

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

**Minutes of a meeting held on 5 July 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>Martin Elliott</b> <b>Alison Hardy</b> <b>Laurie Heller</b> <b>Tom Pedder</b> <b>Sangita Unadkat</b> <b>Ian Waring</b>
<b>Apologies</b>	<b>James Barnes</b> <b>Jeremy Brooks</b> <b>Jamie Chapman</b> <b>James Crookes</b> <b>Bruce Dear</b> <b>Caroline DeLaney</b> <b>Jayne Elkins</b> <b>David Hawkins</b> <b>Victoria Hills</b> <b>Pranai Karia</b> <b>Nick Jones</b> <b>Anthony Judge</b> <b>John Nevin</b> <b>Daniel McKimm</b> <b>Franc Peña</b> <b>Jon Pike</b> <b>Peter Taylor</b>

**1. MINUTES**

The Minutes for the 17 May 2017 Committee meeting were approved and will be added to the Committee webpage.

## 2. UPDATE ON PROJECT TO REVIEW CLLS REPORT ON TITLE

Laurie Heller who leads the sub-group updated the Committee on the CLLS report on title project.

Laurie has produced short minutes of the sub-group's last meeting, which have been sent to the Committee.

The sub-group considered detailed drafting points, which have since led to the production of the redraft circulated to the Committee.

The following were the decisions on principles taken at the sub-group meeting:

- The detailed drafting of the revised Report should not “veer towards” the standard required in a certificate of title. Where possible however, wording in the latest draft of the Certificate of Title and the Wrapper should be followed, but only where to do so would not counteract the intended lower level of protection to be offered by the Report. The wording of the Wrapper should largely be applied in general introductory provisions of the Report as to reliance to be placed upon it and the qualifications upon which the Report should be based
- The Opinion expressed in the Report should be lowered by reference to the limited information presented in the Report. It would refer only to “key details” or “key terms” summarised in the relevant Schedules and omit statements that they are “fairly and accurately” portrayed.
- In view of the limited nature of the Short Form Report, to be employed in constraining circumstances, the opinion on “good title” to the property should refer to legal title only, and make no reference to beneficial interests. That approach would be consistent with the treatment of “marketability” which, it had been agreed, should be more guarded and separated from the report on “good” legal title.
- There should more limited reference to the “Company” confirming the accuracy of the information in the report. In the circumstances in which the Short Form is most often to be employed, the actual level of scrutiny of clients rarely underpins the opinion of the Report to the level of assurance that the current Short Form purports to give. The revised Report should adopt a more realistic account of what is offered or is likely to be feasible in constrained circumstances. The Company should, for example, state only how the Property is presently used. Such details of planning permissions as are given in the Report should appear in the disclosure schedule of the Report.
- As the Short Form of Report would most often be used to cover properties let at rack rents or held for occupation by the client at full market rents, it should concentrate on those details in Schedule, which should be headed accordingly. Schedule 6 should contain additional information where the lease held by the client has equity value and is to be acquired for investment purposes.

At the Committee meeting, the Committee considered that the Report was inappropriate for a prospective tenant in need of a more detailed, plain English document. However, the Report is more appropriate for M&A type transactions where there are a large number of leases held by the relevant corporate occupier, on which only limited reporting is required.

The Committee was relatively relaxed on whether to include in the Report the provision by which proceedings had to be commenced within a specified period after the date of the Report.

While the detail of the Report is still to be finalised, the Committee was generally satisfied with the current form of the Report. Much of its substance on the title and leases has not changed from the previous 3<sup>rd</sup> edition. The creation of the new 4<sup>th</sup> edition will be a good opportunity for the CLLS to remind the profession of this useful document and highlight the types of transaction for which it is suitable.

The Committee considered that it would be useful to obtain the input of some banks on whether they would be happy to use the Report for a property with no or little capital value. Once the Committee has agreed the form of Report, it was suggested that Daniel McKimm or Anthony Judge seek views from their banking contacts. Perhaps it could be sent to contacts at UK Finance, which is the new trade association representing the finance and banking industry in the UK from 1 July 2017. The new association takes on activities previously carried out by among others the British Bankers' Association and the Council of Mortgage Lenders. It should be noted that the CML Handbook has been renamed the "UK Finance Mortgage Lenders' Handbook for conveyancers".

The next meeting of the sub-group to progress the Report will be called for early September 2017.

**Action:** The Committee's sub-group will continue to work on the Report taking into account the Committee's feedback.

### 3. **PROPOSED NEW RICS CODE FOR SERVICE CHARGES IN COMMERCIAL PROPERTY AND PROPOSED NEW RICS CODE FOR LEASING BUSINESS PREMISES**

The Committee's comments on the current form of the two RICS documents have been sent to Jon Bowey of the RICS. The Committee's key points were:

#### Service charge Code

In relation to paragraph 1.2 and the 12 principles, the Committee notes that principles 6 and 9 relate to time limits for the issue of budgets and detailed statements of actual expenditure. There is a concern that an employed surveyor may not be able to comply with these Core Principles if their employer (who is not RICS regulated) refuses to allow them to do so. Similarly, if an overseas client refuses to allow an RICS regulated surveyor acting for them to comply with these Principles. This could put the employee or surveyor in an invidious position.

The Committee notes the following - there is an acknowledgment in Client instructions on page 8 that, in relation to the specific timescales, RICS professionals will not automatically be liable to disciplinary proceedings in the event of delay, if this results from a client's failure to provide approval or instructions. This is provided that all reasonable steps have been taken to advise the client of the requirements of the professional statement. If a surveyor is asked not to comply to accept an instruction, the RICS would expect the surveyor to reject the instruction. If the surveyor did not do so, the ultimate penalty would be expulsion but there would be warnings first. For the RICS this is an important issue with a key motivation behind the Code being the importance of fiduciary duties in relation to the money of third parties.

Despite all of that, the Committee asks that further consideration is given to whether principles 6 and 9 should be included as Core Principles and if possible they should be excluded from the Core Principles.

There is a concern about a possible 2-tier market developing with non-regulated advisers being used who do not have to comply with the Code.

There appears not to be a reference to what is now a fairly common provision, permitting a landlord who encounters a large unexpected and unbudgeted for expense in the middle of a service charge year, to raise a further one-off service charge demand to cover these costs. It is a provision, which is often included when acting for a landlord. This should be acceptable as long as it was reasonably framed, so that it operated only in a real emergency, as it enables the landlord to collect the money to deal with an emergency without having to borrow money at a cost, which might otherwise be the alternative.

#### Code for Leasing Business Premises

The Committee considered that a tenant should be able to charge the lease to a bank or reputable lending institution without the landlord's consent.

There was nothing specific in the Code on the Minimum Energy Efficiency Standards and perhaps there should be something on who should bear the cost of satisfying the standards. Some landlords are concerned about internal non-structural alterations impacting on air-conditioning and, therefore, wish to consent to such alterations. For that reason, the Committee asked that paragraph 9.5 is reviewed. Also the main box for paragraph 9 should summarise which consents if any are required for particular alterations.

At paragraph 3.7, sometimes service charge is not returned until the end of year reconciliation, which makes some sense, as the tenant should pay their proper share for their period of ownership and at 10.2, she has never known a landlord give a tenant the benefit of any premium discounts.

Paragraph 5.6 may be interpreted to "outlaw" an upwards only review. The wording needs looking at again.

10.2 Whilst the landlord must disclose to the tenant whether the landlord is receiving commission, the landlord should not have to disclose the amount of the commission.

There was to be a formal consultation on both projects in the Summer with a launch on 1 January 2018.

4. **PROPERTY FRAUD AND SOLICITOR'S DUTIES AND JAYNE ELKINS' NOTE:**

Committee members have provided comments on Jayne Elkins draft note on "Property fraud – issues to consider". Jayne has refreshed the note. It will be circulated to the Committee a final time with a view to publishing it on the Committee's webpage shortly. Many thanks again to Jayne for all of her work on the note.

The Law Society and Land Registry joint note on property fraud is being finalised and should be published shortly. The note is intended not to set down the duties of solicitors, but instead to raise awareness as to those circumstances that may be indicators of fraud. Often there are more than just one indicator of fraud and the recent cases have highlighted that.

Buyer's solicitors should not necessarily rush to ask additional identity enquiries in the light of the recent cases if there are no obvious suspicious circumstances. However, if there are such circumstances (and this is where awareness notes like the Law Society/Land Registry joint note may be useful), further enquiries may need to be raised by buyer's solicitors who may need to alert their client.

**Action:** Jayne Elkins' note to be circulated for a final time to Committee and it will then be published on Committee's webpage.

5. **BEIS CONSULTATION ON OVERSEAS COMPANIES AND CONVEYANCING**

The Department for Business Energy and Industrial Strategy issued a consultation on overseas entities, that own UK property, having to register their beneficial owners at Companies House. The entities would be issued with a number that would have to be provided to Land Registry to enable transactions involving the overseas entities to be registered.

The consultation document had been overtaken by subsequent discussions between BEIS and stakeholder groups. For example, the proposal that a transfer would be void if the overseas entity did not have a valid number had been dropped because of the unforeseen consequences e.g. what would happen to the proceeds if the transfer was void?

BEIS has had further discussions on further aspects of its proposals. There is a concern about owner's powers held by a party entitled to be registered following completion of a transfer. Such powers include selling the property, which means an overseas entity could sell on without needing to be registered. BEIS is likely to deal with this by requiring the third party purchaser from the overseas entity to provide the latter's Companies House ID number to Land Registry. BEIS has also confirmed that its proposals have been passed to Parliamentary draftsmen.

6. **LANDLORD'S DUTIES TO ASSIST IN PREVENTION OF FRAUD – GOVERNMENT CONSULTATION ON TOBACCO DUTY EVASION**

At Budget 2016 the Government announced its intention to consult on detailed proposals on sanctions to tackle illicit tobacco.

The Committee has submitted a response endorsing a more detailed response from Eversheds Sutherland -

<http://www.citysolicitors.org.uk/attachments/article/114/Consultation%20-%20Sanctions%20to%20tackle%20tobacco%20duty%20evasion%20and%20other%20excise%20duty%20evasion.pdf>

7. **SEARCH INTERMEDIARIES AND SUPPLIERS AND TERMS AND CONDITIONS:**

There has been no further feedback on the summary of the Committee's position in the Minutes for the March 2017 Committee meeting. No further action will be taken on this issue for the moment.

8. **CHANGING THE CERTIFICATE OF TITLE FOR THE MINIMUM ENERGY EFFICIENCY STANDARDS?**

The Committee has been asked what plans if any it has to revise the Certificate of title to take account of the impact of the Minimum Energy Efficiency Standards

The effect of MEES is that from April 2018 it will essentially be unlawful to grant new leases where the relevant property has an "F" or "G" EPC rating (although the leases themselves will be valid and enforceable).

The Committee's view was not to change the Certificate at this stage. A change could have been made for this issue when the 2016 Update of the 7<sup>th</sup> edition was produced, but the Committee decided that the issue of ratings should be tackled outside the Certificate.

9. **VIEWS ON THE ALIENATION [HTTP://WWW.PROPERTYPROTOCOLS.CO.UK/THE-ALIENATION-PROTOCOL](http://www.propertyprotocols.co.uk/the-alienation-protocol) AND [HTTP://WWW.PROPERTYPROTOCOLS.CO.UK/THE-ALTERATIONS-PROTOCOL](http://www.propertyprotocols.co.uk/the-alterations-protocol) ALTERATIONS PROTOCOLS**

The Committee discussed whether these Protocols were used and whether they were seen to be helpful. It was noted that the Protocols were unlikely to become Protocols under the Civil Procedure Rules. They are voluntary and it remains to be seen whether they will be referred to in cases and judicial decisions.

10. **CLLS OVERSEAS LEGAL OPINION – LAND REGISTRY WORDING**

There will be change to the Land Registry wording for execution by an overseas company. The authorised signatory will sign in the company's name.

Also the Land Registry does not accept an overseas counsel's opinion. It requires provision of a certified copy of the constitution or a duly completed Land Registry form 7 (Certificate of powers of overseas corporations).

11. **"PROTOCOL" FOR APPROACHING RIGHTS TO LIGHT ISSUES**

A major bank had mentioned the possibility of a protocol for rights to light issues.

This is a particular issue on the financing of complex development projects. Banks receive letters or reports from rights to light surveyors as a condition precedent. The bank, however, has no context for the information that it receives from the surveyor.

The Committee was asked whether it wished to be involved in creating an industry protocol on rights to light.

This would set out the context for rights to light issues and how to respond to them. It would set out the legal and credit issues. This may include key case law concerns, the issue of injunctions versus damages and understanding the basis for the surveyor's conclusions.

The idea is to translate the status quo of the approach to rights to light issues into policy that can be a user guide. Any such project would require working with rights to light surveyors. The most similar projects are the Protocols for Alienation and Alterations.

The Committee was reluctant to be involved in such a Protocol. It was considered that the banks should test the relevant letters or reports with the rights to light surveyors themselves. If the Committee produced a Protocol, the solicitor who is asked to produce it for a bank could become an intermediary between the bank and surveyor, which would not be a satisfactory position.

The issue of rights to light is a highly technical one and any summary in a Protocol is likely to be superficial.

12. **TERMINATING A LEASE ON THE BASIS OF AN ILLEGAL ACTION**

A question was asked of the Committee whether a lease should contain a forfeiture event that a tenant had committed an illegal action (e.g. money laundering, sanctions against the tenant with the result that the landlord could not receive the rent). Equally, should a tenant be able to terminate a lease if the landlord had committed an illegal action? The Committee considered that some of the aspects of this issue would be dealt with by the tenant's existing covenant to comply with statutory requirements. In terms of the sanctions aspect and tenant's right to terminate, the Committee had no cogent evidence to show that extra drafting was warranted.

13. **HOMES AND COMMUNITIES AGENCY AND LAND REGISTRY RESTRICTIONS AND CHARGES**

The HCA say they will no longer respond to correspondence about historic charges and restrictions unless received via their web based application system. Their letter says

applicants who apply in other formats will be redirected to the web-based system. However, it would be helpful to understand how HCA will redirect any such queries. Ian Waring will gather more information and report back at a future Committee meeting.

14. **INCLUSION OF ARBITRATION CLAUSE IN PROPERTY DOCUMENTS (REQUIRE ARBITRATION REFERENCE RATHER THAN THE COURTS)**

Consideration of this issue will be deferred to the September Committee meeting.

15. **ONEROUS ELECTRICITY SUB-STATION LEASES**

Should there be a CLLS standard for electricity substation leases? This is in view of the onerous terms being imposed by electricity suppliers causing problems for developers. For example, an absence of lift and shift provisions, uncontrolled rights of access and parking and onerous and extensive covenants. While there are problems with trying to agree this documentation including the time it takes, the Committee considered that a CLLS standard was inappropriate, primarily because of the difficulties of receiving buy-in from the electricity suppliers.

However, the Committee considered that there may be an opportunity to lobby a representative body for electricity suppliers on specific points of concern.

**Action:** Ascertain identity of relevant representative body and seek Committee's views on points of concern.

16. **AOB**

- The new Business and Property Courts have been launched and there is now a Property List.
- New Money Laundering regulations came into force on 26 June 2017. There is a particular impact on auctions. Auctioneers will have to carry out a full Know Your Client on all buyers before they can bid.
- The new Electronic Communications Code is likely to come into force on 1 December 2017.
- Requests were made of the Committee for nominations for the CLLS's Lifetime Achievement Award. Nominations are to be made to Jackie Newstead or Warren Gordon by 8 September 2017 and the Committee will be emailed separately on this.

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

18. **REMAINING 2017 COMMITTEE MEETING DATES - 20 SEPTEMBER AND 22 NOVEMBER, BOTH AT 12.30PM AT HOGAN LOVELLS LLP, ATLANTIC HOUSE, HOLBORN VIADUCT, LONDON EC1A 2FG.**