

CITY OF LONDON LAW SOCIETY – CONSTRUCTION LAW COMMITTEE
Minutes of meeting held on Wednesday 13th June 2018 at Bryan Cave
Leighton Paisner LLP, Adelaide House, London Bridge, London EC4R 9HA

In attendance:

John Hughes-D'Aeth (Chair)
Matthew Jones (Vice-Chair)
Stephanie Canham
Richard Ceeney
Julia Court
Angus Dawson
Nicholas Downing
Fiona Edmond
Rob Horne
David Metzger
Drew Norman
Ben Patton (substituting for Tim Reid)
Victoria Peckett
Andrew Thornton
Kevin Hart (Legal Policy Analyst, CLLS)

Minutes of last meeting

The Minutes of the last meeting were tabled and approved. They will be posted on the CLLS website shortly.

Appointment of Secretary

The Chair proposed that Eleanor Milne (Allen & Overy) be invited to join the Committee as Secretary. This was approved.

Update on current activities

Escrow Agreement: The Chair reported that an article publicising the CLLS model Escrow Agreement and guidance notes was due to appear in this week's Building magazine. This would then be available for re-publication via social media under the CLLS banner.

Retentions: The Chair reported that he, Francis Ho and Martin Potter had met with officials from BEIS to discuss the ongoing consultation and had also taken part in a teleconference with BEIS analysts to discuss the financial implications for industry of introducing a retention deposit scheme (RDS), as well as other options such as a ban on retentions. Whilst BEIS had publicly expressed qualified support for an RDS, they recognised that this was only part of the solution to the much wider problem of culture and payment practices within the industry. It was agreed that the Committee should seek to continue the dialogue by submitting a paper outlining the difficulties that an RDS would create in practice. The Chair agreed to liaise with Francis and Martin to produce a first draft for the Committee to consider.

Performance bonds: Various members of the Committee reported positive experiences in obtaining payment under adjudication bonds following Carillion's insolvency. The Committee noted that the JCT was in discussion with sureties with a view to producing a model form of adjudication bond. The surety market was also open to discussions on alternative products for major projects, such as US-style bonds with much higher percentages and step-in rights.

Security assignments in lending transactions: Matthew Jones reported that a sub-group (comprising him, the Chair, Marc Hanson, Alistair McGrigor and David Metzger) had met on

2nd May to explore the issue and identify acceptable solutions from a construction law perspective. Marc Hanson had been tasked with producing a draft paper for review by the Committee, which would then form a basis for discussion with the Financial Law Committee.

Due diligence reporting: The sub-group mentioned above had also considered a range of suggestions for streamlining the reporting by borrowers' lawyers on construction documents in finance transactions. Matthew Jones had agreed to produce a draft framework for the Committee to consider.

Tenant fit-out and insurance: Victoria Peckett had circulated a draft of an updated note on this subject, which she had prepared with input from Marc Hanson and Andrew Thornton. Comments were invited from Committee members by Friday 22nd June. An updated draft note would then be tabled for discussion with the Land Law Committee.

Other business

Business Contract Terms (Assignment of Receivables) Regulations: David Metzger reported that a combined CLLS delegation had submitted a mark-up of the revised draft Regulations to BEIS in late May. The Regulations had helpfully been amended to limit their application to SMEs (excluding SPVs) and also to exclude project finance transactions. The CLLS changes were intended to clarify the application of the Regulations in these areas. A response from BEIS was awaited.

Late Payment of Commercial Debts (Amendment) Regulations: The Chair (on behalf of Francis Ho) reported the coming into force of these Regulations, noting that they were vaguely drafted and as yet no representative bodies had sought to take advantage of them. [***Post meeting note:*** Paul Cowan (who had hoped to join the meeting by telephone, but was unable to do so) circulated a letter from the Confederation of Construction Specialists, expressing concern at the drafting of the Regulations and noting that most representative bodies would not have the resources to enforce them.]

Insurance update: Andrew Thornton reported that, following the coming into force of the GDPR, some insurers were seeking sub-limits on liability for data breaches under public liability policies. It remained to be seen whether the market would bear this.

CLSC and CLLS AGMs: Kevin Hart reminded the Committee that these were to be held on Monday 18th June and that all Committee members were welcome to attend.

Brexit legislation: Kevin Hart reported that the CLLS had agreed an MoU with the relevant Government Departments (led by BEIS) to set up a series of working groups with the Law Society to provide expert advice on the draft legislation needed to transpose EU law into UK law post-Brexit. The aim was to co-ordinate responses centrally, rather than each Committee and law firm having to respond to each item separately. Although not much construction-related legislation was anticipated, the Committee agreed to consider (possibly at the next meeting) how it should organise itself to provide support to the working groups as needed.

Decline of the common law: David Metzger reported a recent conversation with members of Atkin Chambers, noting the decrease in litigation following the Woolf reforms and the Construction Act and the impact on the judiciary's role in creating legal precedent.

Reverse charge to VAT: The Committee noted the potential impact of the draft Regulations recently published on this subject, which were due to come into force in October 2019.

Date of next meeting

The next meeting would be held on Wednesday 12th September 2018 at 12.30 pm.