

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

**Minutes of a meeting held on 13 July 2011 at CMS Cameron McKenna, Mitre House, 160 Aldersgate Street, London EC1A 4DD**

<b>In attendance</b>	<b>David Hobart (Chief Executive of CLLS)</b> <b>Robert Leeder (CLLS)</b> <b>Nick Brown (Chair)</b> <b>Warren Gordon (Secretary)</b> <b>Nick Brent</b> <b>Jeremy Brooks</b> <b>John Butler</b> <b>Jayne Elkins</b> <b>Martin Elliott</b> <b>Alison Gowman</b> <b>Laurie Heller</b> <b>Simon Hillson</b> <b>Daniel McKimm</b> <b>Mark Rees-Jones</b> <b>Jeanette Shellard</b> <b>Nicholas Vergette</b>
<b>Apologies</b>	<b>James Barnes</b> <b>Nic Berry</b> <b>William Boss</b> <b>Nick Jones</b> <b>Anthony Judge</b> <b>Jackie Newstead</b> <b>Jon Pike</b> <b>Peter Taylor</b> <b>Mark Wheelhouse</b> <b>Martin Wright</b>

**1. WELCOMES**

David Hobart, the new Chief Executive of the CLLS, and Robert Leeder of the CLLS were welcomed to the meeting. David explained that he was visiting each of the CLLS's committees, in part to help him gain an understanding of what the CLLS can best do collectively.

## 2. MINUTES

The Minutes for the Committee meeting of 16 May 2011 were approved. It was agreed that future Minutes can be added to the CLLS website without having to wait for the following Committee meeting. The draft minutes would be circulated to the Committee and assuming no comments within say a week would be added to the website. This ensures the minutes are more current when published.

Consideration may also be given to exploring whether electronic links to the Land Law Committee's website page can be added to the RICS, BPF, IPF and possibly Law Society websites, to raise awareness of the Committee's activities.

## 3. CLLS CERTIFICATE OF TITLE

The Chair summarised the progress so far on the new Certificate of Title project.

Since the last meeting, the Committee has received numerous comments on the Certificate from the LPSLG and APSL and individual law firms, as well as the CLLS planning law committee (on the planning and environmental statements). The sub-group responsible for the Certificate plans to meet on **28 July** to consider the comments.

On timescale for launch of the Certificate, this will probably be after the new Code of Conduct comes into force (6 October 2011), since the new Code does not appear to require the SRA/Law Society to recognise the Certificate (although that interpretation is being confirmed with the SRA). The Committee also awaits the release of the judgment in the Court of Appeal decision on the House of Fraser case on authorised guarantee agreements etc (expected at the end of July 2011), since this is relevant to wording in the Certificate.

The feedback on the Certificate reveals certain recurrent themes.

### **Information from the "Seller" and identification of the source of the information.**

There is still some dissatisfaction with clause 4.2 in the draft 7<sup>th</sup> edition, which relates to the situation where the Company does not yet own the Property and is in the course of buying it from the Seller and how this impacts on the Certificate's confirmations and statements. The current draft of the 7<sup>th</sup> edition seeks to remove most of the references to "Seller" throughout the Certificate and instead rely on 4.2 as to how to construe Company confirmations where there is a Seller. Views have been expressed that clause 4.2 is somewhat ambiguous, for example, the reference to "construing accordingly".

Consequently, a more detailed clause 4.2 was produced for discussion at the Committee meeting. That alternative 4.2 is more detailed in its list of the sources of information for the Company's knowledge (although emphasising that the Seller/Seller's solicitors are the primary source); contains most of the Seller-relevant references; and makes it clear that there will be disclosure when the provider of the Certificate considers information provided by the Seller or its solicitors is inadequate.

There was a brief discussion of the alternative 4.2. Some considered the list of information sources to be excessive and overlap with other provisions of the Certificate (including clause 2.1.2). Also the sources may well be different from those listed depending on the type of transaction (it was noted that the Certificate does not address an acquisition from the "Seller" of shares in the Company owning the Property). While some at the meeting were inclined to revert to the current treatment in the 6<sup>th</sup> edition, the concerns about information sources and the ambiguity of current 4.2 remain. This will be discussed further at the sub-group meeting.

**The multi-let option and how the Certificate should deal with many different leases.**

The 7<sup>th</sup> edition incorporates a "multilet option" in the Letting Documents schedule to facilitate the production of the Certificate where there are a number of Letting Documents. Although further views had been expressed outside of the Committee that the multilet option made it more difficult to produce the Certificate, the consensus at the Committee was that the multilet option improved the Certificate and should be retained.

**Format.** Although there have been one or two dissenting voices outside of the Committee, the revised format in the 7<sup>th</sup> edition of having disclosure follow each statement has been widely welcomed as making the Certificate more user-friendly. There was a suggestion about putting the specific lease related information before the lease statements and the sub-group will consider this.

**Notes to Users.** A draft of the Notes to Users for the Certificate has been provided to the Committee and comments are welcomed. The "Specific Points" section is a mixture of highlighting changes from the 6<sup>th</sup> edition and particular points about specific clauses or paragraphs of the Certificate. Consideration will be given as to whether this section can be split or treated in a different way.

#### **4. APPLICATION OF COMPETITION LAW TO LAND AGREEMENTS**

Reference was made to comments made at a recent Blundell lecture suggesting that competition law may render unenforceable certain widely used lease provisions. The comments suggested that the prohibition on underletting at less than the market rent (let alone at less than the higher of the market rent and passing rent under the lease) may be judged to fall within the "hardcore" category of competition restrictions and, if it does, it will be void and unenforceable, although it is unlikely to affect the rest of the lease.

It was contended at the lecture that covenants restricting the tenant's entitlement to offer or take a premium on assignment or underlease, or surrender back requirements on tenants, may be judged to fall within such hardcore category. The logic behind this analysis is that such provisions restrict the tenant's ability to determine the sale price of the commodity (the premises), which the tenant "acquires" under the lease agreement. The tenant is prevented from offering the premises at the "sale price" he desires e.g. he is unable to undercut the market. If such provisions are properly categorised as price fixing, they will be void. If a provision falls within the hardcore restriction, there is no need

to undertake an assessment of the relevant market etc, as such provision is considered to have an appreciable effect on competition in any event.

The Committee unanimously expressed scepticism at such an analysis. It was noted that most modern leases with provisions restricting/controlling underleases will have restrictions in relation to the level of underlease rent.

## **5. LAW COMMISSION'S REPORT ON EASEMENTS, COVENANTS AND PROFITS A PRENDRE**

In June 2011 the Law Commission published its report on easements, covenants and profits a prendre, including recommendations on changing the law. The recommendations include:

- simplifying the law on the creation of easements by prescription;
- the creation of a new legal interest in land (known as a "land obligation") which can be positive or negative and the benefit and burden of which will be capable of registration. In future, positive obligations (as well as negative ones) will be directly enforceable against successors in title. This will overcome the need for workarounds (such as chains of indemnity covenants) currently used to secure the performance of positive obligations. Existing restrictive and positive covenants will be unaffected. This change will, generally, be welcomed;
- extending the jurisdiction of the Lands Chambers of the Upper Tribunal to enable it to make orders modifying or discharging not only the new land obligations, but also easements and profits created post-reform.

Importantly in view of the current market interest, the Report does not review rights to light, although the subject is touched on in the context of prescription. The Report also does not consider leasehold covenants. There is no timetable for when the Law Commission's recommendations may become law.

## **6. RIGHTS OF LIGHT PROJECT**

Laurie Heller, Jeanette Shellard, Nicholas Vergette, Jon Pike, Warren Gordon, Bill Gloyn and Gordon Ingram have agreed to constitute a sub-group of the Committee to consider and draft a rights of light deed/crane oversailing licence. Concerns arising from uncertainties caused by the *Heaney* decision on rights of light provide added importance to the project. The first meeting of the sub-group is on 20 July.

## **7. LAND REGISTRY E-TRANSFER PROJECT**

The Land Registry's e-transfer/e-charge/e-signature project is dead. The Land Registry's focus now appears to be on electronic lodgement and despatch, using e-channels to send paper documents.

**8. BPF LEASE**

The BPF will use Land Securities' "Clearlet" lease as the starting point for its lease project. The Committee will closely follow progress on this project.

**9. CLLS LAND LAW COMMITTEE LEASE PROVISIONS**

A sub-group of the Committee will meet in September 2011 to look again at the Committee's insurance provisions, which have not been looked at in a few years and which appear on the Committee's page of the CLLS website.

The Committee was interested in the amount of hits to the new service charge provisions on the CLLS website. This will be investigated.

**10. IMPLICATIONS OF THE NEW SRA CODE OF CONDUCT**

It was noted that the final form of Chapter 3 is very different from the version consulted on. However, the changes were broadly welcomed (conveyancing is now not excluded from the exceptions where a solicitor may act, with appropriate safeguards, where there is a client conflict). More detail is provided in the "indicative behaviours", although some of the helpful detail from the current Code remains absent. The CLLS will keep the new Code under review and may provide further feedback.

**11. AOB**

Robert Leeder will investigate whether the CPD hours available for attending Committee meetings are "accredited".

**12. CPD- 1.25 hours (CPD reference CRI/CLLS).**

**13. Meetings for 2011 at 12.30pm: 21 September and 23 November at CMS Cameron McKenna, Mitre House, 160 Aldersgate Street, London EC1A 4DD.**