

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

**Minutes of a meeting held on 14 July 2010 at CMS Cameron McKenna, Mitre House, 160 Aldersgate Street, London EC1A 4DD**

<b>In attendance</b>	<b>Warren Gordon (Secretary and Chairing meeting)</b> <b>Jeremy Brooks</b> <b>Martin Elliott</b> <b>Alison Gowman</b> <b>Laurie Heller</b> <b>Daniel McKimm</b> <b>Steven Pitchford (standing in for Simon Hillson)</b> <b>Mark Rees-Jones</b> <b>Jeanette Shellard</b> <b>Peter Taylor</b> <b>Nicholas Vergette</b>
<b>Apologies</b>	<b>Nick Brown (Chair)</b> <b>James Barnes</b> <b>Nic Berry</b> <b>Nick Brent</b> <b>John Butler</b> <b>Nick Jones</b> <b>Anthony Judge</b> <b>Lewis Myers</b> <b>Jackie Newstead</b> <b>Jon Pike</b> <b>David Waterfield</b> <b>Mark Wheelhouse</b> <b>Martin Wright</b>

**1. MINUTES**

The Minutes for the Committee meeting of 19 May 2010 were approved.

**2. PERPETUITY-TYPE TRAPS**

Following the coming into force of the Perpetuities and Accumulations Act 2009 (the effect of which is that the rule against perpetuities does not apply to most property related documents taking effect on or after 6 April 2010), the Committee supports the abolition of certain other statutory traps, that can cause problems on property transactions and, should, perhaps, have been dealt with at the same time as the rule against perpetuities.

Those traps are contained in:

**paragraph 7(2) of Schedule 15 to the *Law of Property Act 1922***, by which a contract (entered into on or after 1 January 1926) for the renewal of a lease for a term exceeding 60 years from the termination of the lease, whether or not contained in the lease, is void.

**section 149(3) of the *Law of Property Act 1925***- "a term, at a rent or granted in consideration of a fine, limited after the commencement of this Act to take effect more than twenty-one years from the date of the instrument purporting to create it, shall be void, and any contract made after such commencement to create such a term shall likewise be void; but this subsection does not apply to any term taking effect in equity under a settlement, or created out of an equitable interest under a settlement, or under an equitable power for mortgage, indemnity or other like purposes."

The London Property Support Lawyers Group has suggested that an approach by the Committee to the relevant Government department may assist. The matter will, in the first instance, be discussed with Robert Leeder of the CLLS.

Abolition of these statutory provisions may also be included in the Government's project to repeal unnecessary laws.

### **3. LANDLORD'S INSURER'S WAIVER OF SUBROGATION- TENANT'S CONTRACTOR**

At a previous meeting, there was a discussion of the difficulties currently being experienced by tenants and their contractors in persuading landlords to extend their building insurance to cover fitting out or refurbishment works to be carried out by tenants to their premises in a multi-let building. Landlords are concerned about their claims record.

The consequence is that the employer tenant may not be able to comply with its obligation to the contractor in clause 22C of the standard JCT contract (assuming that option has been adopted) to take out an insurance policy in the joint names of itself and the contractor in respect of the existing structures for the full re-instatement cost. Some landlords are also not prepared to obtain from their insurers a waiver of subrogation rights against the contractor. This recent shift in the attitude of landlords has important implications for both tenants and contractors.

Committee members Martin Wright and Jeremy Brooks met Bill Gloyn of JLT Group and Paul Hocknell of Willis Limited to discuss the matter further and a note of the meeting accompanies these Minutes. The conclusion of that meeting was that it might be time to consider changing clause 22C.

Further discussions are likely to take place (with the construction law committee) with a view either to attempt to mitigate the problem, or, at the very least, to provide information to the profession about the problem.

#### **4. CRC ENERGY EFFICIENCY SCHEME**

The working party, set up to explore whether a cross industry consensus could be achieved on apportionment of CRC costs between landlords and tenants in new leases, has now reported back on the results of its consultation. The working party concluded that there is no consensus about the next steps to be taken and, therefore, at the moment, a single industry standard CRC lease provision is regarded as unachievable (although a new edition of the working party's guide on CRC will be issued looking at the alternative ways of charging CRC costs to tenants).

It was suggested by one committee member that the Committee should take the lead in producing a "standard" set of drafting and possibly also CRC enquiries for commercial property transactions. Jeremy Brooks agreed to talk to Peter Williams of Eversheds (who sits on the working party) about possible drafting.

#### **5. CLLS SERVICE CHARGE PROVISIONS**

A meeting is to take place on 8 September to discuss the CLLS service charge provisions involving the Committee sub-group who drafted the provisions and some of the people working on the proposed new edition of the RICS Service Charge Code.

#### **6. GOOD HARVEST**

The *Good Harvest* case has been settled, depriving the Court of Appeal of a possible opportunity to give its views on the enforceability of parallel/sub guarantees from outgoing tenant's guarantors. Notwithstanding the negative comments in the High Court, the position on such parallel/sub guarantees is not definitive, although their use is likely to be challenged.

It was suggested that the "ultimate" solution was to change the law to clarify the position and approaches could be made to the Law Commission.

As a linked point, it was suggested that the Committee could undertake a project to produce a form of guarantee for a lease.

#### **7. CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999 FRAMEWORK DOCUMENT**

Following Lovells' production of its very useful document considering the use of rights under the Contracts (Rights of Third Parties) Act 1999 as an alternative to collateral warranties, a sub-group of the Committee (Jeanette Shellard, Laurie Heller and Mark Rees-Jones) will, shortly, be meeting members of the Construction Law Committee to discuss possible drafting for a framework document for the use of the Act.

#### **8. SRA CONSULTATION ON CONFLICTS OF INTEREST**

There was a brief discussion of the conflicts aspects of the SRA's consultation (closed on 20 August 2010) on its proposed new handbook of regulations.

The issues under consideration are:

- how much flexibility should firms be given in determining when they can act in situations involving or potentially involving a **conflict** of interests (between two or more clients)? In answer to that question, the SRA has identified the following three potential options, of which it favours Model 2.

**Model 1** – firms do not act where there is a **conflict** of interests;

**Model 2** – firms only act where there is a non-substantive client **conflict** of interests, and subject to certain conditions;

**Model 3** – firms are permitted to act where there is a client **conflict** of interests subject to certain conditions.

- how does the SRA deal with the more detailed provisions which currently govern acting for seller and buyer and lender and borrower, etc.? The SRA believes that it is not necessary to retain separate provisions covering alternative dispute resolution, acting for seller and buyer, etc. as the general principles are the same as for other **conflict** situations.

With regard to the current limitations on acting for both lender and borrower, the SRA intends to consult, and welcomes the views of, interested parties on the continued need or otherwise for the very specific requirements that are currently in rule 3 (see rules 3.16 – 3.22). Since these requirements were introduced, changes to the market have occurred which, in the SRA's view, suggest that they might no longer be needed. These are:

- the sale of mortgages is now regulated by the Financial Services Authority and therefore, for example, it is clearly the responsibility of the party selling/recommending the mortgage to the borrower to ascertain the borrower's financial situation; and
  - many major lenders, under the auspices of the Council of Mortgage Lenders, have produced standard mortgage instructions, thus reversing the trend at the time the requirements were introduced for lenders to ask solicitors to advise on matters outside the normal scope of the retainer with the lender.
- should the requirements relating to **conflicts** be expressed as outcomes or rules?

The draft chapter of the Code on **conflicts** of interests will be consulted on in October 2010, with accompanying guidance.

**NB: Notwithstanding the closing of the consultation on the handbook, the Committee may wish to consider making representations, for example, on the possible relaxation of the current limitations on acting for both lender and borrower.**

**9. NEW PROJECTS FOR THE COMMITTEE**

As well as drafting a form of lease guarantee (referred to at 6. above), the Committee should liaise with the Law Society in relation to a possible new edition of the Standard Commercial Property Conditions.

**10. MEMBERSHIP ISSUES**

Ed Bannister has resigned from the Committee having left Field Fisher Waterhouse. The Committee would like to thank Ed for all his contributions to the work of the Committee. The Committee approved Jayne Elkins, a partner at FFW, taking Ed's place on the Committee.

Steven Pitchford will be standing in for Simon Hillson while he is on sabbatical.

**11. AOB**

Mention was made of the recent launch of the Commercial Real Estate Legal Association providing non-contentious commercial real estate lawyers with a "dedicated specialist forum of their own".

**12. CPD- 1 hour**

**13. Remaining meetings for 2010 at 12.30pm: 23 September (note change of date), 17 November. Both at CMS Cameron McKenna, Mitre House, 160 Aldersgate Street, London EC1A 4DD.**