



The City of London Law Society

4 College Hill
London EC4R 2RB

Tel +44 (0)20 7329 2173

Fax +44 (0)20 7329 2190

DX 98936 - Cheapside 2

mail@citysolicitors.org.uk

www.citysolicitors.org.uk

www.citysolicitors.org.uk

David McIntosh QC (Hon)
Chairman

5 August 2011

By Email: cp11_11@fsa.gov.uk

FAO: Zaglul Islam

Dear Sirs

Re: CLLS Regulatory Law Committee response to Financial Services Authority's Quarterly Consultation No. 29 (CP11/11)

The City of London Law Society ("CLLS") represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world.

This response to Chapter 8 of the Financial Services Authority's Quarterly Consultation No. 29 (CP11/11) (the "**Consultation**") has been prepared by the CLLS Regulatory Law Committee (the "**Committee**"). Members of the Committee advise a wide range of firms in the financial markets including banks, brokers, investment advisers, investment managers, custodians, private equity and other specialist fund managers as well as market infrastructure providers such as the operators of trading, clearing and settlement systems.

The Committee wishes to provide feedback specifically on the proposal in Chapter 8 and Appendix 8 of the Consultation on the proposed new PERG 11 guidance relating to land investment schemes.

We understand that the proposed changes to PERG 11 have been prompted by the successful winding-up petition in relation to *Sky Land Consultants PLC*. We think this case should be expressly referenced in the proposed guidance; in particular it would be of benefit to firms, investors and their advisers to understand the context in which the existing guidance has been modified.

We consider the judgment adds a great deal of clarity to the law in a notoriously difficult area and welcome the FSA's proposal to reflect the judgment in PERG 11. Though the case and the proposed guidance relate specifically to land investment schemes, we consider that the principles covered in that judgment will have broader relevance, and it is critical, therefore, to ensure that the guidance reflects accurately the points of law that were addressed.

In some respects, however, the draft guidance goes further than the judgment and makes some questionable propositions of law.

Proposed Q.20 at PERG 11.3

The Judge in *Sky Land* stressed the necessity of looking at the substance of arrangements rather than the legal form. This is really the 'headline' of the *Sky Land* judgment.

The substance of an arrangement is not the same as, and cannot be derived conclusively from, the intentions of the putative operator or of the investors, although we accept that intentions may be an evidential pointer as to the substance of an arrangement.

Therefore we suggest that:

- in the first paragraph of the new text (starting "*It is likely that you will need to be authorised...*") the reference should be to the substance of the firm's role, rather than the intended role;
- the paragraph which follows (starting "*Where you, or one of your agents...*") goes too far as a purported statement of legal principles. The contractual effect of representations is extremely case-specific, and as a legal matter it is highly relevant to determine whether agents or representatives have been authorised by the firm to make the representations in question. It is not correct as a matter of law, therefore, to suggest that "*it will usually be reasonable for investors to rely on those representations*". We suggest instead that the emphasis of this paragraph should be on an examination of the facts (including representations) to establish what the real substance of a scheme is. (This is the correct theme of the new paragraph which follows this paragraph.)

- in the paragraph starting “*If your investors have purchased...*”, if the “*shared understanding*” is intended to refer to an understanding shared between the firm and investors (rather than, for example, shared only among the investors) we agree that this again is strong evidence of the substance of the arrangements. However, it must also be necessary that this “*understanding*” be translated into the substance of the operation. It would be helpful to clarify whose shared understanding the guidance refers to, and the critical relevance (in line with the *Sky Land* Judgment) for that understanding to be reflected in the substance.
- the paragraph which follows (beginning “*Even if you do not intend to seek planning permission...*”) is not supported by *Sky Land* (or, as far as we are aware, any other judicial authority) and we believe reaches a highly questionable conclusion in legal terms. The suggestion appears to be that if investors (alone) form the impression that services will be provided and arrangements made which would amount to a collective investment scheme then that may be sufficient to show that a firm “*purports*” to create a scheme even if the firm has no intention of providing such services or making such arrangements. We strongly oppose this suggestion; it cannot be the case that the absence of intention (or indeed the presence of a contrary intention) is irrelevant as evidence of what a firm “*purports*” to have done, or as to the substance of an arrangement. (We acknowledge that it would be otherwise if the firm cynically allowed a false impression to be created in order to part investors from their money, but has no intention of delivering. That might well amount to “*purporting*”, as well as likely being fraudulent. If that is what the proposed guidance means to say, it is important to make that point clearer.)

Proposed Q.20A at PERG 11.3

We find the proposed guidance here confusing. While the land ownership point is correctly made, the position where a third party is responsible for obtaining planning permission and marketing requires further analysis of the relevant facts:

- is the third party acting under arrangements with the firm, either (in substance) as a joint venturer or as a delegate? (In this case we acknowledge that the firm may be an operator);
- where the firm’s relationship with the third party is more tenuous (e.g. a mere introduction) it may still be moot (on the facts) whether the firm has done sufficient to establish all of the substantive elements required for a collective investment scheme; and
- the question still arises (if the firm has arguably only established, but stopped short of operating) whether the “*by way of business*” test would be satisfied.

Proposed Q.20C at PERG 11.3

We are unsure as to the intended meaning of the reference in the question to each plot-holder being “*separately represented*”. Two meanings can be discerned:

- each plot-holder retains separate advisers to deal with planning permission applications and/or the property sale process (this meaning follows more logically from the manner in which the words have been laid out in the question); or
- each plot-holder receives separate (and, presumably, differing) representations from the putative operator of the scheme as to the arrangements for how his plot is to be managed.

The answer to the question suggests the latter meaning is intended, but clarification of either or both references would be beneficial.

Proposed Q.21 at PERG 11.3

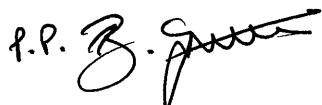
The proposed guidance here refers to proposed Q.20. Consistent with our comments above regarding the critical distinction between substance, intentions and impressions, the proviso here relating to “*suggestions to the contrary*” should refer to “*arrangements*” rather than “*suggestions*”.

General Comment

Many of the comments made in *Sky Land* can usefully be applied outside the area of land investment schemes to schemes more generally. Although there is already a cross-reference to PERG 11 in the short general discussion of the collective investment scheme activities in PERG 2.7.12, the cross-reference might usefully highlight that some of the principles expressed in PERG 11 are equally applicable to other types of collective investment schemes.

We would be delighted to discuss any of the above observations and suggestions with you. You may contact me on +44 (0)20 7295 3233 or by email at margaret.chamberlain@traverssmith.com.

Yours sincerely



Margaret Chamberlain
Chair, CLLS Regulatory Law Committee

© CITY OF LONDON LAW SOCIETY 2011.

All rights reserved. This paper has been prepared as part of a consultation process. Its contents should not be taken as legal advice in relation to a particular situation or transaction.

**THE CITY OF LONDON LAW SOCIETY
REGULATORY LAW COMMITTEE**

Individuals and firms represented on this Committee are as follows:

Margaret Chamberlain (Travers Smith LLP) (Chair)
Chris Bates (Clifford Chance LLP)
David Berman (Macfarlanes LLP)
Peter Bevan (Linklaters LLP)
Patrick Buckingham (Herbert Smith LLP)
John Crosthwait (Independent)
Richard Everett (Lawrence Graham LLP)
Robert Finney (Dewey & LeBoeuf LLP)
Jonathan Herbst (Norton Rose LLP)
Mark Kalderon (Freshfields Bruckhaus Deringer LLP)
Ben Kingsley (Slaughter and May)
Nicholas Kynoch (Mayer Brown International LLP)
Tamasin Little (S J Berwin LLP)
Simon Morris (CMS Cameron McKenna LLP)
Rob Moulton (Ashurst LLP)
Bob Penn (Allen & Overy LLP)
James Perry (Ashurst LLP)