

**Interim Code Rights:
the approach taken by the Tribunal thus far**

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Paragraph 26 – Key Features

- (1) An operator may apply to the court for an order which imposes on the operator and a person, on **an interim basis**, an agreement between them which—
- (a) confers a code right on the operator, or
 - (b) provides for a code right to bind that person.
- (2) An order under this paragraph imposes an agreement on the operator and a person on an interim basis if it provides for them to be bound by the agreement—
- (a) for the period specified in the order, or**
 - (b) until the occurrence of an event specified in the order.**

Paragraph 26 – Key Features

(3) 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.

Paragraph 26 – Key Features

(4) Subject to sub-paragraphs (5) and (6), the following provisions apply in relation to an order under this paragraph and an agreement imposed by it as they apply in relation to an order under paragraph 20 and an agreement imposed by it—

- (a) paragraph 20(3) (time at which operator may apply for agreement to be imposed);
- (b) paragraph 22 (effect of agreement imposed under paragraph 20);
- (c) paragraph 23 (terms of agreement imposed under paragraph 20);
- (d) paragraph 24 (payment of consideration);
- (e) paragraph 25 (payment of compensation);
- (f) paragraph 84 (compensation where agreement imposed).

Paragraph 26 – Key Features

(5) The court may make an order under this paragraph even though the period mentioned in paragraph 20(3)(a) has not elapsed (and paragraph 20(3)(b) does not apply) if the court thinks that the order should be made as a matter of urgency.

(6) Paragraphs 23, 24 and 25 apply by virtue of sub-paragraph (4) as if—

(a) references to the relevant person were to the person mentioned in sub-paragraph (1) of this paragraph, and

(b) the duty in paragraph 23 to include terms as to the payment of consideration to that person in an agreement were a power to do so.

Paragraph 26 – Key Features

(7) Sub-paragraph (8) applies if—

(a) an order has been made under this paragraph imposing an agreement relating to a code right on an operator and a person in respect of any land, and

(b) the period specified under sub-paragraph (2)(a) has expired or, as the case may be, the event specified under sub-paragraph (2)(b) has occurred **without (in either case) an agreement relating to the code right having been imposed on the person by order under paragraph 20.**

(8) From the time when the period expires or the event occurs, **that person has the right, subject to and in accordance with Part 6 of this code,** to require the operator to remove any electronic communications apparatus placed on the land under the agreement imposed under this paragraph.

Reminder of Paragraph 21

21 What is the test to be applied by the court?

- (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.

Distinction between paragraph 26 and paragraph 27

- Interim code rights are distinct from temporary code rights which can be imposed under paragraph 27.
- Temporary code rights available where:
 - Notice given under para 20 seeking new permanent Code rights;
 - Apparatus is already installed on the land; and
 - Recipient of notice has a right to require removal of the apparatus under para 37/40.
- See *CTIL v The University of London* [2018] UKUT 356 at [31].

Key questions arising out of paragraph 26

“Interim basis”: for how long?

What is the threshold for “good arguable case”?

Can it only be used as a preliminary to seeking permanent code rights?
Are these ‘parasitic’ on permanent code rights?

What form will an agreement conferring interim rights take?

Key questions arising out of paragraph 26

How will the 'public benefit' test be applied?

How will the Tribunal exercise its discretion?

Procedurally, how will applications for interim rights be dealt with?

How will the Tribunal identify 'prejudice' and which prejudice cannot be compensated by money?

The case law on interim rights

CTIL v The University of London [2018] UKUT 356



EE Limited and Hutchison 3G UK Ltd v Islington London Borough Council [2018] UKUT 361



The case law on interim rights

CTIL v The University of London [2018] UKUT 356

Facts

- Block of student accommodation opposite Paddington station.
- Loss of another site in Paddington (Eastbourne Terrace) meant that new site for apparatus required.
- CTIL sought access to roof of Lillian Penson Hall to carry out survey and other non-intrusive investigations.
- CTIL did not seek permanent rights to install apparatus. Their desire to do this was dependent on the outcome of the non-intrusive investigations.



The case law on interim rights

CTIL v The University of London [2018] UKUT 356

Issues

1. Does the Tribunal have jurisdiction to impose an agreement under para 26 providing only for a right of access to undertake a survey of the roof of the building? Is a right of access to undertake a survey a Code right at all?
2. Can the operator seek an interim code right under para 26 without at the same time seeking any permanent code right under para 20?
3. Has the operator shown a good arguable case that the conditions in para 21 are satisfied?



The case law on interim rights

CTIL v The University of London [2018] UKUT 356

Decision

1. Does the Tribunal have jurisdiction to impose an agreement under para 26 providing only for a right of access to undertake a survey of the roof of the building? Is a right of access to undertake a survey a Code right at all? **YES.**
2. Can the operator seek an interim code right under para 26 without at the same time seeking any permanent code right under para 20? **YES.**
3. Has the operator shown a good arguable case that the conditions in para 21 are satisfied? **YES.**



The case law on interim rights

CTIL v The University of London [2018] UKUT 356

University of London's Appeal Pending

1. Right of access to undertake a survey is not a Code right
2. Para 26 application cannot be made without a para 20 claim for final code right being on foot at the same time
3. UT wrongly applied the para 21 test (permission to appeal pending)



The case law on interim rights

EE Limited and Hutchison 3G UK Ltd v Islington London Borough Council [2018] UKUT 361



Facts

- Rooftop site on residential block in Islington.
- EE had the apparatus on a nearby site, Leroy House, but were being required to remove it for redevelopment.
- EE had agreed with landlord of Leroy House on a date for complete removal.
- Sought permanent code rights under para 20 and interim rights until determination of the reference.
- Parties had agreed terms for a code agreement save for financial terms.
- Risk of loss of coverage for approximately 3-4 months.

The case law on interim rights

EE Limited and Hutchison 3G UK Ltd v Islington London Borough Council [2018] UKUT 361

Issues

1. Procedurally, how should this be dealt with?
2. What is the prejudice?
3. Does the public benefit outweigh the prejudice?
4. What form will an agreement for interim rights take?



The case law on interim rights

EE Limited and Hutchison 3G UK Ltd v Islington London Borough Council [2018] UKUT 361

Decision

- Given orally at conclusion of argument at a CMC.
- Generally, para 26 applications will be dealt with summarily without cross-examination [14].
- Standard of proof is not the balance of probability: need not be free of all doubt or uncertainty but it must be a case that is more than simply arguable [16].
- A party's willingness to accept installation of the equipment in principle, as shown in negotiations, is potentially relevant to exercise of UT's discretion [21].
- Urgency is potentially relevant to the exercise of the UT's discretion [22].



The case law on interim rights

EE Limited and Hutchison 3G UK Ltd v Islington London Borough Council [2018] UKUT 361

Decision

- Capable of being compensated by money: *“there may be cases in which aesthetic or personal considerations meant that compensation for any diminution in financial value did not provide adequate recompense for the prejudice”* [35]
- Public benefit: loss of coverage *“is likely to be regarded by the public as an unacceptable break in a service they expect to be available to them at all times”* [37]
- Prejudice to the SP: (1) the imposition of unagreed terms in itself cannot be weighed in the balance [41]; (2) the creation of a legal estate (a lease) was not inherently prejudicial; (3) some prejudice caused by noise disturbance and inconvenience of work being carried out.



The case law on interim rights

EE Limited and Hutchison 3G UK Ltd v Islington London Borough Council [2018] UKUT 361

Decision

- Good arguable case that para 21 conditions made out.
- Interim rights granted, conditional on planning permission being granted to the owners of Leroy House.
- *“In principle it ought to impose no obligations on the site owner other than an obligation not to derogate from the rights which have been granted. It should require no covenants or undertakings from the site owner. It should put the full risk of the operation which the operator wishes to embark on the operator and none of the risk on the site provider”* [48]



Conclusions

Some clarity on procedure:
summary process
without oral
evidence or
extensive
disclosure

Form of agreement:
less elaborate than
for full permanent
code rights

Clarity on evidential threshold:
“good arguable
case”= as
interpreted by CA in
Canada Trust

Discretion:
UT has accepted
that even if good
arguable case is
shown, Tribunal
could exercise
discretion to not
grant right

Remaining uncertainties

**Application of the
public benefit test**

**Connection
between para 26
rights and
permanent rights
under para 20**

**Will UT ever
consider money to
be inadequate
compensation for
the prejudice?**

**How long could an
interim Code right
be granted for?
What are the limits
on the use of para
26 in this respect?**

Thank you for listening

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