

Minutes for CLLS Land Law Committee meeting Wednesday 6 May 2020

Attendees: Jackie Newstead (Chair), Warren Gordon (Secretary), Kevin Hart (CLLS), Anthea Bamford, Jamie Chapman, Caroline DeLaney, Jayne Elkins, Martin Elliott, David Hawkins, Laurie Heller, Stephen Josephides, Daniel McKimm, Brigid North, Tom Pedder, Franc Pena, Jeremy Shields, Sangita Unadkat, Ian Waring and Patrick Williams.

1 The **Minutes** for the 29 January Committee meeting and 17 April Emergency meeting were approved and are on the Committee's webpage.

2 Land Registry

The Committee discussed various Land Registry matters.

Acceptance of Mercury signing approach (Option 1)

It was noted that HM Land Registry from 4 May accept documents that have been signed using the "Mercury signing approach" ("Option 1" in Law Society practice note). The Land Registry state that a signature page will need to be signed in pen and witnessed in person (not by a video call). The signature will then need to be captured, with a scanner or a camera, to produce a PDF, JPEG or other suitable copy of the signed signature page. Each party sends a single email to their conveyancer, to which is attached the final agreed copy of the document and the copy of the signed signature page. Further details are included in the Land Registry's Practice Guide 8 – see section 12. The Land Registry will continue to accept this Mercury signing approach until further notice.

The benefit of the change is that the conveyancer does not need the wet-ink document in their hands before they can exchange or complete. Land Registry has now said that if the conveyancer holds a document signed in accordance with Option 1, it can be submitted to the Land Registry and the relevant Portal certificate can be given. The Committee welcomed this change, but noted the following points.

The Land Registry guidance leaves a few points unanswered. In particular, while there is reference to a director signing a deed in the presence of a witness, there is no reference to execution for corporates by 2 directors or a director and a secretary. This seems like an oversight by the Land Registry since they clearly endorse Option 1 (which would include 2 directors etc). This point will be clarified with the Land Registry.

Another point relates to the signing of plans. The Mercury process envisages only the signatory page being printed out to be signed. Logically, it would seem consistent with the Mercury process for the conveyancer to send an email to the signatory attaching the pdf full document (including plan(s)) and as separate attachments the signatory page and the plan(s). The signatory prints out the signatory page and plan(s), signs them in wet ink (witnessed where required) and attaches them to the email with the pdf full document (including plan(s)). The email is then sent back to the conveyancer. The Land Registry guidance below does not refer to plans and the practical issue is the size of the plan and the difficulty of printing it out and scanning/photographing it (bearing in mind that the Land Registry has strict requirements on the scale of plans). This needs further clarification from the Land Registry.

A 3rd point is that the Land Registry's acceptance of the Mercury process is stated to apply to a transfer or other disposition deed. So it is unclear whether other deeds and documents such as a power of attorney (which is not a disposition deed) can be signed using the Mercury process. It is logical that it would, but this, along with other points of uncertainty, will need to be confirmed with the Land Registry.

The Land Registry has established a forum with stakeholders to discuss key issues and these and other points will be raised with the Land Registry.

In terms of whether Committee members will ask for the return (for example from the client) of the actual wet-ink pages (which are now not required by the Land Registry), the Committee's view was that it is not necessary for land registration purposes, but some firms may nevertheless wish to collate the pages with the wet-ink signatures for evidential or other purposes.

While the Land Registry now accepts the "Mercury signing approach" ("Option 1"), it does not accept electronic signatures. The Land Registry's digital mortgage uses its own form of identity verification, which is different from the current prevalent types of e-signature.

Evidence of identity

The Land Registry has adopted, on a temporary basis, from 4 May some more flexible processes in relation to evidence of identity, the detail of which is contained in Land Registry guidance, new [Practice Guide 67A](#). The Land Registry had previously announced that they would not reject applications where evidence or confirmation of identity is completely missing until further notice, but would instead raise a requisition. The 4 May change allows for verification of a person's identity (see form ID1 or ID2) to be done by video call and involves the use of an additional new [form ID5](#).

3 Update on control on enforcement for commercial property

To protect tenant businesses, there is currently a moratorium on the forfeiture of commercial leases for non-payment of "rent" (meaning any sum the tenant is liable to pay under the lease), so that landlords cannot forfeit from and including 26 March 2020 until at least 30 June 2020. That date may be extended. Tenants, however, remain liable for any payments that fall due under the lease during that period.

Additionally, on 23 April 2020, the Government announced a temporary ban on the ability for landlords to use statutory demands (made between 1 March 2020 and at least 30 June 2020) and winding up petitions (presented from 27 April 2020 to at least 30 June 2020), where a commercial tenant's inability to pay is the result of COVID-19. Any winding-up petition that claims the company is unable to pay its debts must first be reviewed by the courts to determine why. This measure can be extended in line with the forfeiture moratorium and will be included in the Corporate Insolvency and Governance Bill.

From and including 25 April 2020 until at least 30 June 2020 (extended in line with the forfeiture moratorium), landlords are prevented from using Commercial Rent Arrears Recovery (CRAR) unless the minimum amount of net unpaid rent is equivalent to 90 days' rent (Taking Control of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020). This would allow landlords to use CRAR for all unpaid quarterly rent apart from for the quarter starting on the September quarter day.

4 Transactional drafting for COVID-19

The most common new provision for COVID-19 being requested by tenants on negotiations for a new lease is a suspension of rent and other tenant's obligations triggered by various COVID-19/pandemic related circumstances of varying breadth. Some landlords refuse to consider a suspension provision of this type, perhaps instead allowing for an extended rent free. What is agreed or not will depend on the parties' respective negotiating strengths. The request for such a suspension provision is

encountered more in leisure and retail (where businesses have been forced by legislation not to open for trade) rather than offices.

In other types of agreement such as agreements for lease, drafting is sometimes being introduced to allow for delays to practical completion of works because of COVID-19/pandemic related circumstances (affecting for example the availability of building materials or contractors), with possible use of longstop dates. More time may be built into agreements for Completion deliverables and provision may be made in relation to how deeds are to be physically handed over where there are pandemic related constraints. It was noted that under the provisions of certain JCT contracts, a contractor can terminate if works stop for more than a specified period. Changes to this may need to be considered for new deals; in terms of agreements already in force, building sites are still generally open and discussions should be taking place between the parties.

Members had not encountered on a regular basis the use of mechanisms such as options, retentions and escrows to deal with COVID-19 issues.

It was also noted that members' experience and recent press articles highlight that most insurers are not covering COVID-19.

5 New Certificate of title project

An update was provided on the Committee sub-group's project to produce a new 8th edition of the Certificate of title. The meetings have been disrupted because of the pandemic. Prior to then, there had been a few meetings focusing in particular on the Certificate's front end and Schedule 5 on the Letting Documents (occupational leases). Schedule 5 has been reviewed in the light of the Model Commercial Leases and the new Code for Leasing Business Premises with some changes proposed to reflect these. Detailed comments are awaited from the sub-group on the front end and Schedule 5 and when further progress has been made in those respects, this will be brought back to the full Committee. In advance of the Committee meeting, the Committee had been provided with the drafts currently being considered. Further sub-group meetings will be arranged to take place remotely. Due to the pandemic delays, the new edition will not be launched until 2021.

6 New Rent deposit deed project

This is a project to review and update the Committee's rent deposit deed which is now over 10 years old. The document is still in pretty good shape but needs a bit of refreshing. There has been one meeting of the sub-group and the Committee was also provided with the drafts currently being considered. The Committee will be kept updated on progress. Further sub-group meetings will be arranged to take place remotely.

7 Undertakings required by lenders project

The form of undertakings required by lenders project continues with consideration being given to the comments of the sub-group's members. A composite version has been produced and it is hoped that a version will be provided for consideration at the June Committee meeting. Among the issues are who should be the addressee, the lender or lender's lawyers or both (caution is required for the holding deeds to order undertaking which potentially lasts for an extended period where it is just the law firm benefiting in case they cease to act). Also on the lender side, the undertaking is likely to be for the benefit of the Security Agent (and not other finance parties) and Security Agent will

include successors but without extending the liability of the firm giving the undertakings. This new document should be launched this year.

8 Consultation on modifications to Retail Prices Index

methodology <https://www.gov.uk/government/consultations/a-consultation-on-the-reform-to-retail-prices-index-rpi-methodology>

The Government and UK Statistics Authority are consulting on the UK Statistics Authority (UKSA)'s proposal to address the shortcomings of the Retail Prices Index (RPI). It has shortcomings meaning that it has sometimes overestimated, and at other times underestimated, the rate of inflation and it lost its National Statistic status in 2013. Despite the shortcomings, Government continues to have a major use of the RPI especially in its issue of index-linked gilts. The CPIH (Consumer Prices Index including owner occupiers' housing costs) has been the Office for National Statistics (ONS)'s lead measure of inflation since March 2017. Since 2010, the rate of RPI annual inflation has been on average 1% point per annum above the CPIH.

The Government has no plans to remove the requirement for UKSA to compile and maintain the RPI and publish it every month. However, the UKSA is minded to address RPI's shortcomings by bringing the methods and data sources from the CPIH into the RPI. This means that from the implementation date the RPI index values will be calculated using the same methods and data sources as are used for the CPIH. The introduction of the new data source and methods to the RPI will see its annual measured rate of inflation be lower, on average, by 1% point per annum.

A major point of concern is the impact of the proposals on the index-linked gilt market and consequently on the public finances. The Government is also mindful of the potentially wide-ranging impact of the proposed changes to RPI and of their responsibilities as public sector bodies to consider this in future policy making. Impacts from the change to RPI could have unintended and diverse impacts, affecting the public finances, economy, financial markets or groups of users. The Consultation seeks information detailing those impacts.

In light of the pandemic, the consultation period has been extended to 21 August 2020. Concerns have been expressed by investors about the adverse impact on RPI based investments/returns if the changes are implemented. Existing RPI linked provisions often cater for changes to its methods and data sources. For new drafting, references to RPI may sometimes be replaced with CPI (plus a figure) to seek to equate to the current RPI. Careful consideration needs to be given to the use of alternative formulae to RPI to be clear that in the context of the particular provisions there is an equivalent rate of return.

Committee members may wish to encourage clients to respond to the Consultation for example to request that the changes do not affect existing obligations based on RPI.

9 Approach to new RICS Code for Leasing Business

Premises https://www.rics.org/globalassets/code-for-leasing_ps-version_feb-2020.pdf

The Committee briefly touched on the RICS's new Code for Leasing Business Premises published in February but not coming into force until September 2020. It was considered that this new Code was probably a little more balanced than the previous edition. The Committee will review the impact of the new Code on lease negotiations in a year's time.

10 Committee's standard sub-station

lease <http://www.citysolicitors.org.uk/storage/2020/01/CLLS-Land-Law-Committee-Substation-lease-outdoor-freestanding.pdf>

The template **substation lease** for an outdoor freestanding site, together with a guidance note have now been on the CLLS website for a few months. The documents are considered to be helpful, but it is important that they should be better publicised. Kevin Hart will talk to Project Associates (communications consultancy who assist the CLLS) to promote this further for example in the Law Society Gazette. The launch communications will need be approved in advance by the working group responsible for the documents. Committee members are also encouraged to promote the documents e.g. suggest the template is referred to in heads of terms; use it in practice; possible articles. If the documents are a success, the working group will look to produce variants of the lease for other substation scenarios.

11 Update on standard sale contract project

The idea behind this project is to create a standard commercial property sale contract, somewhat akin to the Model Commercial Leases. Peter Williams is leading the project with some of the people behind the RICS Auction Conditions. There has been one meeting just before the pandemic. The Committee will be kept updated and it is represented on the working group.

12 Use of disclaimers for documents on Committee's webpages

Kevin Hart is reviewing with the CLLS the disclaimers on its website for the CLLS's precedent documents. Consideration should be given to having a disclaimer on the front cover of individual documents to improve visibility. The disclaimer should be the same for all Committees.

The statistics for the CLLS Land Law committee precedents to 30 April 2020 are very encouraging:

Main Precedent page - 5,198 hits
Certificate of Title - 4,499
Draft Legal Opinion - 427
Wayleave Agreement - 374
Service Charge Provisions - 169
Insurance provisions for rack rent leases - 157
Release Deed for rights to light - 114

13 AOB

The 2020 CLLS AGM is likely to be deferred and will take place later in the year, date to be confirmed.

The Committee meeting lasted 1 hour 10 minutes.

14 Next meeting

The next scheduled meeting is on 24 June 2020 at 12.30pm by phone. An emergency meeting can be scheduled before then if required.

Warren Gordon CMS