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Dear Sir/Madam

Ensuring tenants' access to gigabit-capable connections

The City of London Law Society ("CLLS") represents approximately 17,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. This response has been prepared by the Land Law Committee, the details of which are on the CLLS website herewith:

http://www.citysolicitors.org.uk/index.php?option=com_content&view=category&id=141&Itemid=469

Response to consultation on ensuring tenants' access to gigabit-capable connections

Question 1: Would the placing of an obligation on landlords in the manner proposed encourage more landlords to respond to requests sent by operators?

This committee worked closely with the City of London Corporation and the British Standards Institute to agree a standardised wayleave for fixed line broadband in 2016. That standardised wayleave was agreed as between landowners and operators and is endorsed by several of the operators who offer gigabit-capable connections to tenants. The standardised wayleave was introduced as a method to speed up the process of agreeing and granting wayleave agreements. At the time, the operators said that delays to the installation of telecoms infrastructure was largely caused by the delay in agreeing wayleaves. No mention was made about delays in landlords responding to requests for access.

This committee has seen no evidence that this is in fact a problem. Whilst we note that the consultation paper asserts that operators have informed DCMS that a high number of landlords, especially in relation to multi-dwelling units – are not responding to access requests, the introduction of measures such as those proposed in this consultation paper

should only be effected as a response to a proven and significant issue. If the issue is that landlords of multi-dwelling units are not responding to requests for access, that may be because requests are being made to the landlord entity (which may be a company owned by the leaseholders, or may be an investment/development company) but are not being passed on to the managing agents/management company which runs the property on a day-to-day basis. It may be more proportionate for operators to ask their intended customer to provide them with the details of the managing agents/management company and to make their request for access to that entity (in addition to a formal request to the landlord entity). The intended customer will almost always have that information, and this will be the most effective method of engaging the landlord in a discussion with the operator. We therefore consider that operators have the ability to resolve this issue themselves without the need for further legislation.

Question 2: To what extent would placing an obligation on landlords complement or undermine the facilitation within the Electronic Communications Code of negotiated agreements between landlords and operators?

Part 4 of the Electronic Communications Code (the "Code") sets out the provisions whereby the tribunal can impose an agreement on a person and that includes the right of operators to seek temporary and interim code rights. Recent decisions of the tribunal have demonstrated that the operators have been able to secure interim rights under the Code within a matter of months. In particular in the case of CTIL v University of London [2018] UKUT 0356, an application was issued by CTIL on 16 July 2018 and judgment was handed down on 30 October 2018. The Upper Tribunal is dealing with these applications swiftly and in our view there is no need for further legislation which would place matters which are essentially civil in nature, within the remit of the criminal courts.

Question 3: Do you consider that the use of the courts for the purpose of granting entry to operators where they have been unable to contact a landlord is reasonable. If not, why not?

As explained above, we consider that it is not necessary or appropriate to grant further powers to operators who already have and are already using the mechanisms set out in the Code to obtain orders allowing access. If DCMS considers that further powers are appropriate, we consider the most appropriate amendment would be to the existing Code and the relevant forum would be the Upper Tribunal (Lands Chamber) as the same tribunal would then deal with any application for an agreement to be imposed on the landlord. In our view it is entirely inappropriate and ineffectual use of judicial resources for two different courts, one civil and one criminal, to be dealing with the question of whether an operator should be able to install electronic communications apparatus without the consent of the landlord/landowner.

We are concerned to ensure that any application by an operator comes before the magistrates with a fair and balanced representation of the facts. The magistrates' court (or the Sheriff Court in Scotland) would decide the application for the warrant based on the operator's evidence alone and the landlord may have no opportunity to present evidence as to why it would be inappropriate for a warrant to be granted.

Further, it is a matter for the landlord and tenant to agree the terms on which electronic communications apparatus may be installed within common parts of a building and/or the tenant's demise. When taking leases, tenants should ensure that they have the appropriate rights to install and/or connect to telecommunications services and to require landlords to deal with matters as appropriate.

Question 4: Do you agree that two months is an appropriate amount of time to pass before a landlord is considered absent and an operator can seek entry via the courts? If not, what how [sic] much time would be appropriate?

From what we have said elsewhere in this response, we consider that it is disproportionate for operators to seek magistrates warrants to enter premises. That said, if the government considers it appropriate to introduce this measure, we consider two months should be sufficient notice. We consider it essential that the operator should prove where and how it has served notice and whether it has sought to contact the managing agent/management company (if any), before making an application for a warrant. We also consider that this procedure should only be available in the case of registered land. Where land is unregistered there is no central register of land interests and we consider it will be almost impossible for operators to prove that they have contacted the appropriate landowner in that case.

In the event that a landlord has acknowledged the notice but then not engaged with the operator in agreeing the terms of the wayleave, we consider that the appropriate remedy is for the operator to apply for an agreement to be imposed pursuant to the Code. It should not be open to an operator to choose between their rights under the Code and the ability to apply for a warrant.

Question 5: What evidence should an operator be reasonably expected to provide to the courts of their need to enter a property and their inability to contact a landlord?

We consider it essential that the operator proves that they have used their best endeavours to contact the correct landlord, at the correct address and that it is necessary for them to access the landlord's property (other than the area let to the tenant, which the tenant can consent to). The operator must ensure that when entering the property to install electronic communications apparatus they cause as little damage as possible and remediate it to the landlord's reasonable requirements. The operator must ensure that they maintain security at the property at all times. Where an operator gain access via a warrant, into a building which is multi-let, and where the operator gains access by, for example changing the locks to the main entrance, they must be under an obligation to provide new keys to all other occupants of the property at the operator's cost and the operator must undertake to the court that they will secure the property to the same standard as before the entry. Examples of some of the evidence that might be appropriate include the following:

1. A copy of the notice and method of service (which should be by recorded delivery or personal service, rather than simple post);
2. An affidavit or signed witness statement evidencing steps taken by the landlord to verify the identity of the landlord and any managing agent/management company;
3. A copy of the landlord's registered title (if registered);
4. A contract with the tenant for the supply of the service;
5. Confirmation of steps they have taken to seek to provide the service without the need to enter the landlord's property/common parts;
6. Steps they will take to ensure that the property/common parts are made and kept secure throughout and after completion of the works;
7. An explanation of why the operator cannot secure the same outcome by exercising their rights under the Code.

In any warrant, the court should be able to set down the basis for the access arrangements. Perhaps reference could be made to the standard OFCOM access arrangements. See the references to access arrangements in OFCOM's Electronic Communications Code's Code of Practice (for example, in paragraphs 1.33-1.41 and Schedules A and B) https://www.ofcom.org.uk/__data/assets/pdf_file/0025/108790/ECC-Code-of-Practice.pdf

Question 6: is there a need to define what constitutes a request by a tenant for a communications service?
Yes, we consider that if the magistrates court is to be asked to grant a warrant for entry, the operator should only be able to make that application if there is a signed supply agreement between the operator and the customer.

Question 7: Do you agree the temporary access granted by the court should be valid until such time as a negotiated agreement, underpinned by the Code, is signed between an operator and a landlord?
Yes, but we note that Part 4 of the Code provides for an agreement to be imposed as an alternative to a negotiated agreement and this should be taken into account.

Question 8: Would temporary access granted by the court provide an incentive for landlords to re-engage?
Your letter assumes that the landlord has already engaged, but has subsequently disengaged. If warrants of entry are to be granted to operators, we consider that their scope should be limited, particularly taking into account the powers granted to operators in the Code.

Question 9: Do you foresee any issues with operator/landlord negotiations which take place after the installation has taken place?

Whilst we would normally anticipate that installing the electronic communications apparatus ahead of negotiations would harm the landlord's negotiating position, the reality is that the Code has already harmed the landlord's negotiating position. In the event that the landlord and operator cannot agree the terms of the wayleave, then the operator can apply under the Code to impose an agreement and the Code regulates the terms of the Code rights.

If you have any queries about this response, please do not hesitate to contact us.

Jackie Newstead
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