

CITY OF LONDON LAW SOCIETY – CONSTRUCTION LAW COMMITTEE
Minutes of meeting held on Thursday 22nd March 2018 at
Berwin Leighton Paisner LLP, Adelaide House, London Bridge, London EC4R 9HA

In attendance:

John Hughes-D'Aeth (Chair)
Julia Court
Paul Cowan
Marc Hanson
Matthew Jones
Alistair McGrigor
David Metzger (by telephone)
Victoria Peckett
Martin Potter
James Pratt
Andrew Thornton
Kevin Hart (Legal Policy Analyst, CLLS)

Election of Vice-Chair

Matthew Jones was proposed from the Chair and elected.

Minutes of last meeting

The Minutes of the last meeting were not tabled and would be circulated separately for approval, following which they would be posted on the CLLS website.

Committee membership

Kevin Hart reminded the Committee of the "miss 3 meetings and out" rule, that vacancies should be openly advertised and that membership was generally restricted to one per firm. It was noted that several new members had recently joined the Committee and there was not felt to be a pressing need for further recruitment. It was agreed to review the position towards the end of 2018.

Kevin noted that Committees were now expected to have a Secretary. This need not be a partner and could be someone of senior PSL or Counsel status who was otherwise willing and able to contribute to the Committee's work. Members were encouraged to consider and suggest potential candidates.

Update on current activities

Foundation Level training: The Autumn 2017 sessions seemed to have been well received by attendees. It was agreed to seek formal feedback when next running the programme, probably in Autumn 2019. There was a discussion about the target audience and whether it should include, for example, non-CLLS member firms and legal apprentices. The Committee agreed to keep this under review when planning future sessions.

Government consultations: The Committee had submitted responses to the recent BEIS consultations on the Construction Act and retentions. These would be posted on the CLLS website shortly. **[Post meeting note: now done.]** The Government was scheduled to publish its response on 27th April.

Of more concern was the draft Bill on retentions, which had gained a head of steam following Carillion's insolvency and was due to have its Second Reading at about the same time. Julia

Court noted that BEIS had indicated (via TeCSA) a willingness to consult with practitioners on the subject. It was agreed that a working group comprising Francis Ho, David Metzger, Victoria Peckett and Martin Potter should take this forward on behalf of the Committee.

Business Contract Terms (Assignment of Receivables) Regulations: David Metzger reported that a revised draft of the Regulations had been published and was in circulation for final comment. It was a substantial improvement on previous drafts, due in large measure to the combined lobbying of several CLLS Committees (Financial, Banking, Construction and Insolvency). The Committee thanked David for his efforts on its behalf.

Escrow Agreement: This (and the associated guidance) was now in final form and would be uploaded to the CLLS website shortly. The Chair agreed to seek to place an article on the topic in Building magazine, which could then be re-published under the CLLS banner.

Possible future work

Security assignments in lending transactions: The Committee noted the issue raised by the *Mailbox* case, on which it would be helpful for construction and finance lawyers to find common ground. Marc Hanson, Matthew Jones and Alistair McGrigor undertook to produce a paper outlining the problem, for discussion with the Financial Law Committee.

Pre-construction agreements: The Committee noted that the problem highlighted by the *Almacantar* decision was more commercial than legal in nature. Given that the JCT had published a form of PCSA, this was not considered to be a priority for the Committee.

Performance bonds: Some members had encountered issues when calling on adjudication bonds following Carillion's insolvency. It appeared that sureties were still seeking to avoid payment wherever possible; this was only likely to change if they started to lose business, which apparently was not yet happening. The JCT was working on a form of adjudication bond (in liaison with the surety market) and the Committee agreed to wait until this was available before taking its own steps.

The Committee discussed whether US-style bonds with step-in rights might offer an option, but these were only felt likely to be suitable for very large projects (if at all). It also noted that step-in rights at the sub-contract level had generally not worked as intended, although in some cases they had enabled a discussion to happen between the client and sub-contractors.

Tenant fit-out and insurance: This remained a live (and poorly understood) issue. The Committee agreed to review and refresh its previous note (prepared in conjunction with the Land Law Committee and the RICS) to make reference to the JCT 2016 provisions. Marc Hanson and Victoria Peckett undertook to action this.

Due diligence reporting: The Committee noted the variable quality of reporting by the borrower's lawyers on construction documents in finance transactions. It was agreed that it would be desirable to create a model framework if possible, covering both the level of detail to be included and the extent of reliance by third parties (including limits of liability). Marc Hanson and Matthew Jones undertook to produce a first draft.

Project bank accounts: Although common in the public sector, these had gained very little traction among private clients, not least because the clearing banks were only willing to offer them on a "funded" basis. It was agreed that this should not be a priority for the Committee.

Insurance update

Andrew Thornton drew the Committee's attention to three recent developments:

- the recent hardening in the PI insurance market for contractors, following the Grenfell Tower fire and losses on several energy from waste projects;
- market pressures in relation to D&O and pension trustee cover post-Carillion; and
- Brexit – regulators were warning insurers to prepare for a “hard landing” and to encourage clients to think about the impact on their insurance programmes.

Other business

Kevin Hart reported that the CLLS had formed a new Data Law Committee and would shortly be looking for volunteers to join. He also reminded members of the Annual Service on 14th May 2018 and the CLLS AGM on 18th June 2018.

Date of next meeting

The next meeting would be held on Wednesday 13th June 2018 at 12.30 pm.