FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**BIR/00CN/ERO/2026/0011**
Subject Property	:	**Land at Lyndhurst** **Hampshire**
Claimant **(Operator)**	:	**Wessex Internet Limited**
Representative	:	**Temple Bright LLP**
Respondents **(Site Provider)**	:	**(1) Camilla Masters** **(2) Georgia Arrusi**
Representatives	:	**Gasson Associates** **(Peter Baughen)** **(2) Clarke Willmott LLP**
Application	:	**Electronic Communications Code** **Paragraph 26 (interim rights)**
Tribunal Member	:	**Deputy Regional Judge Gravells**
Date of Decision	:	**1 May 2026**

DECISION

Introduction

1 A Reference under Schedule 3A to the Communications Act 2003 (the Electronic Communications Code ('the Code')) was received by the Tribunal on 4 February 2026 including (1) an application for an order imposing an agreement for rights under paragraph 20 of the Code requiring the parties to enter into a new agreement for the occupation by the Claimant of a new site belonging to the Respondents and (2) an application for an order imposing an agreement for rights over the new site on an interim basis under paragraph 26.

2 Regulation 3(2) of the Electronic Communications and Wireless Telegraphy Regulations 2011 applies to both applications, which must therefore be determined by 3 August 2026.

3 This is the Decision of the Tribunal on the applications for interim rights under paragraph 26.

4 The Claimant is an 'operator' within the meaning of paragraph 2 of the Code by virtue of a direction by OFCOM. The Claimant has been appointed by central and local government to deliver gigabit full fibre broadband connectivity to under-served rural communities. More specifically, the Claimant seeks Code rights to enable the installation and maintenance of underground ducting and fibre optic cabling for the Lyndhurst Project in accordance with its contract with Building Digital UK. The application for interim rights is made to enable work to commence without further delay.

5 The Respondents are registered at the Land Registry as the freehold proprietors of the subject premises.

The legal background

6 The Electronic Communications Code regulates the legal relationship between mobile telephone operators (whether providing a phone signal or physical infrastructure) and the landowners on whose land electronic communications equipment is to be located. The Code provides protection for landowners while seeking to protect 'the public interest in access to a choice of high quality electronic communications services': see paragraph 21 of the Code.

7 Code rights are conferred upon operators by agreement with the occupier of land (paragraph 9), and an agreement may be imposed by an order of the Tribunal (paragraph 20). However, paragraph 26 makes provision for interim Code rights, which can only be created by the Tribunal imposing an agreement upon the parties.

8 The test that an operator must satisfy in order for the Tribunal to impose an agreement conferring Code rights under paragraph 20 is set out in paragraph 21 of the Code –

> (1) … 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.

9 For interim rights under paragraph 26 the operator need only show that it has a 'good arguable case' that the paragraph 21 test is satisfied.

10 Whether Code rights are sought under paragraph 20 or paragraph 26, the terms on which they are conferred are determined by the Tribunal in light of the provisions of the Code. Paragraph 23 refers to an order under paragraph 20 but with some modifications it also applies to an agreement for interim rights (paragraph 26(4)). So far as relevant, paragraph 23 provides –

(1) An order under paragraph 20 may impose an agreement which gives effect to the code right sought by the operator with such modifications as the court thinks appropriate.

(2) An order under paragraph 20 must require the agreement to contain such terms as the court thinks appropriate, subject to sub-paragraphs (3) to (8).

(3) The terms of the agreement must include terms as to the payment of consideration by the operator to the relevant person for the relevant person's agreement to confer or be bound by the code right (as the case may be).

(4) Paragraph 24 makes provision about the determination of consideration under sub-paragraph (3).

(5) 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 to persons who—

(a) occupy the land in question,

(b) own interests in that land, or

(c) are from time to time on that land.

11 In the case of an agreement for interim Code rights under paragraph 26, paragraph 23(3) applies as if the duty to include terms as to the payment of consideration were a power: see paragraph 26(6)(b).

The factual background

12 On 29 March 2025 the Claimant contacted the Respondents to discuss a proposed agreement for Code rights over the subject premises. Neither Respondent responded. However, in response to a second letter sent on 12 April 2025, the second Respondent stated that all correspondence should be addressed to the Respondents' land agent, Mr Peter Baughen of Gasson Associates.

13 On 23 April 2025 the Claimant contacted Mr Baughen to explain the position and attached copies of the earlier correspondence, draft agreements and proposed plans. On 28 April 2025 Mr Baughen telephoned the Claimant and a meeting was arranged for the following day. A further meeting took place on 16 May 2025 when the proposed route of the ducting and cabling was surveyed.

14 A final agreement and plan were produced on 24 July 2025. During the following months the Claimant requested updates on the status of the agreement. The

Claimant was led to believe that the second Respondent had signed the agreement and that the first Respondent would do so. However, the second Respondent instructed solicitors, who proposed amendments to the agreement, which the Claimant has accepted. The Claimant seeks to have the amended agreement imposed by the Tribunal and the second Respondent has consented to the imposition of the amended agreement.

15 However, the first Respondent failed to engage with the Claimant either directly or through Mr Baughen.

16 On 9 December 2025 the Claimant served notices pursuant to paragraphs 20 and 26 of the Code, inviting the Respondents to confer Code rights on the terms set out in the revised proposed agreement.

17 On 4 February 2026 the Claimant made the present Reference to the Tribunal.

18 On 24 February 2026 the Tribunal issued Directions and scheduled a case management hearing for 21 April 2026 with an indication that the paragraph 26 applications for interim rights would be determined on that occasion if that proved to be possible.

19 The hearing took place by remote video conference. The Claimant was represented by Tessa Davies. The first Respondent appeared in person; and the second Respondent was represented by Henry Russell of Clarke Willmott LLP.

Representations of the first Respondent

20 The first Respondent failed to comply with the Tribunal's Directions and her first communications to the Claimant and to the Tribunal were a number of brief emails sent on 16 and 17 April 2026. In those emails the first Respondent raised a number of (similar but differently formulated) issues –

(i) that the Claimant had submitted incorrect and missing title numbers and an inaccurate map of the proposed site;

(ii) that the Claimant had failed to conduct 'meaningful negotiations' with the first Respondent, who was abroad and/or recovering from operations;

(iii) that the Respondents intended to develop the proposed site;

(iv) that the Claimant had not proved that it is a 'technical necessity' to use the proposed site and that the proposed ducting and cabling should be installed under the public highway;

(v) that the Claimant should provide a scientific guarantee that the proposed works would not pollute the soil of the proposed site;

(vi) that Mr Baughen was not a reliable channel for negotiations because of a current legal dispute with the first Respondent;

(vii) that any agreement should include a six-month break clause in the event that the Respondents obtained planning permission to redevelop the proposed site.

21 The Claimant sought to 'rebut' each of the above issues; and the Tribunal accepted those 'rebuttals' -

(i) The first Respondent had failed to respond to requests for clarification; but the Claimant had checked and confirmed the title numbers and the map.

(ii) The Claimant was led to believe that it should negotiate with both Respondents through Mr Baughen. In any event, the Claimant sent letters to the first Respondent in March and April 2025; and the first Respondent admitted that she was contacted by Mr Baughen in January 2026. She therefore had had ample opportunity to engage with the Claimant.

(iii) See paragraphs 33-43 below.

(iv) See paragraphs 28-29 below.

(v) The Claimant confirmed that their ducting and cabling are industry standard and have been subject to extensive review by the local planning authority and Natural England. In any event, the proposed agreement provided the Respondents with remedies for any proved losses.

(vi) see (ii) above.

(vii) see paragraphs 33-43 below.

22 At the hearing the first Respondent raised two further issues that had not been mentioned previously –

(i) She asserted that the proposed works would adversely affect 'Capability Brown-designed landscapes'. Despite repeated questioning, it was not clear whether she was asserting that the landscapes in question were the proposed site or neighbouring land. In any event, she provided no evidence to support her assertions. However, it is difficult to see how the proposed installation of underground ducting and cabling would have any (lasting) impact of the local landscape.

(ii) She asserted that the installation of telecommunications apparatus was in fact designed for the benefit of corporate enterprises and not for the benefit of local individuals. Again, that assertion was unsupported by the evidence.

Representations of the Claimant

<u>Paragraph 21 test</u>

23 Tessa Davies, on behalf of the Claimant, referred to the Upper Tribunal decision in *EE Limited and Hutchison 3G UK Limited v London Underground Limited* [2021] UKUT 0128 (LC), where the Tribunal stated (at paragraph 7) –

> For a claimant to demonstrate a good arguable case does require that it make out its case to the normal civil standard of proof on the balance of probability; as the Court of Appeal confirmed in *University of London*, at [77], a good arguable case is a lower test than is laid down by paragraph 21 itself. Instead it means that the claimant must show that it has a plausible evidential basis for its claim that the paragraph 21 conditions are satisfied. The test is flexible and fact specific.

First condition: the prejudice to the Respondents is capable of being adequately compensated by money

24 Ms Davies referred to the Upper Tribunal decision in *EE Limited and Hutchison 3G UK Limited v Islington LBC* [2018] UKUT 0361 (LC), where the Tribunal stated (at paragraphs 34-35) –

> What matters is whether the type of prejudice that will be suffered is such that money will not provide adequate compensation ...; whether it is incapable of being compensated in money in principle.

25 Ms Davies submitted that there was no prospect that the proposed installations on the terms proposed by the Claimant would result in uncompensable (in money) prejudice to the Respondents; and that the Respondents had not seriously suggested that it would.

Second condition: the public benefit outweighs any prejudice to the Respondents

26 Ms Davies referred to paragraph 21(3) and (4) of the Code (see paragraph 8 above).

27 She referred to the decision of the Upper Tribunal in *Cornerstone Telecommunications Infrastructure Limited v University of the Arts London* [2020] UKUT 0248 (LC), where the Tribunal stated (at paragraph 51) –

> It is clear that Parliament in enacting the Code intended private landowners to participate in the provision of telecommunications sites for the public good by suffering the use of their land for that purpose, being compensated for any damage caused but for consideration calculated on a basis that prevents them from making a profit out of the deal as they could under the Code's statutory predecessor. The test for the imposition of such rights is quite a stiff one; for the respondent to escape this public duty, unless it is itself going to redevelop the site, it must show 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 14 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. The benefit is perhaps even higher today than it was when the Code was enacted and certainly in the current circumstances we are all keenly aware of it.

28 In the same decision, the Tribunal stated (at paragraph 27) –

> It is now well-established (see *Cornerstone Telecommunications Infrastructure Limited v University of London* [2018] UKUT 356 (LC), paragraphs 131–133) that it is no part of the Tribunal's task to consider whether alternative sites would do just as well. ... We have to weigh the public benefit arising from the imposition of a paragraph 20 agreement as if the alternative were that the claimant does not operate from [the subject premises]; that benefit is not diminished by the fact that the same benefit might be achieved by the use of an alternative site or of a sharing deal [in the vicinity].

29 Ms Davies submitted that that principle addresses objections by the first Respondent that alternative solutions should be adopted.

30 Ms Davies submitted that the public benefit likely to result from the order sought comprises -

(i) delivery of gigabit full fibre broadband connectivity to under-served rural communities;

(ii) access for properties in Lyndhurst to a choice of high-quality electronic communications networks;

(iii) addressing the problems with 'not spots'.

31 Ms Davies questioned whether the first Respondent's challenge to the public benefit was based on objective evidence.

32 Ms Davies submitted that the public benefit would outweigh any very limited prejudice to the Respondents; and that the terms of the proposed agreement for interim rights would satisfy the requirements of paragraph 23(5) of the Code -

(i) Protective terms in the agreement seek to minimise loss and damage to the Respondents and have been revised to take account of concerns raised on behalf of the second Respondent.

(ii) The proposed agreement imposes only limited obligations on the Respondents.

(iii) It is in the Claimant's own interest to ensure that the ducting and cabling is installed safely and with appropriate materials, having regard to the nature and condition of the proposed site and the duties that the Claimant owes to its employees and contractors.

(iv) Once the ducting and cabling is installed there will be limited ongoing impact on the proposed site, save for occasional access to maintain, inspect and make adjustments as and when required.

(v) Any concerns as to consideration, compensation or other terms of the final agreement can be dealt with at the final hearing for permanent rights (as the Code envisages).

Intention to redevelop

33 Ms Davies noted that the second Respondent did not raise the issue of redevelopment and that the issue was first raised in the emails of the first Respondent sent on 16 and 17 April 2026.

34 However, in response to the first Respondent's declared intention to redevelop the proposed site, Ms Davies made the following submissions.

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 Ms Davies referred to the decision of the Upper Tribunal in *Icon Tower Infrastructure Ltd v On Tower UK Ltd* [2026] UKUT 89 (LC), where the Tribunal stated (at paragraphs 15-16) –

> [15] Where appropriate, and suitably modified, principles applicable under the 1954 Act are to be applied under the Code. These include the requirements that: (i) where intentions have changed over time, it is the intention at the date of the hearing that is relevant; (ii) the defence in paragraph 21(5) is not made out unless the relevant person has a firm intention to carry out the redevelopment, and this is something that they have a reasonable prospect of being able to bring about of their own volition.
>
> [16] To succeed at trial, and largely mirroring the applicable test under ground (f) in section 30(1) of the 1954 Act, Icon needed to establish that it intended, as at the date of the hearing in the First-tier Tribunal, to carry out the work upon which it relied (namely, erecting its own mast on its site). Intention has three components:
>
> (1) The subjective element: Icon had to prove that it had a firm and settled intention to carry out the work, and that this was not likely to change.
>
> (2) The objective element: Icon had to prove that there was a reasonable prospect of being able to bring about the relevant redevelopment by its own act or volition, and surmounting any hurdles or pre-conditions.
>
> On Tower emphasises that it was Icon which bore the burden of establishing that it had the requisite intention to redevelop. On Tower had no need to prove anything. It merely had

to raise challenges which called for an answer from Icon in order that Icon might discharge the burden that lay upon it: see *MVL Properties (2017) Limited v The Leadmill Limited* [2025] EWHC 349 (Ch) at [10a] per Norris J.

37 Although the first Respondent stated that the proposed site was currently being promoted through 'Call for Sites' for the Local Plan, no evidence of this had been provided. Indeed, there was evidence to suggest that the Call for Sites for the Local Plan had been completed, and that the proposed site was not selected.

38 Furthermore, Ms Davies submitted that even a successful submission through a 'Call for Sites' was a very long way from 'something that [the Respondents] have a reasonable prospect of being able to bring about of their own volition', including by 'surmounting any hurdles or preconditions'. The site is in a National Park and subject to very strict planning restrictions and conditions.

39 Contrary to the assertion of the first Respondent that she had applied for planning permission, there was no documentary evidence of an application or even that the proposed site had been the subject of detailed expert planning analysis or that there had been any pre-application discussions with the planning authorities.

40 In summary, the likelihood of the Respondents being able to bring about redevelopment of their own volition, including by surmounting any hurdles or pre-conditions was, at best, remote

41 Even if such an intent and likelihood of success could be sufficiently evidenced, paragraph 21(5) of the Code also requires that the Respondents 'could not reasonably [develop the proposed site] if an order were made'. Ms Davies submitted that no evidence had been produced to suggest what the proposed redevelopment entailed, but it seemed highly implausible that such redevelopment would prevent the installation of the entirety of the proposed ducting and cabling. The Claimant is highly experienced and adept at making alterations to their routing to accommodate redevelopment, including by drilling sections at depth, routing closer to field edges, changing position of chambers and other measures.

42 Moreover, the proposed agreement contains a comprehensive lift and shift provision, which requires the Claimant at its own expense to move the ducting and cabling an unlimited number of times to a suitable new position, in the event of redevelopment. And, if such a relocation is not possible then the Respondents have the right under the Code to terminate the agreement with 12 months' notice.

43 Ms Davies submitted that the Respondents had not met the intention to redevelop test.

Terms of the interim agreement

44 The Claimant has amended the proposed agreement to take account of the concerns identified by the second Respondent.

45 Ms Davies noted that the first Respondent had failed to provide a marked-up copy of the proposed agreement, as required by the Tribunal's Directions, and had proposed no amendments to either the agreement originally proposed by the Claimant or to the amended agreement.

Determination of the Tribunal

46 In determining the issues in dispute between the parties, the Tribunal took full account of the written and oral representations of the parties so far as relevant to the issues in dispute.

47 The Tribunal determines that the first Respondent has failed to advance any argument and/or evidence to undermine Ms Davies' submission that the Claimant has shown a 'good arguable case' that that two-fold test in paragraph 21 is satisfied.

48 The Tribunal determines that the first Respondent has failed to demonstrate an intention to redevelop the proposed site such as to preclude the Tribunal from imposing the proposed agreement (as amended) on the parties.

49 The Tribunal determines that the terms of the proposed agreement for interim rights (as amended) are appropriate.

50 The Tribunal determines that the proposed agreement for interim rights (as amended) should be imposed on the parties.

Costs

51 The Claimant claims that the first Respondent should pay the Claimant's costs of the case management hearing. Given the extent to which the Claimant has been successful in the proceedings, pursuant to paragraph 96 of the Code, the Tribunal orders that the first Respondent pay the Claimant's costs in the sum of £3,000.00.

52 The Tribunal further orders that, consistent with usual practice in such cases, pursuant to paragraph 84(2)(a) of the Code the Claimant pay the second Respondent's transaction costs in the sum of £500.00.

Order

53 In order to give effect to this Decision, the Tribunal issued a formal Order dated 27 April 2026.

Appeal

54 If a party wishes to appeal this Decision, that appeal is to the Upper Tribunal (Lands Chamber). However, a party wishing to appeal must first make written application for permission to the First-tier Tribunal at the Regional office which has been dealing with the case.

55 The application for permission to appeal must be received by the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

56 If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason(s) for not complying with the 28-day time limit. The Tribunal will then consider the reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

57 The application for permission to appeal must state the grounds of appeal and state the result the party making the application is seeking.

1 May 2026

Professor Nigel Gravells
Deputy Regional Judge