.)
2. What term should be granted under the new lease?

Decision

1. The hypothetical negotiation under section 34 should take into account V's potential rights under the Code. In other words, the willing lessee in those hypothetical negotiations would be an operator who would be aware of how rent would be calculated under the Code. On that basis, a strict application of the no-network assumption would have produced an annual rent of £2,250. However, it was relevant in this case that V was sharing the site with two other operators. This therefore resulted in a higher rental payment because it meant there would have been a hypothetical bidding process in respect of the lease and such competition would have pushed up the sums which a willing lessee would have been prepared to pay to the sort of rents that were paid by operators prior to the Code coming into force. On that basis, the court took into account evidence of valuations under the old Electronic Communications Code 1984 to award an annual rent of £5,750.
2. V wanted a short three year term with a six month rolling break clause, as this would provide it with flexibility to terminate any renewal

lease early and renew again under the Code at a potentially more favourable rent (currently, case-law indicates that V cannot do this, but an appeals is pending in the relevant case). H, on the other hand, wanted the certainty of a 10 year term with a one-off break after 5 years (to postpone for as long as possible the need to spend legal fees again on another renewal). The court struck a compromise between the two, granting a 10 year term with a six month rolling break after 5 years.

Points to note/consider

1. Although this is only a County Court decision, it is of interest because it is the first reported case on how a court determines rent on the renewal of a lease of a telecommunications mast site under the 1954 Act following the Code coming into force.

It will, in particular, be of some comfort to landowners that where, as here, the site is in demand by operators, rents fixed under section 34 are likely to be much closer to what they would have been before the Code came into effect, even though the current market for Code agreements is fettered by the no-network assumption. However, the court did stress that the position may be different for sites that satisfied the needs of only one operator and which were of no interest to competitors. In such circumstances, negotiations would be conducted against the background of the no-network assumption, which might in turn result in a modest rent reflecting only the value of the site to the landowner.

2. Cases on the Code continue to come thick and fast. They include this quarter Cornerstone Telecommunications Infrastructure Ltd v University of the Arts London [2020] UKUT 248 (LC) and EE Ltd and another v Edelwind Ltd and another [2020] UKUT 0272 (LC).

In the former case, a tenant was able to resist the imposition of code rights on the basis of paragraphs 21(2) and (3) of the Code (these paragraphs allow prospective grantors to resist if they will suffer loss that cannot be compensated in money, or if the prejudice that they will suffer is so great that it outweighs the benefit that the public will derive from the use of the site). At the same time, the Upper Tribunal (Lands Chamber) made some interesting observations on the terms of the disputed code agreement that it was being asked to impose (although it cautioned against any attempt to derive general principles from what it said).

In the latter case, the Upper Tribunal (Lands Chamber) ruled that an agreement for installing and operating telecommunications equipment on the roof of a building had been validly terminated under paragraph 31 of the Code by a tenant of the building where the notices to terminate the agreement expired after the date the tenant's lease was due to expire following the exercise of a break clause. It also ruled that the agreement in question was a licence rather than a lease (meaning that it was not capable of assignment).

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