FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LC – 2021 – 000425**
Property	**:**	**Land on the west and south west side of Greenwood Place, Kentish Town**
Claimant (Operator)	**:**	**Cornerstone Telecommunications Infrastructure Limited**
Representative	**:**	**Rory Cochrane of counsel instructed by Osborne Clarke LLP**
Respondents (Site Provider)	**:**	**Folgate Estates Limited (1) J Murphy and Sons Limited (2)**
Representative	**:**	**Barry Denyer-Green of counsel instructed by Knights Plc**
Application	**:**	**Electronic Communications Code Paragraph 26 – Interim Rights**
Tribunal	**:**	**Judge D Jackson Mr N Wint FRICS**
Hearing at	**:**	**20th October 2021 Centre City Tower, Birmingham**
Date of Decision	**:**	**11 November 2021**

DECISION

Background

1. The Claimant is a telecommunications infrastructure provider and operator pursuant to a direction under section 106 of the Communications Act 2003. The First Respondent is a subsidiary of Folgate Holdings Limited which is ultimately owned by the same beneficiaries as the Second Respondent. 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 Respondents an agreement for interim Code rights to enable it to carry out a multi- skilled visit (known as an "MSV") at property described at the outset of proceedings as O2 Forum Car Park, 9-17 Highgate Road, Kentish Town, London NW5 1JY. As will presently appear the exact description and extent of the Property is at the heart of the dispute between the parties.

2. By Order of Upper Tribunal Judge Elizabeth Cooke made on 31st August 2021 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 Case Management Hearing on 20th October 2010. At the request of the Respondents the hearing took place in person at the Tribunal hearing centre in Birmingham. The Claimant was represented by Mr Cochrane and the Respondents by Mr Denyer-Green. Due to limits on the number of persons that can safely be accommodated in the hearing room other interested persons were able to hear proceedings by way of remote link.

4. The Order of Upper Tribunal Judge Cooke directed that the FTT will consider and (if possible) determine the application for interim rights at the Case Management Hearing. The Tribunal has followed, and where appropriate and with any necessary modifications, the provisions of the Upper Tribunal (Lands Chamber) Practice Directions made on 19th October 2020 and in particular paragraph 14.12 which provides that "Applications for interim or temporary rights will usually be determined at the case management hearing (which may be brought forward in cases of extreme urgency) or on paper."

5. As explained by the Deputy Chamber President in **EE Limited and Hutchison 3G UK Limited v London Underground** [2021] UKUT 0128 (LC) At paragraph 2:

   "…. at paragraph 14.12 of the Tribunal's Practice Directions, and in its directions for the hearing, the Tribunal seeks to determine claims for interim rights by a summary procedure at the first hearing, if that can be done fairly"

   At the outset Mr Denyer-Green applied for an adjournment to obtain further evidence in relation to the extent and description of the Property. Dealing with a case fairly and justly includes seeking flexibility in the proceedings in accordance with the overriding objective (see Rule 3(2)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013). Accordingly, as Mr Paul Brosnahan, a Director of the First Respondent, was present in the hearing room he was permitted to give evidence on oath in relation to that specific issue and was cross examined by Mr Cochrane.

6. The Tribunal has considered Statement of Case for the Claimant and Witness Statement of Ms Sarah Elizabeth Moran dated 18th October 2021. We have also considered Statement of Case of the Respondents and Witness Statement of Paul Brosnahan. We have considered a Bundle of documents pages 1-319 and Supplementary Bundle pages (S) 1- 221. Finally, we are grateful to both counsel for providing their Skeleton Arguments in advance of the hearing.

The Second Respondent

7. On 15th October 2021, and only 5 days before the hearing, the Claimant indicated in correspondence that it was no longer seeking Code rights over the whole of the land comprised in the statutory notices. Instead it sought rights only to a much smaller area of land referred to as "the Yellow Land". As that land is owned solely by the First Respondent Mr Cochrane asked that the reference be dismissed against the Second Respondent.

Chronology

8. The history of this reference can be summarised as follows

    - 10th March 2021 – Mono Consultants, acting on behalf of the Claimant, wrote to the Respondents in relation to land situated at O2 Forum Car Park [222]
    - 31st March 2021 – Mr Brosnahan telephoned Mono Consultants [referred to at 233]. A note of the conversation made by Mono [236] reads: "He states he did not want to entertain any further discussions and was absolutely opposed to having a site on the land. He mentioned something about 750 flats being proposed on the surrounding land within the next 5 years…".
    - Also, on 31st March 2021 Solomon Taylor Shaw solicitors acting on behalf of the First Respondent wrote to Mono Consultants [237]: "Please accept this letter as confirmation that our client does not grant permission for you to visit their site".
    - 15th April 2021 – Osborne Clarke, instructed by Claimant, respond to Solomon Taylor Shaw in relation to the First Respondent [238]
    - 14th May 2021 – Osborne Clarke wrote to Second Respondent requesting access to Land at O2 Forum Car Park for the purposes of an MSV.
    - 4th June 2021 – Statutory Notice pursuant to paragraph 26(3) of the Code served on First Respondent [244] and Second Respondent [248]
    - 28th July 2021 – Osborne Clarke serve amended MSV agreement on First Respondent [271] and Second Respondent [268]
    - 24th August 2021 – Notice of Reference and Claimant's Statement of Case
    - 31st August 2021 – Order of Upper Tribunal Judge Cooke
    - 17th September – Knights Plc instructed by Respondents [274]
    - 12th October 2021 – Respondents' Statement of Case
    - 13th October 2021 – Witness Statement of Paul Brosnahan on behalf of Respondents
    - 15th October 2021 – email Osborne Clarke to Knights [285-286] enclosing plan limiting area of land to be subject of the MSV to that "shown coloured yellow" [S199]. The MSV was amended to remove Second Respondent, remove tree lopping rights and to revise definition of investigative works.
    - 20th October 2021 – hearing before FTT

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

9. 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."

10. 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

11. Matters falling for determination are as follows:

a) Validity of the Statutory Notice
b) Who occupies the land at the rear of the O2 Forum?
c) Redevelopment
d) Paragraph 21 test
e) Discretion
f) Terms of the MSV Agreement
g) Costs

Validity of the Paragraph 26(3) Notices

12. "Land" is defined at paragraph 5b of the Statutory Notices given under Paragraph 26(3) of the Code on 4th June 2021.

The definition in the Notice to the First Respondent [167] reads:

"**Land**" O2 Forum Car Park, 9-17 Highgate Road, Kentish Town, London NW5 1JY forming part of the land known as land and buildings on the south-west side of Greenwood Place, Kentish Town as registered under Land Registry title number NGL206051 and land and buildings on the west side of Greenwood Place, Kentish Town registered under title number NGL18370"

The definition in the Notice to the Second Respondent [161] reads:

"**Land**" O2 Forum Car Park, 9-17 Highgate Road, Kentish Town, London NW5 1JY forming part of the land known as land lying to the south-west of Highgate Road, London as registered under Land Registry title number NGL 940802"

13. Office copies for NGL206051 appear at [212-213] with filed plan at [214]. The Property Register describes the land as "land and buildings on the south-west side of Greenwood Place, Kentish Town".

    Office copies for NGL18370 appear at [215-216]. The filed plan is at [217]. The Property Register describes the land as "land and buildings on the west side of Greenwood Place, Kentish Town". It should be noted that NGL206051 as edged green has been removed from the title of NGL18370. The land edged blue is subject of a lease set out in the Schedule of notices of leases.

    Office copies for NGL940802 appear at [205-211].

14. Mr Denyer-Green argues that the Notices are invalid because "Land" at paragraph 5b of the statutory Notice refers to "O2 Forum Car Park". Such a description is unknown and cannot be said to describe the full extent of the property comprised in the three registered titles. It is the Respondent's case that all the land so comprised is known as "Murphy's Yard". Matters are compounded by the Claimant's Statement of Case which refer to the "Land" variously as a car park, a greenfield site and away from nearby buildings. Mr Denyer-Green submits that the Claimants are seeking rights over land that is not described by the Notices. The form of Notice is prescribed, the land must be identified. As the Notice is not in the prescribed form it is not valid.

15. Further Mr Denyer-Green argues that the legal principles which underly ordinary compulsory purchase powers apply equally to the imposition of Code rights.

    Mr Denyer-Green relies upon **Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Limited** [2019] UKUT 107 (LC) (upheld at [2019] EWCA Civ 1755) at paragraph 86:

    "It is important to bear in mind when considering the effect of Part 4 of the Code that it involves the imposition by the Tribunal of intrusive rights on unwilling parties. It is properly regarded as a variety of compulsory acquisition and we consider it should attract the same cautious approach to its interpretation as has always been applied to powers of compulsory purchase."

    At paragraph 87:

    "That approach was considered by the Supreme Court in ***R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council*** *[2010] UKSC 20 [2011] 1 AC 437. Lord Collins of Mapesbury considered the relevant authorities at paragraphs 9 to 11, summarising their effect as follows:*

    The courts have been astute to impose a strict construction on statutes expropriating private property, and to ensure that rights of compulsory acquisition granted for a specified purpose may not be used for a different or collateral purpose"

    Mr Denyer-Green also referred the Tribunal to **Prest v Secretary of State for Wales** [1983] JPL 112, a compulsory purchase case and case law under Article 1, Protocol 1 ECHR.

    Mr Denyer-Green helpfully summarises the position at paragraph 19 of his Skeleton Argument:

    "In summary, as in the case of the compulsory taking of land or rights over land, the rules must be interpreted restrictively against the expropriator, and where less rights would serve the expropriator's purpose, the greater rights sought should not be granted."

    In oral argument Mr Denyer-Green submitted that strict approach to the expropriation of private property extends both to the Code and the Tribunal's exercise of its discretion under the Code

16. Finally, Mr Denyer-Green submits that excessive rights are being sought. Mr Brosnahan told us that including the Second Respondent's title NGL940802 (see field plan at [211]) the Respondents' site was approximately 10 acres. Mr Denyer-Green argues therefore that a notice requesting excessive rights over an excessive area of land, where a lesser area would suffice, must be void. Further the rights sought are "just excessive for the limited purposes of an MSV".

17. In relation to the description of the "Land" as the "O2 Forum Car Park" Mr Cochrane annexed to his Skeleton Argument a copy of a Lease dated 2nd July 2018 and made between Folgate Estates Limited (1) and Academy Music Group Limited (2) relating to the Forum, 9-17 Highgate Road London NW5 [S16-54]. Clause 3.3[S27] grants ancillary rights to park on land edged blue on the plan [S25]. On that basis at least some part of the "Land" could be described as "O2 Forum Car Park". However, Mr Cochrane concedes that description is not apt for the entirety of the land.

18. Mr Cochrane drew to the Tribunals attention that there is no requirement for a plan to form part of the statutory Notices. A verbal description is sufficient. The Tribunal notes that plans are attached to the draft MSV Agreements as served with the Paragraph 26(3) Notices [174 -190]. Whilst the form of notice is prescribed by OFCOM under paragraph 90 of the Code neither counsel were able to refer us to any OFCOM guidance as to how and with what degree of specificity "Land" should be described.

19. We find that the large areas of "Land" comprised in both Notices cannot in anyway be described as "O2 Forum Car Park". We further find, having considered the Witness Statement [26 - 31] and photographs [33 - 50] produced by Mr Brosnahan, that the "Land" cannot be described as either a car park or a green field site. The site is in fact "Murphy's Yard" which is the operational base for the Second Respondent, a leading global, specialist engineering and construction company. The site includes the headquarters building, departmental buildings, an operational yard as well as other buildings occupied by tenants. The whole of "Murphy's Yard" is secured and controlled by security staff at the gatehouse.

20. Would a reasonable recipient have been misled by the statutory Notices? As we have found the description "O2 Forum Car Park" is inaccurate. However, both Notices then go on to correctly recite the description adopted in the three Property Registers and correctly record the three title numbers. Under those circumstances a reasonable recipient would not have been misled. We further find that the actual recipients were not misled either. When Mr Brosnahan telephoned the Claimant's agents on 31st March 2021 he did not demur at the description "O2 Forum Car Park". Furthermore, on the same date the First Respondent's then solicitors, Solomon Taylor Shaw, solicitors confirmed: "Please accept this letter as confirmation that our client does not grant permission for you to visit their site". That letter is headed "O2 Forum Car Park". No objection was raised as to the description.

    We also find that the statutory purpose of requiring sufficient identification of the land over which rights are sought is satisfied by the incorporation of Land Registry description and title numbers in the statutory Notices (**Pease v Carter & Anor** [2020] EWCA Civ 175)

21. We were referred by Mr Cochrane to **Cornerstone Telecommunications Infrastructure Limited v Central Saint Giles General Partner Limited and another** [2019] UKUT 183 (LC) where at paragraph 24 the Deputy Chamber President, having referred to **Keast** and points about the validity of initial notices, observed:

    "The Tribunal is not attracted to excessively technical arguments about the form of Code notices where no question of jurisdiction is engaged."

In view of the invitation to dismiss the reference against the Second Respondent do not have to consider whether or not that Notice is valid. As far as the First Respondent is concerned, we find that the Notice is not invalidated merely by the misdescription of the "Land" as "O2 Forum Car Park"

22. Mr Cochrane accepted entirely Mr Denyer-Green's submissions in relation to expropriation and referred the Tribunal to **Cornerstone Telecommunications Infrastructure Limited v Keast** [2019] 116 (LC) at paragraph 13:

"The courts take a particularly strict approach to the construction of statutes that expropriate private property: ***R (Sainsbury's) v Wolverhampton City Council*** *[2011] 1 AC 437. Where there is any ambiguity, the construction chosen will be the one that interferes least with private property rights. It seems to me that that principle is relevant both to the construction of the Code and to the exercise of the Tribunal's discretion under the Code, for example in its judgment as to what are the "appropriate" terms to be imposed alongside Code rights. I bear this closely in mind in assessing the preliminary issues, all of which challenge the Claimant's application on the basis that it is out of line with the requirements of the Code – whether as to the form of the notice, the nature of the rights sought, or the OFCOM direction that authorises the Claimant to seek them."*

23. In response to the Respondents arguments that excessive rights were being sought over an excessive area, the Claimant's solicitors wrote to the Respondent's solicitors on 15th October 2021 [285-286]. In that letter the Claimants limited the area of the "Land" to be subject to the MSV to that shown yellow ("the Yellow Land") on the plan at [S199]. On the basis that the Claimants were only seeking rights over NGL206051 and NGL18370 which is owned by the First Respondent, the Second Respondent was removed from the draft MSV Agreement. Tee lopping rights which had also been contentious were also removed.

24. At the hearing Mr Cochrane confirmed that the Claimant only seeks rights over the Yellow land. Mr Cochrane referred to **Keast** at paragraphs 27-29 where Upper Tribunal Judge Cooke considered *"the effect of a discrepancy between the paragraph 20 notice and the claim in the Tribunal".* The remarks at paragraphs 28 and 29 are clearly obiter. However, they are crucial to the arguments advanced by Mr Cochrane on the question of validity:

"28. In view of what I have decided about the rights claimed in this case there is no need for me to say any more about this further point. And indeed it will be unusual for the rights sought in a paragraph 20 notice to be different from those sought in the Tribunal proceedings for the simple reason that the notice should contain a draft of the agreement sought, and that same draft will be the starting point of the Tribunal reference. Negotiations with the occupier of the land will, almost invariably, have begun long before the paragraph 20 notice is drafted and there may well be changes of position on both sides in the course of negotiations. The paragraph 20 notice is likely to be drafted only when a Tribunal reference is obviously going to be necessary and therefore will append the same draft agreement that the Code operator will seek from the Tribunal.

29. That being the case, the point argued here is probably academic, but at any rate it is best left for decision if it actually arises. Obviously the Tribunal cannot impose upon the occupier of land any Code right that has not been sought in the paragraph 20 notice; that is perfectly clear from the terms of paragraph 20. On the other hand, where the reference to the Tribunal seeks fewer rights than were sought in the paragraph 20 notice, and the Respondent was in fact misled or pressurised or inconvenienced by the notice, then that is a matter that may weigh with the Tribunal in the exercise of its discretion as to what are the appropriate terms to be imposed upon the occupier of the land. But my provisional view is that it is unlikely that that sort of discrepancy will invalidate the paragraph 20 notice."

25. We find that the fact that the Claimants, at the eleventh hour, now seek rights over a very substantially smaller area of "Land" does not invalidate the paragraph 26(3) Notice. The Second Respondent is not prejudiced as the Claimant no longer seeks for it to be bound. If the First Respondent has been "misled, pressurised or inconvenienced" that can be reflected in the terms to be imposed.

    For completeness we should make it clear that whilst the area of the "Land" specified in relation to the Second Respondent could potentially be described as excessive that is not the case as far as the First Respondent is concerned. The Notice as originally drafted proposed rights over the whole of NGL18370 and NGL206051. Turning to the revised plan at [S199] the "Land" over which rights were initially sought is edged red. The "Yellow Land" covers a little under half of that area. The photograph at [S56] shows the Church and the Forum. We can gauge scale from the containers and vehicles. In the context of an MSV we find that neither the area of "Land" over which rights were initially sought against the First Respondent nor "the Yellow Land" can be described as excessive.

    Finally, those parts of Mr Denyer-Green's submissions in relation to terms and duration fall away as the parties have now finally agreed the form of the MSV Agreement (see below).

26. However, **Keast** does not solve all the Claimant's problems. There is a sliver of "the Yellow Land" on the map [S199] which lies outside NGL206051. It is the area immediately to the rear of the Forum which lies outside the red line drawn on the Land Registry plan. Following **Keast** that sliver of "the Yellow Land" cannot be the subject of interim rights as it was not included within the Paragraph 26(3) Notice.

Who occupies the land at the rear of the O2 Forum?

27. We now turn to a Lease dated 2nd July 2018 and made between Folgate Estates Limited (1) and Academy Music Group Limited (2) whereby "The Forum, 9-17 Highgate Road London NW5" was demised for a contractual term of 20 years from and including 25th March 2018 at an initial Annual Rent of £340,000 per annum subject to review [S16-54].

28. The demised property is shown edged red on the plan at [S25]. The land edged blue is the subject of Ancillary Rights set out at paragraph 3 [S27] of the Lease and in particular:

    "3.2 The right in common with all persons so authorised to pass and repass at all times and for all proper purposes connected with the Premises with or without vehicles over the Landlord's land edged blue on the plan annexed hereto for the purpose of identification only.

    3.3 The right to park vehicles on the Landlord's land edged blue on the plan annexed hereto for the purpose of identification only belonging to or authorised by the Tenant for all proper purposes connected with the Premises subject to the right of all persons authorised by the Landlord to pass and repass on foot."

    There is also a reference to the same area of land, albeit not specifically referred to as edged blue, at clause 4.1.7.6 [S30]:

    "During any development of the rear yard, access to more than one high sided vehicle (including tour buses) will be permitted and venue related vehicles can park in the yard for as long as reasonably necessary at the Property in the course of the Tenant's business."

29. The significance of the land edged blue on the Lease plan is that it forms a sizeable part of "the Yellow Land". Mr Denyer-Green relies on **Cornerstone Telecommunications Infrastructure Limited v Compton Beauchamp Estates Limited** [2019] EWCA Civ 1755. The Court of Appeal upheld the decision of the Upper Tribunal that only an occupier can confer Code rights either voluntarily or by compulsion. We were referred in particular to paragraph 54 of the Judgement in **Compton Beauchamp** per Lewison LJ:

    "In my judgement, therefore, the UT were correct to hold that whether a person is an occupier for the purposes of the Code is "a question of fact rather than legal status; it means physical presence on and control of the land"

30. In order to determine who is in occupation of the land edged blue on the Lease plan and crucially who is occupation of that part of "the Yellow Land" which is coterminous with it, we departed from summary procedure and received sworn evidence from Paul Brosnahan who is a director of the First Respondent.

31. Mr Brosnahan was shown the Lease Plan [S25] and confirmed that the land edged blue was the Yard at the rear of the Forum. The Yard can be clearly seen on the photographs at [S56 and S57]. From the ground the Yard is about 18 feet above the level of Murphy's Yard. Mr Brosnahan also told the Tribunal which of the gates shown on the photograph at [S58] gave access to the Yard. His clear evidence was that he did not hold key to the Forum Yard gate. The Forum owners had changed the lock. The only keyholders were the Forum. The other gate gives access to J Murphy land. Mr Brosnahan told us that the Forum used the Yard to store containers, equipment and beer barrels. In addition to music events the Forum also provides facilities for TV programme makers and that stage equipment and the like was also stored in the Yard from time to time. When groups come to play at the Forum, they arrive in 3 or 4 coaches in which they sleep rather than staying in hotels. Mr Brosnahan told the Tribunal that the Respondents had no control over the Yard as it was leased to the Forum. Mr Brosnahan recalled negotiations for renewal of the Lease and that clause 4.1.7.6 was inserted to ensure that the Forum could still use the Yard for tour buses even following any potential redevelopment. In cross examination Mr Cochrane asked why occupation/ control of the Yard was not mentioned in Mr Brosnahan's witness Statement. Mr Brosnahan told us that the Yard was "not ours". The Respondent's own 10 acres of land – "why talk about the Forum? We were more worried – what the hell are they trying to do with Murphy's Yard?"

32. We accept Mr Brosnahan's evidence. Applying the test set out at paragraph 54 of **Compton Beauchamp** it is clear that although the Yard is not demised under the Lease (which grants ancillary rights only over the Yard) the owners of the Forum have sole physical presence and control over the land edged blue on the Lease Plan.

33. Mr Cochrane sought to argue that the First Respondent could be bound under Paragraph 26(1)(b) of the Code. However, before that can be done Code rights need to be conferred, by way of agreement or imposition, with the occupier. Mr Cochrane therefore suggested that any MSV agreement take effect at a future date to allow the Claimant's time to seek Code rights from the lessees of the Forum. The Tribunal was not attracted by that suggestion.

34. Taking stock, the Claimants now seek Code rights only against the First Respondent and only in respect of "the Yellow Land". We have determined that the sliver of Yellow Land outside NGL206051 cannot be the subject of Code rights because it was not included in the Paragraph 26(3) Notice. We further determine that the land edged blue on the Lease plan and which forms part of "the Yellow Land" cannot be the subject of Code rights because neither of the Respondents are the occupiers of that land.

Redevelopment

35. Paragraph 21(5) of the Code provides:

    "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."

36. In **EE Limited and Hutchinson 3G UK Limited v Sir James Chichester and others as Trustees of the 1968 Combined Trust of Meyrick Estate Management** [2019] UKUT 164 (LC) the Upper Tribunal adopted, at paragraph 40, a two stage test (following **Cunliffe v Goodman** [1950] 2 KB 237)

    "*Accordingly, whether the Respondents wish to build a mast or a housing estate, they can resist the Claimants' application only if they can demonstrate both that they have a reasonable prospect of being able to carry out their redevelopment project and that they have a firm, settled and unconditional intention to do so."*

37. In his Witness Statement Mr Brosnahan indicates that the First Respondent is the lead developer of Murphy's Yard. A total of 825 residential units will be built with estimated costs in excess of £100m. Exhibit PB2 is a copy of the outline Planning Permission that has been submitted [52-65]. Exhibit PB3 is the Developers Briefing [67-160].

38. Mr Cochrane's main submission focuses on the words "and could not reasonably do so if the order were made" in Paragraph 21(5). The planning application that has been made gives the earliest possible dates for commencement of the development as September 2023 [57]. Under those circumstances a 6 month MSV agreement is not going to hold up the proposed development in any way.

39. At the hearing Mr Denyer-Green conceded that "it is too early in the development for **Cunliffe**". That concession is well made. The Respondents cannot show, prior to the grant of planning permission, that it has a reasonable prospect of being able to carry out the redevelopment nor, at this early stage an unconditional intention to do so. On that basis the Respondents cannot resist the Claimant's application on redevelopment grounds.

40. The Tribunal would wish, however, to make it quite clear to both parties that having considered the planning application and developers brief we are quite satisfied that the Respondents' intentions are genuine. The developers brief is a significant and substantial document. There is already considerable impetus behind the Respondents' plans and evidence that a considerable sum of money has already been spent in getting the project this far. Should planning permission be granted and finance put in place we have no doubt that the development will have every prospect of proceeding.

Paragraph 21 – the test to be applied

41. 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.

42. The Tribunal has considered the Claimant's Statement of Case [10 - 15]. The Claimant is an infrastructure provider to Vodafone and others and is itself an operator pursuant to a direction under section 106 of the Communications Act 2003. The Local Authority has served an enforcement notice on the existing Vodafone site at 379 Kentish Town Road. If Vodafone is unable to comply with enforcement the existing site will have to be decommissioned by March 2022. Vodafone needs a temporary site to reduce the risk of a gap in coverage between anticipated decommissioning and the identification of a new permanent site. The proposed site at "Murphy's Yard" is close to both Kentish Town Station and Kentish Town Road where there is greatest risk of a deterioration in service if a temporary replacement site is not found.

43. The Claimant indicates that the Land on the west and south west side of Greenwood Place, Kentish Town is suitable because it is "a greenfield site and situated on a spacious car park away from nearby buildings". As set out above that is simply wrong. The photographs exhibited by Mr Brosnahan at PB1 [32 - 50] give a much more accurate picture of busy headquarters and operational yard all within a secure area. The Claimant has clarified matters by way of Witness Statement of Sarah Elizabeth Moran. It would appear that the Claimant's use the term "greenfield" to mean rights over land rather than over a building or rooftop. The Tribunal is bound to observe that the use of the term "greenfield" in that way is confusing to say the least.

44. The Respondent in its Statement of Case [16-25] indicate that the land is plainly unsuitable because it is an operational site within a security fence. It also appears from the Statement of Mr Brosnahan that there is only one means of access.

45. The Tribunal disagrees with the Respondents assessment of the lack of suitability. It may be that the Respondents are under a misapprehension as to what is involved in an MSV. The photographs [56- 58] show "the Yellow Land". It is clearly a working yard. However, comparing "the Yellow Land" with the photograph at [s56] it does not appear that there are any buildings situated there. We are looking at a yard, parking and ad hoc storage. Although "Murphy's Yard" is secured there is clearly satisfactory access from Greenwood Place. An MSV imposed for a period of 6 months will not cause any significant disruption to the Respondents' operations nor will it require the stopping up of the Greenwood Place access. Any disruption or inconvenience will be relatively minor and can be more than adequately compensated by money. The public benefit in finding a temporary site close to both Kentish Town Station and Kentish Town Road where there is greatest risk of a deterioration in service if a temporary replacement site is not found outweighs the prejudice to the Respondents.

46. We find that both conditions in Paragraph 21 are satisfied. As set out above the Respondents cannot resist the Claimant's application on redevelopment grounds.

Discretion

47. Paragraph 26(3) requires the Tribunal to focus on whether there is a good arguable case that the paragraph 21 test is satisfied. However, Mr Denyer-Green helpfully reminds the Tribunal that making an Order for Interim Code Rights is a discretionary matter.

48. In particular, Mr Denyer-Green argues that there is simply no point in making an Interim Order as there is no prospect of a subsequent Paragraph 20 application being successful in view of the Respondents' redevelopment plans. Mr Cochrane, in response reminds the Tribunal that what is ultimately sought is a temporary replacement site. This application relates solely to interim rights to carry out an MSV – and if "the Yellow Land" is found not to be suitable the Claimant will search for other sites. Neither an MSV nor a paragraph 20 application in relation to a temporary site will impinge on the proposed September 2023 start date for the proposed development.

49. Terms of any MSV have now been agreed and any objections the Respondents have previously raised based on onerous or unreasonable terms now fall away. The Claimant has now narrowed the area over which it seeks an MSV to "the Yellow land". We have found that area to be reasonable in the context of an MSV and not excessive. We have found the statutory notice served on the First Respondent to be valid. We need not concern ourselves with the First Respondent as the reference against it is to be dismissed. For reasons given above the Tribunal cannot impose rights over two parts of "the Yellow land" namely the sliver outside the red line on the title and the area at the rear of the Forum occupied by tenants. From the photographs it would appear that the remaining area is best described as a yard and does not appear to be built upon. A 6 month MSV will not cause any significant inconvenience in terms of access or security and certainly no prejudice that cannot be compensated by money. The public benefit far outweighs prejudice to the Respondents. Although there are development plans, in the absence of planning permission and finance it cannot be said at this stage that there is a reasonable prospect of the Respondents being able to carry out their redevelopment nor a firm, settled and unconditional intention to do so.

50. We find that "the Yellow Land" is entirely suitable for telecommunications equipment. There is nothing unusual in the nature of the Respondents business or security arrangements which make it unsuitable. It is, as the photographs show, an operational yard used variously for parking and storage. There is nothing in the proposed MSV Agreement which is incompatible with current use. We keep firmly in mind the Claimant's stated purpose. The Claimant seeks access for 6 months to carry out an MSV. If the site is suitable the Claimants will apply under paragraph 20 for a temporary period to cover decommissioning elsewhere. On that basis there is no significant prejudice or inconvenience to the Respondents.

51. We must have regard to the public interest in access to a choice of high quality electronic communications services. We entirely understand why many landowners oppose the imposition of Code rights. However, the position of the Respondents is somewhat different. They derive rental income from tenants including the O2 Forum. Performers and patrons of the O2 Forum need high quality internet and phone signals. The Respondents propose a development of 825 residential units and it is reasonable to assume that the development and residential occupiers will require access to high quality electronic communications services. In the present case it could well be argued that what is in the public interest is also in the interest of the Respondents having regard to the present and future needs of their tenants and occupiers of the proposed development.

52. We find that the Claimant has established a good arguable case that the test in paragraph 21 is met. The terms as agreed between the parties and the extent of "the Yellow Land" (subject to two excluded areas) are reasonable and proportionate. We find that the site is suitable and that the imposition of

an agreement will not affect any development on the site which is not due to commence until September 2023 at the earliest. We therefore exercise our discretion to impose an agreement upon the First Respondent.

Terms of the MSV Agreement

53. At the hearing counsel confirmed that terms have now been agreed. The agreed terms are set out in the MSV Agreement at [S185 – 198] as amended in blue and red. The only further amendment is to strike out the covenant for title at B2 [S191]

Costs

54. At the hearing Mr Denyer-Green applied for costs on behalf of the Second Respondent. However, both counsel expressed a desire to see this written Decision before making final submissions on behalf of the other parties. Accordingly, we adjourn the question of costs for 28 days. At the end of that period any party seeking a costs order must serve brief "Submissions on Costs" on the Tribunal and the opposing party. Thereafter the Tribunal will issue further Directions.

Decision

55. 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 First Respondent, on an interim basis. The Claimant and the First Respondent are bound by an agreement in the following terms:

    a) As contained in the ECC Interim Code Agreement (MSV) at pages 185 – 198 of the Supplementary Bundle as amended in blue and red. The Agreement is subject also to the striking through of clause B2.

    b) The Plan to be annexed to the Agreement (Grantor's Property) is the plan at page 199 of the Supplementary Bundle. The land shown coloured yellow on the Plan shall not include:

    i. The area of land at the rear of the Forum that falls outside the land shown edged with red on the Plan
    ii. The land edged blue on the plan at page 25 of the Supplementary Bundle being a plan annexed to a Lease dated 2nd July 2018 and made between Folgate Estates Limited (1) and Academy Music Group Limited (2)

56. The reference against the Second Respondent is dismissed.

D Jackson
Judge of the First-tier Tribunal

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.