

The latest decision on LTA 1954 telecoms rent valuation (EE v Morriss)

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Property disputes analysis: Judge Rodger QC, in *EE Ltd and Hutchinson 3G Ltd v Morriss and others* gave further guidance on the correct approach under the Landlord and Tenant Act 1954 (LTA 1954) regarding rent valuation and the wider importance for telecommunications operators and site providers. The court determined that the rent payable under the new tenancy should be £3,500 per annum. This reflected the significantly greater than average management time, inconvenience, and potential for interference, which were a feature of this particular site. It also included an annualised contribution toward the site provider's costs. It is because of the importance of how rent is valued, the matter came before Judge Rodger QC, the Deputy President of the Upper Tribunal (Lands Chambers), sitting as a judge of the County Court. Written by Katherine Traynor, barrister at Landmark Chambers.

EE Ltd and Hutchinson 3G Ltd v Morriss and others [\[2022\] Lexis Citation 2](#)

What are the practical implications of this case?

As it is currently understood, tenancies for telecommunications sites occupied under tenancies governed by [LTA 1954](#) must be renewed under [LTA 1954](#), but any new tenancy granted on renewal would be subject to the Electronic Communications Code made under the [Communications Act 2003](#) ('the Code').

The dispute concerning the new tenancy terms falls within [LTA 1954, s 35](#). In determining those terms, the court shall have regard to the terms of the current tenancy and all relevant circumstances. The case of *O'May v City of London Real Property Company Ltd* [1983] AC 726 applies, placing the burden of persuading the court to depart from the original terms on the party proposing the change.

[LTA 1954, s 34](#) applies to the determination of the rent payable under the new tenancy—which provides that the rent payable is to be that 'at which, having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a willing lessor', with various matters under LTA 1954, s 34(1)(a) to (d) to be expressly disregarded.

The statutory basis of assessment of rent under [LTA 1954, s 34](#) differs significantly from a determination under paragraph 24 of the Code; however, the principles of valuation of rent under the Code were held to be indirectly relevant to the determination of rent under [LTA 1954](#). Indeed, the influence which valuations and procedures in the Code would have on the hypothesis required by [LTA 1954, s 34](#) had previously been considered by the same judge in *Vodafone Ltd v Hanover Capital Ltd* [\[2020\] Lexis Citation 293](#).

Hanover Capital had been the only reported [LTA 1954](#) telecoms decision since the Code came into force. In that case, the court indicated that in the absence of reliable evidence of rents agreed in the market for telecommunication sites, the correct approach would be to consider a structured approach, having regard to factors that would fall due for consideration if the parties were negotiating rent for a new letting under the Code. However, the court considered that if there would be competition for the site, it would be appropriate to look at old code rents as evidence of open market value.

In the context of rural sites, where the underlying value of the site is often held to be fairly nominal, this decision might mean that settlement of cases of a similar nature is easier.

The court's willingness to take Code comparables as a starting point is now established at the County Court level. This is because the conclusion in *Hanover Capital*, that a negotiation will take account of the fact that a potential lessee can apply to the Tribunal for a similar agreement under the Code, was confirmed.

The question of how capital payments agreed alongside comparable transactions should be treated was previously a matter of controversy. It now appears clear that the court will take account of such

payments in assessing rent. However, it is arguable that this decision does not have universal application due to the unusual range of uses to which the land was put, which led to an increase in the management time that was held to be likely.

Among the other interesting discussions in this decision, this case does appear to provide clear guidance on the comparable valuation approach, which ought to be adopted when there is transactional evidence of sufficient quality and quantity. Therefore, the alternative framework, such as the structure set out in *Hanover Capital*, is the exception, but as aforementioned, this is subject to the specific facts.

Unlike in *Hanover Capital*, the judge did not increase the rent due to the effects of competition. Whether or not this will be the position in other cases will depend on the case's particular facts and whether competition would be likely in respect of a particular site in the hypothetical world.

Commentary:

Further, and of interest, the government, in its response to the consultation on changes to the Code on 24 November 2021, has proposed a draft Bill, which would implement changes to [LTA 1954](#), ensuring that the procedures for dealing with renewal disputes and the terms of any new lease under the Code are more closely aligned to Part 5 of the Code. Moreover, as part of this proposed change, jurisdiction to deal with [LTA 1954](#) disputes would transfer to the First-tier and Upper Tribunal.

What was the background?

In 2004, a renewed tenancy was granted on a site within the Pippingford Park Estate by a lease for a term of ten years to the then telecommunications provider Orange. In 2012, following the merger with T-Mobile, the lease was assigned to EE Ltd and the Second Claimant, Hutchinson 3G UK. Since the expiry of the lease on 1 August 2014, the claimants had been holding over under the tenancy continued by LTA 1954.

Therefore, the claimants applied under [LTA 1954](#) for a new tenancy of the site. The defendants did not oppose the grant of a new lease for a term of ten years, and many of the terms of that lease were agreed upon, but the parties were unable to agree on all of the terms, with particular focus on the rent payable.

The 2004 lease included a 'pay-away' clause, under which half of the income from sharers was paid to the third defendant in addition to an annual rent of £7,757.

What did the court decide?

There are effectively two parts of the judgment, which are summarised as follows and addressed in turn separately below:

- terms in dispute, and
- rent payable

As to the terms, there were more in dispute than in most [LTA 1954 Act](#), with six separate topics addressed by the court. Some of the issues have greater commercial significance than others—the most important terms concern the right to install additional equipment, access, contractual compensation, and the form of a break clause.

Rolling Bank Clause

The claimants sought to have the right to terminate the tenancy at any time after the fifth anniversary of the term on giving not less than three months' notice, without any obligation to give vacant possession: it was suggested the justification for this clause was to enable it to take advantage of the more favourable regime provided by paragraph 24 of the Code.

The defendants were content for the tenancy to provide a break clause exercisable any time after the fifth anniversary but objected to any 'rolling' break clause and wished for termination to be conditional on giving vacant possession.

Having regard to the parties' respective positions (paras [47–48]), the court considered that the solution found in *Hanover Capital* seemed the appropriate and reasonable approach to adopt in this case. As in *Hanover Capital*, the court gave little weight to the claimants' supposed commercial interest in terminating the lease to obtain a more favourable rent under the Code, agreeing with the defendants' that this is an unattractive stance; however, the court explained why in practice it is improbable that the claimants would seek that tactic. The court was more influenced by the claimants' desire for operational flexibility if technological changes rendered the site unsuitable. Accordingly, the court did not consider it appropriate to introduce a requirement to give vacant possession; therefore, the lease will include an unconditional break clause.

Contractual Compensation

Regarding contractual compensation, the court determined that where a new tenancy is entered into following proceedings under LTA 1954, the rent will be determined having regard to market value and absent evidence that consensual Code agreements negotiated in the market include contractual compensation provisions, the best course of action is to ensure so far as possible that the rent payable under the new tenancy is rooted in market evidence. In essence, the rent set is 'inclusive' of any future compensation rights, contrary to the position imposed under Part 4 or Part 5 of the Code.

Notably, the court did suggest that if in future, there is evidence that paragraph [25] is replicated in contractual form, in agreement in the market, it may be necessary to revisit this issue.

Access

It should also be noted, the court rejected the defendants' claim for separate access payments on top of rent paras [35–38].

Valuation/Rent Payable

Concerning the valuation of the rent payable, the court signalled a move away from the structured approach resorted to in *Hanover Capital*, suggesting that if the evidence of recent open market transactions was of sufficient quality and quantity, it was unnecessary to adopt the structured approach previously identified. Accordingly, the court made it clear that the starting point in a [LTA 1954](#) case would be to look at the market evidence and adopt the conventional approach under [LTA 1954, s 34](#), as per the defendants' expert's approach.

On the transactional evidence, the court considered the defendants' expert valuation of £12,000 unconvincing, suggesting the weakness in his valuation was his preference for older comparables and significant arbitrary adjustments made to the transactional evidence. Essentially, the judge concluded that there is no basis for adjustments on the assumption an incoming tenant would be prepared to pay additional rent to reflect apparatus previously held on the site and agreements for which rent was agreed prior to the Code are not a 'reliable guide' for current market valuations, even if the agreement was finalised after the 28 December 2017.

While the starting point for the court was the valuation figure of £1,200 a year as proposed by the claimants' expert, it was signalled that the claimants' expert evidence did not reflect what happens in reality and doubted that it would survive negotiations with a well-advised site provider. However, the court concluded that rent at or a little above that level would not be inconsistent with the transactional evidence of sites let with capital payment, which were amounts equivalent to £1,750 to £2,500 per annum.

Another key issue in determining the rental valuation was whether capital payments made in comparable transactions were made to incentivise willingness or an established feature of the market. The court concluded on the evidence before it that capital payments were almost invariably a core component of the financial package, which would be agreed with willing landlords and tenants. Accordingly, the court determined that when seeking a market value valuation, it would be appropriate to incorporate an annual equivalent of the capital payment, thereby rentalising the capital payment.

A capital payment of £15,000, something often found in the market, should be rentalised. Rather than annualising the £15,000 capital payment on a straight-line basis over a term of ten years, with the result that £1,500 should be added for this component, the judge accounted for the fact that the capital payment is made 'up front', by assuming a yield of 5%; thus, the figure to be added to the starting point of £1,200 would be £1,943 per year.

Second, the particular site warranted a higher rent than usual due to the particular features set out in para [112], bringing the figure up to £3,000 per annum. Finally, an allowance of £500 per annum for professional fees was justified. This figure was influenced by the fact that work involved in this particular site would be more complicated than on a more straightforward letting, not least due to the involvement of the Ministry of Defence.

Case details:

- Court: Mayors and City of London County Court (Sitting at the Royal Courts of Justice)
- Judge: Martin Rodger QC
- Date of judgment: 7 January 2022

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