



**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

**Case Reference** : **LC – 2023-000743**

**Property** : **Land on the West side of Gipsy Lane, Water  
Orton which is registered at HM Land Registry  
under title number WK270738**

**Claimant  
(Operator)** : **CORNERSTONE TELECOMMUNICATIONS  
INFRASTRUCTURE LIMITED**

**Representative** : **James Tipler of counsel  
instructed by Gowling WLG (UK) LLP**

**Respondent** : **MR BRENDAN DUFFY**

**Representative** :

**Application** : **Electronic Communications Code  
Paragraph 26 – interim rights**

**Tribunal** : **Judge D Barlow**

**Date of Hearing** : **7 March 2024**  
**Date of Order** : **7 March 2024**

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**DECISION and ORDER**

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## Background

1. The Claimant is a telecommunications infrastructure provider and operator pursuant to a direction under section 106 of the Communications Act 2003. The Respondent is the owner of a field on the west side of Gypsy Lane Water Orton. The Claimant seeks an Order pursuant to Paragraph 26 of the Electronic Communications Code (introduced by the Digital Economy Act 2017 which inserted Schedule 3A to the Communications Act 2003) imposing upon the Respondent an agreement for interim Code rights to enable it to carry out a multi-skilled visit (known as an “MSV”) to assess the suitability of the southern corner of the field for the installation of a 5G Tower (“the Site”).
2. By Order of Upper Tribunal made on 15 November 2023, this reference was transferred to the First-tier Tribunal (Property Chamber) under Rule 5(3)(k)(ii) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010.
3. The reference was listed for a Case Management Hearing on 7 March 2023 which took place remotely using VHS. The Claimant was represented by Mr Tipler of counsel. The Respondent, Mr Duffy failed to attend.
4. The Order of Upper Tribunal directed that the FTT will consider and (if possible) determine the application for interim rights at the Case Management Hearing. As explained by the Deputy Chamber President in ***EE Limited and Hutchison 3G UK Limited v London Underground*** [2021] UKUT 0128 (LC).
5. Mr Duffy is unrepresented but communications with the Claimant, its agent and lawyer has principally taken place through a Mr Bennet. Mr Bennet’s relationship or connection to Mr Duffy is unclear, but he has also written on Mr Duffy’s behalf to the Tribunal. A video link for the hearing with full instructions on how to join was sent by VHS on 23 February 2024 (and resent to Mr Duffy on 4 March 2024 following an email request from him). It was anticipated that Mr Duffy would represent himself at the hearing, possibly with the assistance of Mr Bennet. Neither gentleman notified the Tribunal or the Claimant that there was any issue with the hearing arrangements. VHS and the Tribunal were however unable to contact Mr Duffy on the morning of the hearing by telephone or email, to ascertain if he was experiencing difficulty joining.
6. The Tribunal determined that it would exercise discretion under Rule 34 to proceed in the absence of Mr Duffy on the grounds that he had been notified of the hearing with instructions on how to join. He had not communicated any issue with the date or the instructions. Mr Duffy did not contact the Tribunal on the morning of the hearing to say if he was in difficulty and was uncontactable by telephone or email. The Tribunal is satisfied that it was in the interests of justice to proceed with the hearing because:
  - a. Considerable time and resource of the Claimant and the Tribunal would otherwise be wasted.
  - b. Mr Duffy had failed to engage positively with the Claimant throughout, he had failed to comply with the Tribunal’s directions with regard to filing a response by 20 December 2023, only submitting detailed grounds of objection to the application on 23 February 2024.

- c. The tenor of all correspondence with Mr Duffy indicates a strong disinclination on his part to engage positively with the Claimant or the proceedings.
  - d. There was nothing in Mr Duffy's responses to date that could give the Tribunal confidence that he would attend a postponed hearing.
  - e. Mr Duffy set out his objections in sufficient detail on 23 February 2024, for the Tribunal to understand the grounds on which he objects to the application. Those grounds could therefore be fully considered in his absence.
7. The reference under consideration is the Claimant's application for the imposition of interim rights under paragraph 26 of the Code to enable it to carry out a non-intrusive MSV on the corner of a field owned by Mr Duffy (the Site). The reference was issued on 15 November 2023 following correspondence with Mr Duffy (or with Mr Bennet on his behalf) which commenced on 9 March 2022, but failed to illicit any substantive reason for Mr Duffy's objection to the proposed MSV or any consideration of the terms of the draft MSV agreement.
  8. The Claimant has put forward submissions on the public benefit test in its statement of case, which can be summarised as follows:
    - i) Following the decommissioning of a nearby site there is a lack of essential network coverage and capacity in the vicinity of the Site, which includes users in their homes, at a local rugby club, and on an industrial estate; and travellers upon the M42 and anticipated future nearby rail passengers on the London-Birmingham HS2 leg.
    - ii) A temporary site on the East side of the M42 is filling some of that gap but it is not a long-term solution.
    - iii) The Site may be suitable for a new long-term site, to secure the continued availability and quality of important network services in the vicinity of the Site as demand continues to grow, and is in the interests of the local community.
    - iv) The rights sought are a vital first step in determining if the Site is suitable for a long term solution.
  9. The grounds for objection put forward by Mr Duffy can be summarised as follows:
    - i) The land is situated in the green belt and a 5G tower would contravene the principles underlying the National Planning Policy Framework and planning policy.
    - ii) A 5G tower presents a risk to biodiversity and the quality of life of nearby residents.
    - iii) The tower will reduce the market value of the surrounding properties and devalue Mr Duffy's land.
    - iv) The field adjoining the Site is used for housing and grazing animals, including horses. Caution is required to ensure animal welfare is protected.
    - v) There are more suitable alternative sites including land owned by the local rugby club.
    - vi) The procedure imposes an unfair financial burden which Mr Duffy should not be expected to bear.
  10. In early correspondence with the Claimant's agent Mr Bennet also raised the possibility of the field being redeveloped for animal housing or a small recreational

park. Mr Duffy has not however filed any plans or other documents evidencing this, and he did not refer to redevelopment in his formal objection to the Tribunal.

11. Mr Bennet expressed additional concerns about inadequate consideration offered for any lease/licence of site of the tower (should construction go ahead), which is not relevant to this reference.

### **Paragraph 26 (Interim Code Rights) and Paragraph 21 (test to be applied)**

12. Paragraph 26(3) provides that in relation to interim code rights:

*“The court may make an order under this paragraph if (and only if) the operator has given the person mentioned in sub-paragraph (1) a notice which complies with paragraph 20(2) stating that an agreement is sought on an interim basis and—*

*(a) the operator and that person have agreed to the making of the order and the terms of the agreement imposed by it, or*

*(b) the court thinks that there is a good arguable case that the test in paragraph 21 for the making of an order under paragraph 20 is met.”*

13. Paragraph 21 “What is the test to be applied by the court?” provides:

*“(1) Subject to sub-paragraph (5), the court may make an order under paragraph 20 if (and only if) the court thinks that both of the following conditions are met.*

*(2) The first condition is that the prejudice caused to the relevant person by the order is capable of being adequately compensated by money.*

*(3) The second condition is that the public benefit likely to result from the making of the order outweighs the prejudice to the relevant person.*

*(4) In deciding whether the second condition is met, the court must have regard to the public interest” in access to a choice of high quality electronic communications services.*

*(5) The court may not make an order under paragraph 20 if it thinks that the relevant person intends to redevelop all or part of the land to which the code right would relate, or any neighbouring land, and could not reasonably do so if the order were made.*

### **Issues for Determination**

14. The issues for determination are as follows:

- a) Is there was a good arguable case for determining that the paragraph 21 conditions have been met;

- b) Are terms of the proposed MSV agreement appropriate;
- c) Is it possible to determine the above issues at the CMH and exercise discretion to make an interim rights order, without the need for further evidence.

**Paragraph 21 – the test to be applied**

- 15. Paragraph 26(3) requires the Tribunal to focus on whether there is a good arguable case that the paragraph 21 test is satisfied. If it is the Tribunal must then decide whether to exercise its discretion to make an order for interim rights.
- 16. The Tribunal is satisfied that the Claimant has made out a good arguable case for public benefit as set out in its statement of case and summarised above.
- 17. There is no evidence of any serious loss or prejudice to Mr Duffy that cannot be compensated by money. He has not shown:
  - “... either that it will suffer loss that cannot be compensated in money, or that the prejudice it will suffer is so great that it outweighs the public benefit derived from the use of the site. The level of prejudice must be very high indeed to outweigh the public benefit, in the light of the public demand for, and dependence upon, the availability of electronic communications.”  
***Cornerstone Telecommunications Infrastructure Limited v University of Arts London*** [2020] UKUT 248 (LC).
- 18. Furthermore, in assessing the public benefit condition the Tribunal need not consider whether alternative sites, or the possibility of sharing another site instead, would do just as much public benefit. It must weigh the public benefit arising from the imposition of the agreement sought as if the alternative were that the claimant does not operate from the proposed site. The benefit is not diminished by the fact that the same benefit might be achieved by the use of an alternative site in the vicinity. See ***CTIL v University of the Arts London [2020] UKUT 0248*** (LC) [27].
- 19. Mr Duffy’s stated objections principally relate to the possible construction of a 5G Tower and are not therefore of much relevance to this application. Specifically, his concerns about planning and the environmental impact of a 5GTower are issues the Claimant will have to deal with if following the MSV, it deems the Site suitable. Similarly, any impact on property values or animal welfare are matters for consideration should the Claimant seek further rights under paragraph 20 after completion of the MSV. At that stage issues including compensation can be fully considered.
- 20. Mr Duffy is entitled to seek compensation under paragraph 25 of the Code for expenses (including reasonable legal and valuation expenses) and for diminution of the value of the Site where an order is imposed. This right is not affected by any order made today. He was urged by the Claimant and the Tribunal to seek legal advice but it appears that he did not.
- 21. The Tribunal finds that the proposed MSV Agreement is not incompatible with the current use of the Site. There is no evidence of any significant prejudice or

inconvenience to Mr Duffy and he has not demonstrated any fixed, settled and unconditional intention to redevelop the Site in a way which is inconsistent with the MSV Agreement.

22. The Tribunal finds therefore that the Claimant has established a good arguable case that the tests in paragraph 21 are satisfied and that it should exercise discretion to impose an agreement on Mr Duffy.
23. If, following the MSV the Claimant is satisfied that the Site is suitable it will no doubt apply under paragraph 20 for further rights. Mr Duffy will then have an opportunity to respond with any relevant objections that he has to the granting further rights in relation to the proposed construction of a 5G Tower.

### **The MSV agreement**

24. There has been no negotiation of the Agreement. Mr Duffy has refused to engage with invitations to discuss terms despite the Agreement having been provided to him at an early stage and it could have been negotiated without prejudice to Mr Duffy's objection in principle to the application.
25. The MSV Agreement attached to the reference is in a fairly standard format used by the Claimant on other sites and approved by the Tribunal. It does not appear to include any terms that are unusual or likely to be unreasonably prejudicial to Mr Duffy. The Tribunal proposes therefore imposing rights for a MSV in the terms of the draft MSV Agreement at pages 35 to 43 of the Bundle with a commencement date coinciding with the date of issue of this Decision and Order.

### **Costs**

26. Paragraph 96 of the Code provides:

#### ***Award of costs by tribunal***

*96(1) Where in any proceedings a tribunal exercises functions by virtue of regulations under paragraph 95(1), it may make such order as it thinks fit as to costs, or, in Scotland, expenses.*

*(2) The matters a tribunal must have regard to in making such an order include in particular the extent to which any party is successful in the proceedings.*

27. The Claimant has been wholly successful in obtaining the imposition of an agreement for code rights on an interim basis, on the terms originally proposed to the Respondent, and following general principles is entitled to seek its litigation costs.
28. However, as Mr Duffy was not present it seems fair that he should see the written decision and have an opportunity to make submissions before any decision on costs is made. I will therefore adjourn the question of costs for 28 days to allow any party seeking a costs order to submit brief 'Submissions on Costs' to the Tribunal and

other party. Following that a determination will be made on the written submissions or alternatively further directions issued.

**IT IS ORDERED THAT:**

Pursuant to Paragraph 26(2) of the Electronic Communications Code (Schedule 3A to the Communications Act 2003) the Tribunal imposes an agreement on the Claimant and the Respondent, on an interim basis. The Claimant and the Respondent are bound by an agreement in the following terms:

- a) As contained in the code Agreement at pages 35-43 of the Claimant's Bundle commencing on the same as this Order.
- b) The Plan to be annexed to the MSV Agreement (Grantor's Property) is the plan at page 42 of the Claimant's Bundle.

D Barlow  
Judge of the First-tier Tribunal

7 March 2024

Rights of Appeal

A party may appeal this decision to the Upper Tribunal (Lands Chamber) but must first apply to the First-tier Tribunal for permission. Any application for permission must be in writing, stating grounds relied upon, and be received by the First-tier Tribunal no later than 28 days after the Tribunal sends this written Decision to the party seeking permission