FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00CN/EIA/2025/0603**
Property	**:**	**Croydon Crown Court - land and buildings on the west side of Altyre Road, north side of Fairfield Road and south side of Hazledean Road**
Claimant (Operator)	**:**	**Cellnex Connectivity Solutions Limited**
Representative	**:**	**Gowling WLG (UK) LLP**
Respondent (Site Provider)	**:**	**Secretary of State for Housing Communities and Local Government**
Representative	**:**	**Womble Bond Dickinson (UK) LLP**
Application	**:**	**Electronic Communications Code** **Paragraph 20 (new site)** **Paragraph 26 (interim rights)**
Date of Order	**:**	**11th August 2025**

WRITTEN REASONS

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1. The Claimant is an operator for the purposes of the Code by virtue of a direction given by OFCOM. The Claimant has been appointed by Network Rail to build a communications system as part of the Brighton Mainline Programme.

2. A reference under Schedule 3A of the Communications Act 2003 was received by the Tribunal on 10th January 2025 including an application for an order imposing an agreement for rights under paragraph 20 of the Electronic Communications Code requiring the parties to enter into a new agreement for the occupation by the Claimant of land belonging to the Respondent and also including an application for an order under paragraph 26 imposing an agreement for rights under the Electronic Communications Code on an interim basis.

3. The interim rights application was listed for determination at a CMH on 20th March 2025. At that hearing I determined that there is a good arguable case that the test in paragraph 21 is met. It was not possible to finalise matters at the CMH, and the paragraph 26 application was relisted for 4th April 2025 to determine terms in dispute. On 4 April 2025 imposing I imposed an Early Access Agreement (incorporating terms determined by the Tribunal) on the parties pursuant to paragraph 26 the Code.

4. The final hearing of the paragraph 20 application took place on 5th June 2025 in Birmingham. Oliver Radley-Gardner KC appeared for the Claimant and Kerry Bretherton KC appeared for the Respondent. I received oral evidence from Sarah Burrows (Chartered Surveyor -Cellnex) and Adam Pearce (Head of Asset Management – HMCTS).

5. At the hearing on 5th June 2025 the parties agreed that the conditions under paragraph 21 are met in relation to the Claimant's application under paragraph 20. There remained in dispute a handful of terms which I dealt with by way of extempore judgement.

6. By Order dated 24th June 2025 the Lease at Annex 1 to the Order (which incorporated the terms determined by the Tribunal within the Schedule of Disputed Terms at Annex 2 of the Order) was imposed on the parties pursuant to paragraph 20 for the period stipulated in the Lease, commencing on the date of the order.

7. I made no order for transactional costs. The Claimant was ordered to pay the Respondent's litigation costs in respect of the application made under paragraph 26, summarily assessed in the sum of £33,000 (plus VAT). The Respondent was ordered to pay the Claimant's litigation costs in respect of the application made under paragraph 20 summarily assessed in the sum of £21,750.

8. By letter dated 27th June 2025 the Claimant's solicitors requested these written reasons.

The Law

9. Paragraphs 23(5) of the Code provides:

   "The terms of the agreement must include the terms the court thinks appropriate for ensuring that the least possible loss and damage is caused by the exercise of the code right …"

10. Guidance was given by the Upper Tribunal in **Dale Park** (On Tower UK Limited v JH & FW Green Limited [2020] UKUT 0348 (LC)) at paragraphs 62 -64:

    "62. First, the Tribunal should consider the term the operator seeks and the reason why it needs the term in question in order to pursue the business for whose purposes it received its Ofcom direction and in light of the public interest in a choice of high quality telecommunications services.

    63. Second, the Tribunal will consider the concerns or objections raised by the respondent and whether in order to minimise loss or damage in accordance with paragraph 23(5) the term should not be imposed, or should be imposed to a limited or qualified extent.

    64. If those concerns do not prevent the imposition of the term and do not require its qualification, then the Tribunal will consider whether, in imposing that term, it should also impose further terms to minimise loss or damage."

11. I also have regard to the underlying purpose of the code as identified by Fancourt J in **EE v Stephenson** [2021] UKUT 167 (LC) at [53]:

    "The purpose underlying the Code is to ensure that operators can use and exploit sites more flexibly, quickly and cheaply than had previously been the case, at lower than open market rents, in furtherance of the public interest of providing access to a choice of high quality electronic communications networks, while providing a degree of protection to site owners' legitimate interests."

(1) Initial works

12. The parties agreed the Respondent's wording which included wording in the case of any permitted sharer.

(2) Sharing

13. The Respondent's concerns are twofold. Firstly, sharing with non-code operators gives rise to security concerns in respect of the site which is occupied by a Crown Court. Secondly the administrative burden of unlimited sharing would take away front line court staff from their primary role of maintaining continuity of court services and the administration of justice. The Respondent sought to limit sharing to a maximum of 3 Code Operators.

14. Mr Pearce told me in his evidence that he was concerned about the burden on HMCTS staff having spoken to LSH, who mange public sector telecoms portfolios. Consents, approvals and coordination of contractors would impose a significant burden on FM (Facilities Management) staff dealing with the wider London HMCTS estate. FM staff have to liaise with their external suppliers Equans and OCS (security agents). Arrangements are particularly difficult in respect of access out of hours. The process is that on receipt of a request from Cellnex FM staff have to arrange and facilitate a quote with contractors and await confirmation. Costs are recharged to Cellnex. FM staff are stretched and the workload resulting from additional sharers takes them away from other duties. Mr Pearce told that limiting to 3 sharers was a reasonable compromise. The advice he had received from Equans was that 3 NMO sharers would generate 6-10 visits p.a. More than 3 Code Operators would cause significant management burden without financial compensation for the time taken by staff on site.

15. Sarah Burrows told me that the administrative burden was limited to raising a purchase order with a sub-contractor. As procedures get established at the site the burden will become less as staff get used to working with Cellnex and contractors. Sharing is an important part of Cellnex's business. Cellnex needs to be agile in a fast moving and fluid market. Cellnex are well used to managing sensitive sites including hospitals and prisons. Costs of facilities management are recoverable as compensation for loss and damage under the Code. Sarah Burrows told me that she anticipated sharers would be 2-4 of the big four MNO's together with one or two utility providers, police, charity sector or pager companies. The likely maximum number of sharers would be in the region of 7.

16. In my judgement sharing should be unlimited subject to specific safeguards for this sensitive site. Mr Pearce accepted that Government Guidance makes it clear that public buildings should be made available to telecoms providers. The administrative burden to FM of government estate in arranging and facilitating HMCTS contractors (e.g. OCS security) to attend is unlikely to be significant once the initial build is completed and ways of working become established. In any event The Code provides for recovery of site providers costs by way of compensation. I attach significant weight to the business needs of the operator and the underlying statutory purpose of the Code as identified by Fancourt J. Cellnex is a neutral host which needs to be able to share sites with other providers in line with well established Government policy seeking to encourage sharing. Amendments introduced by the Product Security and Telecommunications Infrastructure Act 20222 sharing is now a code right.

17. Accordingly, I approve the Claimants wording which incorporates significant protections for the site provider - (a) notification of interest from a prospective sharer, (b) veto on national security/administration of justice grounds and (c) sharer to comply with tenant covenants contained in the lease.

(3) Yield Up

18. The Respondent seeks an obligation on the Claimant to remove ECA at the end of the term. The Respondent proposes an obligation to decommission and remove ECA within 6 months.

19. I do not impose any terms in respect of yield up. This is a substantial 10 year agreement. Code rights will continue after expiry of the contractual term by virtue of paragraph 30 of the code. Provisions for removal are already contained in Part 6 of the Code and in particular Paragraph 40. There is no need to duplicate the statutory mechanism. In any event the anti-avoidance provisions of paragraph 100 apply to Part 6.

(4) Termination an (5) Forfeiture

20. The Respondent proposes a termination clause on 18 months' notice in the event of persistent delays by the tenant in making payments within 28 days of demand or substantial breaches of tenant obligations not remedied within not less than 3 months.

21. The Claimant suggests that a forfeiture clause is more appropriate. Such a clause is an entirely standard in leases. The Claimant wishes to have business certainty in order to ensure continuity of service for the benefit of the public. The Claimant also points out that it is the subject of an OFCOM directions and is acting as part of a Network Rail project. The involvement of OFCOM and Network Rail should give sufficient comfort to HMCTS as to the Claimant's bona fides.

22. Whether framed as a forfeiture clause or a termination clause there is a relieving jurisdiction to retrospectively restore the contractual term (see **Manchester Ship Canal Co. Limited v Vauxhall Motors Limited** [2020] AC 1161). In any event even if the agreement is not terminated the Respondent may still enforce the agreement by way of a claim for damages or an injunction.

23. I find that the forfeiture clause as drafted by the Claimant best minimises loss or damage to the Respondent whilst allowing the Claimant business certainty in accordance with its OFCOM direction and in the public interest.

(6) Set Down Area

24. The parties have agreed that the qualified right to use the Set Down Area set out in the Early Access Agreement is to remain in light of concerns in respect of the transport of prisoners to and from the Crown Court which may require approvals to avoid the interference with the processing of prisoners.

(7) Rooftop

25. The parties have agreed that the Claimant may use vacant and unused areas of the rooftop subject to landlord consent to be unreasonably withed or delayed. It shall not be unreasonable for the landlord to refuse on grounds of national security, interference with the administration of justice or if the landlord has a settled intention to redevelop.

(8) Access Conditions

26. Wording has been agreed between the Claimant and the Respondent for new Annex 1 (Landlord's Additional Security Controls).

Costs

27. Transactional costs have been agreed between the parties.

28. Costs in these references have been significantly higher than the usual run of the mill cases for the imposition of MSV and new site agreements. There have been 3 substantive hearings – paragraph 21 test (20th March 2025), MSV terms (4th April 2025) and final hearing (5th June 2025). This is a sensitive site requiring careful consideration by both parties of security concerns and the administration of justice.

29. The usual order in an MSV reference is for the operator to pay the site providers costs. I see no reason to depart form that convention. The Respondent has acted perfectly reasonably in bringing its concerns in respect of security and interruption of court business to the Tribunal.

30. The Claimant was substantially successful at the final hearing in respect of sharing, forfeiture and use of the rooftop. Having regard to the extent of its success the Claimant should have its costs of the paragraph 20 reference.

D Jackson
Regional Judge