

**CITY OF LONDON LAW SOCIETY LAND LAW COMMITTEE**

**Minutes of a meeting held on 25 January 2017 at Hogan Lovells, Atlantic House, 50 Holborn Viaduct, London EC1A 2FG**

<b>In attendance</b>	<b>Jackie Newstead (Chair)</b> <b>Warren Gordon (Secretary)</b> <b>Nick Brent</b> <b>Jamie Chapman</b> <b>Martin Elliott</b> <b>David Hawkins</b> <b>Laurie Heller</b> <b>Victoria Hills</b> <b>Anthony Judge</b> <b>John Nevin</b> <b>Tom Pedder</b> <b>Franc Peña</b> <b>Sangita Unadkat</b> <b>Ian Waring</b>
<b>Apologies</b>	<b>James Barnes</b> <b>Jeremy Brooks</b> <b>James Crookes</b> <b>Bruce Dear</b> <b>Caroline DeLaney</b> <b>Jayne Elkins</b> <b>Alison Gowman</b> <b>Alison Hardy</b> <b>Nick Jones</b> <b>Pranai Karia</b> <b>Daniel McKimm</b> <b>Jon Pike</b> <b>Jeremy Shields</b> <b>Peter Taylor</b>

**1. MINUTES**

The Minutes for the 23 November 2016 Committee meeting were approved and will be added to the Committee webpage.

## 2. UPDATE ON PROJECT TO REVIEW CLLS REPORT ON TITLE – THOUGHTS ON PURPOSE OF DOCUMENT

The Committee discussed the Committee's current Report on title. A sub-group comprising Laurie Heller, Bruce Dear, Pranai Karia, Jon Pike, John Nevin and Warren Gordon will consider the Report.

It was considered that there was a space for the Report among the Committee's portfolio of documents, but it needed to be regenerated to stimulate interest. The Report in its current form is most suitable for use on M&A deals, corporate deals (where it highlights red flag issues) and in relation to rack rent leases.

While some members consider that there is no call for the Report because of the dominant position of the long form Certificate of title, others take the view that the Report should be used more often (since firms' reports are often excessively detailed).

While the front end of the Report will be similar to the Certificate (reliance, opinion and qualifications), there was resistance to turning the Report into a mini Certificate of title.

It was considered that the Report could fulfil both functions of being for clients and being acceptable to funders for the appropriate transaction.

One member thought the Report should provide a tabular overview of the key issues or red flags. Much of the current Report requires a Yes or No response and there was some concern over the risks of this binary approach, particularly among less experienced users. It was, therefore, suggested that there be scope for the inclusion of further commentary where appropriate. It was noted that the Report commented on issues like decoration that are generally not a key concern – the sub-group should perhaps focus the Report on institutional key concerns. Depending on the transaction, should there be provision for searches to be made by the provider of the Report (see Schedule 3, which follows a similar form to the Certificate)? Should a firm acting for a recipient of the Report ask CPSEs? Should the Report replace normal due diligence? Should the Report simply report on what is there?

The letting document section (Schedule 6) should be short since this would usually relate to underleases, below the occupational lease.

Kevin Hart will be asked to provide statistics on the regularity of use of the Report.

Some of the changes for the 2016 Update of the Certificate especially in relation to its front-end provisions will be reflected in the revised Report.

**Actions:** The Committee's sub-group will begin the project to review the Report. Word versions of the Certificate and ancillary documentation will be added to the Committee page on the CLLS website – there is demand among firms for this, but there are currently technical problems preventing this. Kevin Hart will provide stats on the number of hits to the Report on the website.

3. **CODE FOR LEASING BUSINESS PREMISES UPDATE AND VIEWS ON THE CURRENT DRAFT OF THE TECHNICAL CONTENT REVIEW**

The RICS-led project on the revised Code for Leasing Business Premises continues and a draft has been produced by the RICS summarising the current state of the Technical Content Review, primarily relating to the Landlord Code. The draft was circulated to the Committee and the following points were made.

*Rent deposits and guarantees* – there was agreement with not including a suggested level of rent deposit such as six months. This was considered to be a commercial point and could inadvertently set a precedent.

*Length of Term, Break clauses and Renewal Rights* – concern was expressed about the words “(unless the landlord has consented to them)”. It was considered that including these words as part of a pre-condition to the tenant’s break would be confusing and could complicate matters. It was accepted that the tenant should have the responsibility for there being any squatters.

*Rent review* – there was support for including the collar and cap option for indexed rents. It wasn’t considered unduly detailed and in a few words this would highlight a possible useful alternative for landlords and tenants.

*Assignment and Subletting* – there was support for including provision on charging, that the constraints on charging should be less onerous than those for assignment or subletting e.g. landlord’s consent would not be needed to a floating charge.

*Service charges* – concern was expressed about the last sentence of the first paragraph “At present it also states that landlords will seek to observe the guidance of the Service Charge Code when drafting leases, this should be changed to simply say that leases should contain provisions which reflect the requirements of the Service Charge Code.”

Members were worried that in view of the length and detail of the Service Charge Code, it was unlikely that the detail of service charge provisions in leases would fully reflect the Code’s requirements. Perhaps a phrase could be used such as “the landlords will have regard to the principles behind the Service Charge Code”.

There are concerns about the regular carve out in leases from the landlord’s obligation to provide services. Perhaps the Code could have a provision to the effect that it is fair and reasonable to exclude liability in certain circumstances that can be specified in the Code (such as from the MCL lease “will not be responsible for any interruption in the supply of the Services due to any circumstances outside the Landlord’s control or due to any necessary maintenance, repair, replacement, renewal, servicing, inspection or testing, but must take reasonable steps to restore the supply as soon as reasonably practicable”), but not in other circumstances.

*Insurance* – there was comment that no mention was made of tenants benefiting from discounts given by the landlord’s insurer. While it was acknowledged that the premium that the tenant pays usually already reflects the discount, many leases expressly provide

for the tenant to benefit from a discount. The CLLS standard insurance provisions state “The Landlord shall give credit for any discount on the insurance premiums.” And the footnote is “Although some leases still enable the landlord to retain any discount on the insurance premiums, these provisions seek to achieve a more balanced position between the landlord and the tenant”.

On commission, there was objection to the disclosure of the amount of the commission, but there could be disclosure of the fact there is a commission. The CLLS provisions state “2.7 The Landlord may retain any commission offered to it by its insurer for its exclusive benefit [, but shall disclose the amount of such commission to the Tenant on request].” The footnote is “The landlord's retention of commission remains somewhat controversial, but paragraph 2.7 has been included as this is still often found and expected by landlords in leases of commercial property. The commission does not relate to the premium, but to the level of business between the landlord and the insurer. Some landlords may not wish to disclose to the tenant the amount of any commission”.

The second sentence of paragraph 9 should refer to “uninsured risk”. There was concern about the ambiguity of the words “significant effect” – perhaps “the whole or a substantial part of the premises are damaged” should be used. Consideration perhaps should also be given to a different approach taking into account the length of the lease, so a 5 year term may be treated differently from a 15 year term.

*Mandatory nature of Code* - the Committee was concerned about the mandatory nature of the Code especially if it related to specific elements of the Landlord Code. The Committee therefore welcomed the RICS professional obligations being separate from the Code itself and the mandatory obligations focusing on matters such as making the client and ultimately the proposed tenant aware of the Code.

**Action:** Warren Gordon will forward the Committee's comments to the people behind the draft.

#### 4. **REPORT ON SUB-GROUP MEETING TO DISCUSS THE ISSUE OF THE TERMS AND CONDITIONS OF SEARCH PROVIDERS AND SUGGESTED ACTIONS**

Jackie Newstead, Pranai Karia and Warren Gordon (as a sub-group of the Committee) had met to discuss the concerns about whether a buyer or a buyer's lender can benefit from search results obtained by a seller (through the provision of a seller's pack or search results on an extranet). This issue was increasingly cropping up on transactions and also applies to the provision by landlords of search results to tenants or tenant's lenders.

It was noted that most firms represented on the Committee use Searchflow or TM as a conduit to obtain the searches from the information providers (so they are in effect intermediaries). While there is much focus on their terms and conditions, it should be remembered that they are without prejudice to the terms on which the information providers provide their information. The legal profession over the years has not paid much attention to such terms perhaps with the exception of the results of environmental searches.

The reliance wording in the new CON29 local authority search forms set out in quotes below is clearer than the old form.

"Any legal responsibility for negligence will be owed to the person who raised the enquiries and the person on whose behalf they were raised. It will also be owed to any other person who has knowledge (personally or through an agent) of the replies before the time when he purchases, takes a tenancy of, or lends money on the security of the property or (if earlier) the time when he becomes contractually bound to do so."

However, for many search results, there has been little focus on the terms on which they are provided and who can benefit. So it could be said that there is an over-emphasis on the importance of the Ts and Cs of Searchflow, TM and other intermediaries.

Reasons why a firm may look to sue an intermediary include the intermediary providing to the data provider incorrect property information such as the wrong plan, although it would be expected that this would usually be picked up by the firm when considering the search results. A less common concern is the corruption of data (e.g. yes becomes a no) in the course of the data being passed from the information provider via the intermediary to the customer. The information provider will not take responsibility since the data was correct when it left them. The terms usually limit the intermediary's liability and oblige them to have professional indemnity insurance to cover that liability.

As with any terms and conditions, the protection for customers relying on them is not completely watertight and firms are in a constant state of negotiation with the intermediaries over their content. One intermediary has a term which makes their liability subject to the customer's compliance with the terms – this will be a concern for a buyer etc relying on the benefit of the intermediary's terms, which may be undermined by the seller's non-compliance that may have nothing to do with the buyer's transaction. Equally, if the terms are terminated by a breach of the seller, this should not impact on buyers, who already have the benefit of the terms following a transaction with the seller.

Firms have concerns about different forms of intermediaries' terms – basic, enhanced (old form), enhanced (new form) etc. It is important that an intermediary ensures where possible that there is one form to avoid confusion and it is publicised on the intermediary's website. It is, however, acknowledged that the intermediary may resist publicising the terms (for competition reasons) and some intermediaries will have alternative terms depending on their level of liability and cost payable by the customer. Despite that, there remains the overriding importance of consistency in the terms of the different intermediaries to give greater assurance to customers relying on them. However, having industry standard terms for all search results is unlikely to be acceptable and there may be competition concerns.

The Committee's sub-group will consider the drafting of a possible additional CPSE1 seeking confirmation that, where the seller or landlord provides search results, the relevant terms governing the search enable a buyer, buyer's lender, tenant or tenant's lender to rely on those results. There could also be a request for provision of the terms.

There was not unanimous support among the Committee for such an extra enquiry. However, such an enquiry would serve as a reminder of the issue.

The sub-group will give further attention to the terms of main searches such as local authority and water. Anthony Judge agreed to send through some information obtained from his firm's own analysis of this issue.

The whole issue needs to be seen in the context of the availability of "no search insurance", which is widely used in American transactions and is beginning to appear in this country.

The sub-group will consider creating a short note highlighting the issue for the profession.

**Actions:** Sub-group to consider possible extra CPSE and short note on the issue. Anthony Judge will send through his firm's thoughts on the issue.

#### 5. **LAUNCH OF INDUSTRY STANDARD WAYLEAVE FOR FIXED LINE INSTALLATION**

Some members are experiencing degrees of opposition among operators to using the industry form of wayleave. Part of this may be caused by the need for the message to use the document being communicated around all parts of the relevant organisation. Members were encouraged to continue promoting the use of the wayleave both to property owners and operators. Members were also asked to let Warren Gordon know if they are aware of any specific examples of a refusal to use the wayleave.

**Action:** Members to feed back any comments on the standard wayleave and to promote its use.

#### 6. **FEEDBACK ON JAYNE ELKINS' NOTE FOR CLLS WEBSITE IN RELATION TO PROPERTY FRAUD**

The Committee welcomed the note. It was considered that the note was a little residential orientated and was more focused on identity than payment fraud. The Committee especially welcomed the simple precautions listed on page 3 particularly in relation to where money is sent. One member "road tests" the account to which a payment is to be made, by sending through £1. Some firms (especially those specialising in residential transactions) put warnings in their emails about apparent requests by the firm to change account details to which money is to be sent. Mention was made of cases of bill fraud.

The Law Society and Land Registry will launch a joint practice note on property and title fraud in the next few months and it may be worth considering Jayne's note in that context.

**Action:** Consider Jayne's fraud note in the context of the forthcoming joint Law Society and Land Registry note on property and title fraud.

#### 7. **UPDATE ON LAW SOCIETY PROJECTS**

Warren Gordon highlighted some current projects of the Law Society's Conveyancing and Land Law committee (of which he is Chair).

- The 3<sup>rd</sup> edition of the Standard Commercial Property Conditions will launch probably in March 2017. They update the 2<sup>nd</sup> edition which is over 12 years old and include new capital allowance provisions to take account of the legislative changes in 2014. Many of the other new provisions are those which would already be typically found in the contracts of member firms.
- A new concise lease of whole and one of part for offices will launch probably in Spring 2017. The documents are a short form version of the "Model Commercial Lease" and the Law Society worked with an MCL author on this project. The leases are aimed particularly at secondary and tertiary properties, although members may find them useful as more generally applicable short form leases.

## **8. IMMIGRATION ACT AND RESIDENTIAL TENANCIES**

Warren Gordon reminded members of the importance of residential landlords or licensors checking the immigration status of their tenants or licensees. The checks need to be carried out not only before the tenancy is entered into, but also potentially during the course of the tenancy if the tenant has a "time-limited" right to rent. Purchasers of properties subject to such tenancies should be raising enquiries about them and may be exposed to liability if the tenant loses its right to rent. From December 2016, there are new criminal offences for landlords and agents who fail to carry out right to rent checks.

## **9. DRAFT RICS PROFESSIONAL STATEMENT**

Mention was made of a Consultation on a Draft RICS Professional Statement on conflicts of interest in the UK commercial property investment agency market. The Consultation closes on 10 February 2017 and a link to the Consultation follows - [www.rics.org/uk/news/news-insight/press-releases/rics-launches-conflict-of-interest-consultation-on-uk-commercial-property-investment/](http://www.rics.org/uk/news/news-insight/press-releases/rics-launches-conflict-of-interest-consultation-on-uk-commercial-property-investment/)

## **10. AOB**

**DEED OF SURRENDER AND SURRENDER OF A REGISTERED LEASE** - HM Land Registry has confirmed that either a Land Registry form TR1 or a deed of surrender can be used for a surrender of the whole of a registered lease. A surrender is not a registrable disposition so the leasehold estate comes to an end immediately on the landlord's acceptance of the surrender. Presumably there is a similar treatment for TP1s and deeds of surrender of part.

**LENGTH OF MEETING – 1 HOUR 30 MINUTES**

**REMAINING COMMITTEE MEETING DATES FOR 2017 - 22 MARCH, 17 MAY, 5 JULY, 20 SEPTEMBER AND 22 NOVEMBER AT 12.30PM AT HOGAN LOVELLS LLP, ATLANTIC HOUSE, HOLBORN VIADUCT, LONDON EC1A 2FG.**