Access to Land Initiative

Guidance Note prepared by the Working Group on Mobile Templates

Adopted by Steering Group 10th November 2023

Legal Guidance Statement

The purpose of this Guidance Note which has been prepared by a cross section of representatives from both the site provider and operator community is to promote understanding and foster good communication and collaboration, in line with the objectives of the National Connectivity Alliance (NCA). This Guidance Note is intended to offer additional guidance to supplement Ofcom's 'Code of Practice concerning agreements for access to private land', which is available on Ofcom's website.

References to case law, or commentary from the courts, is relevant at the time of publication. The reader should be aware that by virtue of its periodically updated nature it may not be comprehensive or up to date and for this reason it should not be solely relied on, nor used as a primary reference source. Where practicable, links and references are provided to assist the reader.

This Guidance Note does not constitute legal or professional advice and should not be construed as such, nor relied on or treated as a substitute for specific advice relevant to particular circumstances.

This Guidance Note is provided to the reader without any responsibility or liability on the part of the NCA or any member of the NCA or any other contributor to the Guidance Note.

Anyone involved in this area should consider taking professional advice.

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Landlord's costs and expenses (clause 1.5 in the GLA greenfield template lease)

Initial Considerations	• The idea behind this clause is cost-neutrality for the Site Provider, as the Site Provider should not be out of pocket as a result of having to enter into the agreement. • The parties need to watch out for double-counting. Is the item in question already covered by the valuation that has been carried out in respect of the Site Payment?

	• Linked to the above point, it is advisable for valuers to review the detailed valuation breakdown of consideration and compensation in line with these clauses. • Most of the items listed relate to legal costs. Are there any other costs which should reasonably be covered? • It is worth noting that any legal costs will be transactional costs, rather than litigation costs, on the basis that where there is litigation the court will usually be asked to make an order as to costs. • Consider where the site is located, how the property is used and which of the costs listed will be relevant to that location. • Clause 1.5 of the GLA greenfield template lease is intended to cover those additional, unforeseen costs and expenses incurred by the Site Provider during the term of the lease. **General Note**: If any costs/expenses can be foreseen and quantified they should not be caught by this clause as they should form part of the assessment of the Site Payment. Where this is the case, the items covered in the compensation part of the Site Payment should be clearly identified, and agreed between the parties. *[NB: In this note any reference to "Site Payment" has the meaning given to that term in the GLA greenfield template lease.]*

Arguments/Comments in respect of the GLA clause

Clause Number	Site Provider perspective	Operator perspective
1.5.1	All costs should be expressly set out. A reference to disbursements should also be added (in addition to costs and expenses), and consider whether to include reference to bailiff's/enforcement agent's fees.	Need to consider whether the cost/expense has been accounted for in the valuation, as this avoids any potential dispute during the term of the lease.
(a)	The point raised by the Operators could be addressed by the insertion of the words "if appropriate" or "if applicable". If the Site Provider has to take enforcement action they should not be out of pocket in doing that.	This is not offered as a starting point by some Operators, especially those who do not use leases (but rather an agreement) as it is not considered to be applicable.
	Any schedule of dilaps should be linked to when the Code rights come to an end and the Operator then actually vacates, and not just the contractual term coming to an end.	
(b)	The principle that Site Providers are concerned about here is around the costs of the Site Provider in bringing the agreement to an end. They shouldn't be	The concept of forfeiture is not relevant to Code agreements, so this should be deleted. The Code powers that Operators enjoy will

	out of pocket if they have a legitimate reason for terminating the agreement.	prevent the Site Provider from taking back possession of the property.
(c)	Many telecoms agreements which are not leases are simply called "agreements" which could arguably be either a lease or a licence, so it is safer to keep the clause in, in case the document is in reality a lease and this provision would apply.	This provision is not applicable where the agreement being entered into is not a lease, so it should be deleted.
(d)	This clause is not generally considered to be contentious	
(e)	This is an important clause for the Site Provider, and is standard in most commercial property agreements. A Site Provider will wish to ensure that their costs are covered even if the application is withdrawn, and also whether consent is granted or lawfully refused. The Site Provider should not be out of pocket in taking professional advice in respect of matters of consent.	If consent is unreasonably or unlawfully withheld or delayed then an Operator should not have to pay, so the wording needs to be caveated in that respect.
	Where there are no restrictive clauses in the lease requiring consent this clause will not be relevant, so should be deleted.	
(f)	It can take some time to get to the bottom of whether there is actual interference and what the cause of it is, and the Site Provider should not be out of pocket.	Operators would not want to cover the cost unless there was actual interference.
	There will be a cost to the Site Provider in producing the required evidence.	Operators will want to review any findings and should be given the opportunity to perform their own investigations in respect of the interference.
	In the event that material interference is found, the Site Provider's costs of appointing an independent RF specialist should be reimbursed.	The cost of producing the required evidence should be discussed with the Operators prior to incurring any such costs.
(g)	This clause is not generally considered to be contentious	
(h)	It should be cost-neutral to the Site Provider, and therefore the Site Provider should get their costs covered.	The costs of the Site Provider serving notice under paragraph 9.2.1 are generally not an issue (although Site Providers might find that this will differ from Operator to Operator), but if it goes any further then costs would be dealt with as part of the proceedings if for example the Operator wished to serve a counter-notice.

	It is essential to remember why we have this clause in the first place. If entered into consensually the Site Provider needs a way to make sure they can get these monies back. Also makes it clear what is compensation and what is costs and expenses.	The Operators would only expect to cover the cost of any notices served where the notice is validly served.
	These clauses are important even where an agreement is imposed. Avoids the need to go to the UT in future to make a claim. It is the Operators acknowledging that these are expenses that they will agree to cover.	
(i)	Where the lease does not need to be registered this clause will not be relevant and should be deleted.	
(j)	Site Providers believe that they should be entitled to their costs, and don't think that commercial gain for the Site Provider should be taken into account.	Operators will not generally agree to cover the Landlord's costs for serving a Lift & Shift notice, given that the notice will result in considerable inconvenience for the Operators. This is especially so where the Site Provider stands to make a commercial gain.
	The Site Provider should be in same position they would have been in if the equipment wasn't on their land. As such, if the commercial gain cannot be realised due to the presence of the equipment, much as is the case in CPOs, the loss of value or loss of commercial gain should be covered by the Operator (as it would by the acquiring authority in a CPO scenario).	On the Operator side this should be limited to one exercise of the Lift & Shift right, as the Site Provider should be able to find a site that will not need to be redeveloped, so should not need to shift the Operators twice. Operators wouldn't commercially agree that the Site Provider can keep serving notices.
	It is important to consider this in the context of the length of the term. On a greenfield site it is almost impossible to rule out redevelopment, especially in a built environment.	Operators have seen clauses like this being used to frustrate the Operators, and in that situation the Operators would not want to pay. This clause doesn't say that the Site Provider has to be put to proof, so even if it was a vexatious notice the Operator would have to cover the costs, and would not want to do so.
	The parties should note that this clause relates only to the service of the Lift & Shift Notice, and not the costs of the relocation under the Lift & Shift clause when it is exercised. Clause 10.1 deals with the allocation of the costs of the relocation itself.	
Anything missing from the clause?	It might be worth considering whether any management costs need to included here, subject to the point on double counting (see "Initial Considerations" above). Items could include Charity Act reports, for example where the cost was not factored in already at completion, or the cost of the Site Provider engaging	The Site Provider should be under an obligation to mitigate their costs.

	with any superior landlord or mortgagee to obtain consent (where relevant).	
	A Site Provider might want to consider whether any other provisions within the agreement refer to consent/approval and, if they do, to bring those clauses within the ambit of clause 1.5 where the Site Provider believes that dealing with the application will result in them incurring costs/expenses.	The Site Provider should also be under an obligation not to take any unnecessary action(s) that would result in a cost that they would seek to recover from the Operators, as Operators will only want to cover the cost of legitimate and necessary action(s).

Commentary from the Upper Tribunal / Lands Tribunal for Scotland (as at 26 June 2023)

Case Name	Commentary
University of the Arts London **(Cornerstone Telecommunications Infrastructure Ltd v University of the Arts London [2020])**	The Claimant proposed the following clause for the 'Grantor's costs and expenses': **"***The Operator shall pay the Grantor's reasonable and properly incurred costs (including as applicable legal and surveyor costs) within fourteen days of written demand in connection with entering into a wayleave agreement or other agreement with the relevant third party supplier(s)"* The Respondent wanted to expand the paragraph to include a further 6 areas where it was seeking to recover costs: • the enforcement of the Operator's covenants in this Lease, the service of a schedule of dilapidations within 6 months of the Operator vacating the Communications Site after this Lease has come to an end and the service of any notice or any proceedings under section 146 or 147 of the Law of Property Act 1925 notwithstanding that forfeiture is avoided otherwise than by relief granted by the court; • serving any notice in connection with this Lease under section 17 of the Landlord and Tenant (Covenants) Act 1995; • a fair proportion of the Grantor's costs of maintaining the Grantor's Property and Building, any accesses thereto … and providing services for the benefit of tenants and occupiers of the Grantor's Property; • any utilities used at the Communications Site; • facilitating access to and egress from the Communications Site where applicable; and • supervising any works to make good being undertaken by the Operator. The Upper Tribunal stated, "none of the respondent's proposed additional provisions to paragraph 1.5 of the agreement are necessary or appropriate. The approach of the respondent on this issue appears to us to be pedantic and unrealistic" and therefore determined the paragraph shall be worded as proposed by the claimant. *Note: in this case the "Claimant" was CTIL (and references to the "Operator" in the judgment are also references to CTIL) and the "Respondent" was University of the Arts London (and references to the "Grantor" in the judgment are also references to University of the Arts London).*

CTIL v St Martins/London Bridge House **(Cornerstone Telecommunications Infrastructure Limited v (1) St. Martins Property Investments Limited and (2) The Mayor and Commonalty and Citizens of the City of London [2021])**	The Upper Tribunal noted, under paragraph 84(2)(a) of the Code a site provider has the right to compensation for expenses which it has incurred including reasonable legal and valuation expenses. Where a building is of a sensitive nature or has a restricted access policy such compensation may well include the cost of the building owner supervising access. Further, in respect of expenses incurred by the site provider in obtaining advice on the Code and negotiating the agreement, the Upper Tribunal stated "Provision is made for in the claimant's standard form of agreement for it to make a contribution towards legal and valuation fees, but the claimant's practice is to seek to limit these to a sum agreed at the start of the process. As this case demonstrates, agreement of that sum can often delay the commencement of negotiations and result in additional costs being incurred. It is therefore important that the parties' rights and obligations are clear." The Upper Tribunal recognised that this case concerned a particularly valuable building and the claimant had put forward a relatively complex form of agreement (containing detailed provisions) which meant that the resulting negotiation was not straightforward. The Upper Tribunal stated that the figure awarded in this case should not be regarded as setting a norm "they are simply the figures produced by the application of the proper principle to the circumstances of a particular case. They could no doubt be reduced if the claimant chose to use a simpler form of agreement". *Note: in this case the "claimant" was CTIL*
Threadgold House (London Borough of Islington) **(EE Limited and Hutchison 3G UK Limited v The London Borough of Islington [2019])**	In this case, the London Borough of Islington argued that it was entitled to compensation for expenses, diminution in the value of the land and costs of reinstatement. It asserted that it was entitled to compensation to reflect the income that it would have received from the rooftop site on Threadgold House if it were to let to another operator outside of the New Code. **Expenses** - The Upper Tribunal said that there was no dispute about the London Borough of Islington's entitlement to "reasonable and valuation expenses in connection with agreeing the New Code agreement". This included costs incurred in seeking to agree terms for a new agreement, but did not include costs incurred in resisting the imposition of the agreement or attempting to compromise it. The London Borough of Islington was also entitled to compensation for the temporary use of its land at ground level (and, possibly, the undemised area of the roof). **Diminution in value** - The Upper Tribunal recognised that the valuation assumptions required when assessing the amount of consideration payable prevented the site provider from realising the true value of its land. However, that did not give rise to a loss for which compensation is payable under paragraph 84 of the New Code. It was also said, however, that if diminution of the value of the land could be shown to be diminished to a greater extent than had been reflected in the assessment of consideration, it would be a separate claim that may have been admissible.

	Costs of reinstatement- The Upper Tribunal felt that it was unnecessary to deal at any length with this aspect of the compensation claim, because the draft agreement included a provision for the tenant to remove all of its equipment from the site at the end of the term and make good to the reasonable satisfaction of the landlord "any damage whatsoever caused thereby".
CTIL v Marks & Spencer plc & Equorium Property Company Ltd **(Cornerstone Telecommunications Infrastructure Limited v (1) Marks & Spencer plc and (2) Equorium Property Company Limited [2020])**	"The applicants proposed a clause whereby the Grantors would be entitled to solicitors' and other professionals' costs and expenses, if reasonable, proportionate and properly incurred in connection with the entering into of a wayleave agreement with third party suppliers. The respondents have added to this a large list of other matters to which they would seek recoupment of expenses." The Lands Tribunal said "We do not attempt to set out the list here but, as the applicants point out, many of the items relate to notices where the applicants or guarantors may be in breach of the agreement and, therefore, the wording would precipitously convert a potentially disputed obligation into a debt. We think there is force in this criticism. Other items are not relevant since we do not agree to the clauses under which the relevant notices would be provided. For example, we will not be allowing the provision relating to a building surveyor's report and associated suspensive condition. There are exceptions at clause 1.5.1.6 for interference notices and clause 1.5.1.9 for lift & shift notices, the provision for the latter we will be allowing in substantially modified form. So we will allow these two matters in at clause 1.5. *Note: in this case the "applicants" were CTIL and references in the note above to the "Grantors" and the "respondents" are references to M&S*
London Borough of Hackney **(EE Limited and Hutchison 3G UK Limited v The Mayor and Burgesses of the London Borough of Hackney [2021])**	**A site provider will be entitled to recover their legal and professional fees incurred in connection with the rights being sought by the operators, but those fees must be reasonable and "proportionate to the matters in issue"** **Supervision Costs** - the Site Provider requested that the Operators pay for their telecommunications agent to supervise access to the Building. The Operators had no objection to its visits to the Building being accompanied, but objected to paying the fees of a professional telecommunications agent to accompany its own contractors. The Upper Tribunal noted that under paragraph 84(2)(a) of the Code, a site provider has the right to compensation for expenses which it has incurred including reasonable legal and valuation expenses and where a building is of a sensitive nature, or has a restricted access policy, such compensation may include the cost of the building owner supervising access. The Upper Tribunal concluded that, in principle at least, where non-intrusive investigations are being undertaken, professional supervision of other professionals is not something which operators should be expected to pay for, as this does not seem necessary or appropriate. **Professional Fees** - the Site Provider also requested payment of their legal and agent's fees in obtaining advice on the Code and negotiating the Interim Rights Agreement itself. There was much discussion in relation to fees, and whilst it was noted that this matter was not straightforward, the Upper Tribunal pointed out that a site provider is entitled to recoup all of its legal expenses, provided

	that they are reasonable. The Upper Tribunal noted that this matter was not straightforward and related to a "particularly valuable building", so hence it awarded the site provider the higher figure in terms of costs. The Upper Tribunal commented that these costs are not to be "regarded as setting a norm", which suggests that in more straightforward cases a similar sum would not be awarded.
Audley House **(On Tower UK Limited v AP Wireless II (UK) Ltd [2022])**	The Upper Tribunal found that there was no need for the site provider to insist on comprehensive safety and oversight measures because, in the absence of an express management function, site providers will generally not be liable for the safe operation of telecoms sites on their land. The Upper Tribunal did not accept the site provider's arguments and said "it took on the intermediate leases without any provision for anyone else to bear its costs of enforcing the covenants. It has actively chosen to be the landlord of a Code operator, it took the intermediate leases subject to the operator's rights, and it is well aware of the operator's business needs. We take the view that the grant of the new lease is not a reason for APW to acquire an additional right to have On Tower pay for the costs of enforcing the superior landlord's covenants in the intermediate leases." **Transaction costs:** Paragraph 84 of the Code entitles APW to its reasonable legal and valuation expenses outside of its litigation costs. The Upper Tribunal said "These were never going to be inexpensive transactions, in view of the number of terms that the parties had to negotiate and of the fact that both parties regarded the health and safety terms as issues of principle. As is pointed out, for APW the complexity is seen by the number of colours on the travelling drafts; these were not three matching leases and none of them were simple. We accept the transaction costs as claimed, and we point out that there is no reason for them to be matched in less complex deals where the parties are able to reach agreement. We do not think that the costs claimed are likely to have been inaccurate (there is no reason to think for example that they include litigation costs, since the vast majority of the costs claimed relate to a single fee-earner who is not a litigator). Nor do we think that the costs are unreasonable in light of the number of issues involved. We allow the transaction costs as claimed."