

CITY OF LONDON LAW SOCIETY LAND LAW COMMITTEE

Minutes of a meeting held on 23 March 2011 at CMS Cameron McKenna, Mitre House, 160 Aldersgate Street, London EC1A 4DD

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

1. MINUTES

The Minutes for the Committee meeting of 19 January 2011 were approved.

2. MEMBERSHIP

William Boss of SJ Berwin was welcomed to the Committee. David Waterfield of Slaughter & May is no longer a member of the Committee.

3. CLLS CERTIFICATE OF TITLE

A meeting of a sub-group of the Land Law committee took place on 15 March 2011 to discuss a new 7th edition of the CLLS certificate of title. There follows a note of that meeting, that formed the basis of the discussion at the committee meeting.

Summary of main points from meeting on 15 March 2011 to discuss CLLS certificate of title

Attendees: Nick Brown, Warren Gordon, Jackie Newstead, Mark Rees-Jones.

1. The Notes to the Certificate will make it clear that it is unsuitable for a short term lease. The front sheet of the Certificate will allow for brief details of the transaction to be provided. The Certificate will no longer be known as "long form". The distinction with the CLLS's Report on Title is clear enough.

2. Generally, the various parts of Schedule 5 will be incorporated into the relevant sections of the Certificate. This will make it more user-friendly. Parts 1- 4 of Schedule 5 (providing specific details about the property, its benefits, incumbrances and use) will become a new Schedule 2 with existing Schedules 2, 3 and 4 becoming new Schedules 3, 4 and 5 respectively.

In the new Schedules 3, 4 and 5, each statement will be followed by "Qualification" and a space for any qualification to be added. Qualifications will be italicised to make the Certificate easier to read. Clauses 2.1.3, 2.1.4 and 2.3 will be qualified in a similar way, as will paragraph 4 of Schedule 1. Paragraph 2.9 of Schedule 1 will need to be amended, otherwise a qualification will be qualified! The effect of this is Parts 6, 7C and 8C of current Schedule 5 will not be necessary. Parts 7A and 7B of Schedule 5 will become Parts 1 and 2 of new Schedule 4, so that the specific details of the headlease and ancillary licences are in the same schedule as the Lease statements (which will become Part 3).

For the Letting Documents (current Schedule 4), it was considered that the Certificate needs to be made more user-friendly. To that end, consideration will be given to having, as an alternative Letting Documents Schedule, the occupational lease schedule produced by the LPSLG (PSL group) for the 6th edition (or a variant). Where there are only one or two Letting Documents, Parts 8A and 8B of current Schedule 5 will become Parts 1 and 2 of new Schedule 5, so that the specific details of the occupational leases and ancillary licences are in the same schedule as the Letting Document statements (which will become Part 3).

3. There will be a new statement in clause 2.1.3 that there are no benefits being acquired through prescription. Clause 2.1.4 will refer to the Company having absolute title, enabling a qualification to be made if there is a different class of title.

4. The references at the beginning of current Schedules 3 and 4 to the relevant qualifications in Schedule 5 will be removed, since they can be more readily included in clauses 2.1.3/2.4.

5. Clause 4.3 will now refer to the CPSEs (which will be defined). There was some discussion about whether various references to "Seller" in the Certificate are needed in the light of 4.3 and about the circumstances at which 4.3 is aimed. 4.3 appears, primarily, aimed at the Company buying the property from the Seller and the Certificate being provided to a funder for the purchase- in those circumstances, the Company will very much rely on information from the Seller.

The other main transaction where the "Seller" reference may be relevant is a sale of the shares in the Company owning the property. However, 4.3 does not fit that situation and a specific qualification would need to be drafted.

It was considered that 4.3 does not adequately address the concept of the Company's knowledge reflecting information provided by the Seller's solicitors. One way to address this is to be specific in the Certificate as to the source of the information- if such an approach is adopted, there may be no need to refer to the "Group" definition, only mentioned in paragraph 1.7 of Schedule 1.

The approach taken in relation to warranties for share sale transactions may also help to inform the approach taken by the Certificate.

6. It was considered that the CLLS Planning Law committee (Rupert Jones) should be consulted on necessary changes to the Certificate to take account of the community infrastructure levy and the Localism Bill (recognising, of course, that the latter, in particular, is not yet set in stone).

7. Specialist tax advice would be sought on whether changes are needed to the VAT/SDLT statements in current Schedules 3 and 4.

8. There is a need to retain the separate references to "Property" and "Premises", although some of the specific references in the Certificate need tidying up. It is correct, generally, to refer to Premises in current Schedule 3 (and not Property), since the area demised by the head lease may not form the whole of the Property (which may be part freehold, part leasehold).

9. Paragraph 2.9 of Schedule 1 (Rights of Third Parties Act statements) will only expressly refer to the disclosures in Part 6 of current Schedule 5 in relation to the statement that none of the documents expressly provide for third parties being able to use the Act.

10, Paragraph 1.3 of current Schedule 2 will be re-worded so that the Company confirms no further SDLT returns are required (in respect of transactions with an effective date prior to the date of the Certificate) and the certifier will confirm that there is nothing in any relevant document to indicate such further returns are required.

11. In relation to paragraphs 14-16 (planning permissions), the Company may not know about all applications for planning permission made by its tenants, particularly where there are a large number of tenants and the subject matter is of minor importance. Query whether this should be covered in the notes to users, or through an amendment to the paragraphs themselves.

12. Paragraph 4.2.1 of current Schedule 3 will be amended to remove the reference to the taking of all steps, replacing it with a statement that no rent reviews are currently outstanding etc.

13. Paragraph 9.5 will be amended so that, in the event of reinstatement being frustrated, the paragraph will only provide for insurance monies being shared between the parties with reference to the value of their interests. The reference to insurance monies being payable to the landlord will be deleted as not reflecting the typical position for a lease with a long term.

14. Paragraph 16 can relate to an unregistered lease, but also a registered lease with good leasehold title. The reference to "and found to be satisfactory in all respects" will be deleted as it is inappropriate in the case of a registered lease- if it is satisfactory in that way, why does it not have an absolute title? Instead, words will be added that "no adverse matters have been disclosed" or words to that effect.

15. Paragraph 4.2.1 of current Schedule 4 will be amended to make it clear that the taking of all steps only relates to current rent reviews. A step may need to be taken prior to a rent review date or the commencement of negotiations.

16. Paragraph 6.1 will be replaced by "the use permitted by the Letting Document is consistent with the Existing Use". This is clearer.

17. The Court of Appeal decision in the *House of Fraser* case is awaited before the wording of paragraph 8.4 on authorised guarantee agreements is finalised.

18. In paragraph 8.5.1(b), it will be made clear that the underlease rent is not calculated by reference to the passing rent under the relevant Letting Document. This reflects the fact that most leases require the underlease rent to be the open market rent for the underlet premises.

19. Paragraph 9.3 will be re-worded to "There is provision for suspension of rent if the Premises or any part of the Property are damaged or destroyed by insured risks so as to make the Premises incapable of use and occupation or inaccessible, such suspension being limited to a period no longer than the period of loss of rent insurance for which the landlord covenants to insure. Such suspension will not apply where the insurance has been vitiated by the act or default of the tenant". Consider adapting the equivalent provision in current Schedule 3 (paragraph 9.3) for consistency.

20. Paragraph 12.1 of current Schedule 4 will be amended to refer to options to determine detailed in Part 8A of Schedule 5 (which will become Part 1 of new Schedule 5). The options to determine in that Part will not only be options to determine on damage or destruction by an insured risk, but also landlord or tenant's options to determine not triggered by damage or destruction.

21. Paragraph 13.3 of current Schedule 4 (whether contracting out warning notice was served on guarantors) may be amended in view of the practice of firms. This paragraph should be clear that a warning notice was served on the original tenant.

22. Paragraph 23 will be split to reflect the fact that it is aimed both at compensation under Part II of the Landlord and Tenant Act 1954 and Part I of the Landlord and Tenant Act 1927 (compensation for improvements). Paragraph 23.1 will be re-worded to reflect the wording, usually, found in leases.

23. There will be a new statement in new Schedule 5 that the tenant is required to yield up the Premises with vacant possession and in compliance with the repair/decoration covenants in the relevant Letting Document.

24. Part 8A of Schedule 5 (which will become Part 1 of new Schedule 5) will not only ask for the amount of the initial rent deposit, but also the current deposit amount, if different.

On a general note, the Committee awaits the final form of the new Code of Conduct to determine whether any recognition for the Certificate is required from the SRA.

At the Committee meeting, the Chair made some general comments about the approach to the new edition. There will not be an extensive re-write, rather some updating and modest correction. There will, however, be a change in the Certificate's presentation so that each statement will be followed by a space for any disclosure. This has been a much requested change. One concern with this change in approach is the increased risk that a producer of the Certificate unwittingly changes the substantive provisions of the Certificate. Consequently, as a matter of good practice (but not a requirement), when the Certificate is provided to the recipient, it should be accompanied by a blackline comparison document showing changes from the form of Certificate on the CLLS website.

For the new edition "qualifications" will be known as "disclosures" to avoid confusion with other uses of the word "qualification" in the Certificate.

In response to comments about making the Certificate more user-friendly, there will be an alternative Schedule 4 to cater for properties with large numbers of Letting Documents.

There was a brief discussion about whether the provider of the Certificate should advise on the enforceability of provisions, for example, in leases, or instead provide the information in the knowledge that the recipient of the Certificate will take its own professional advice on the Certificate's contents. The almost unanimous view (reflecting previous discussions) was that the latter approach should be adopted. Of course, the provider should not deliberately mislead, but should give sufficient information to enable the recipient's solicitors to then provide to the recipient the legal analysis including on questions of enforceability.

The treatment of "Seller" in the current edition of the Certificate is not entirely satisfactory and this can be improved by requiring the identification of the sources of information that led to the Company's statements (for example, named individuals, replies from the Seller). Consideration will also be given to adding a note to the Questionnaire for the Certificate (found on the CLLS website) reflecting the fact that, where the Company is acquiring the property from the Seller, many of the Company's confirmations in response to the Questionnaire will be only "so far as the Company is aware".

When the drafting process is further progressed, a valuer's views will be sought on the new form of Certificate and how valuers use the Certificate.

The draft of the new Certificate will be updated to reflect the above discussions. The redraft will be circulated to the main PSL groups and also to planning and tax experts for comment.

The CLLS had been approached by Landscape in relation to using technology (not only that offered by Landscape) to promote the use and usefulness of the Certificate. It was considered that further information should be obtained from Landscape on its proposals so that the Committee can consider the matter further.

In due course, the CLLS's report on title (currently, in its third edition) will be reviewed.

4. CLLS SERVICE CHARGE PROVISIONS

The sub-group of the Committee (plus RICS Service Charge Code draftsmen, Peter Forrester and Chris Edwards) have now finalised the CLLS service charge provisions (for a shopping centre and separate provisions for an office building) and, there being no further comment from the rest of the Committee, the provisions will be added to the CLLS website. The proposed new Code has also been finalised and will be launched at the beginning of May 2011.

In view of the Code's reference to the CLLS service charge provisions, press releases (through Lehmann Communications) about the provisions will be timed to coincide with the Code's launch. The provisions will be publicised in RICS's Commercial Property Journal- Warren Gordon has produced a short piece. There may be scope for further joint CLLS/RICS articles on the provisions/Code in property journals and Lehmann will be consulted.

5. LOCALISM BILL

Reference was made to a couple of aspects of the Localism Bill of concern to real estate lawyers. Section 104 allows local planning authorities to apply to a magistrates' court for a "planning enforcement order" in respect of concealed breaches of planning control, even though the existing 4/10 year time limits for enforcement of planning breaches have elapsed. This could have serious consequences for property owners who were not responsible for the planning breach and had assumed any breach was immune from enforcement.

The other particular concern was that privately held property could be designated "assets of community value". The nomination could be made by a parish council or others. While the owner of the property and others can ask for the decision to be reviewed, the review may be unsuccessful. The effect of such a designation is potential blight on the property in that if the owner wishes to dispose of the property, the relevant "community interest group" must be given the opportunity to bid for the property. This will delay and impact on the owner's desired disposal.

6. OFT GUIDANCE ON APPLICATION OF COMPETITION LAW TO LAND AGREEMENTS

The final form of the Office of Fair Trading's guidance on the application of competition law following the revocation of the Land Agreements Exclusion Order is due to be published very shortly. There is not expected to be significant change from the draft guidance.

There was also a brief discussion on the impact of the Groceries Market Investigation (Controlled Land) Order 2010, by which certain land agreements in connection with grocery retailing activities are subject to additional control.

7. HMRC NOTE ON SDLT AVOIDANCE SCHEMES

Mention was made of HMRC's press release in January 2011 in relation to SDLT avoidance schemes. HMRC state that at the time of writing, their assessment is that none of the avoidance schemes that they have fully analysed has the effect the promoters claim – either because the general SDLT provisions do not apply in that way or because the targeted anti-avoidance rule operates to neutralise any tax advantage.

HMRC also state that they are now challenging all schemes which they have identified as being in use and will relentlessly pursue those who deliberately bend or break the rules – including, where appropriate, seeking penalties.

HMRC produced the note following a request from the Law Society, who had received many messages from solicitors faced with the dilemma of becoming involved in a scheme with which they felt uncomfortable or losing the conveyancing work.

8. LIGHT GREEN LEASE PROVISIONS

Much "light green" lease drafting, although well-meaning, has little bite. For that reason, the Committee has, for the moment, decided to defer embarking on a light green lease provisions drafting project, but will continue to monitor the practice in this area.

9. AOB

- Further enquiries will be made about how the CLLS Construction Law/Land Law committees' joint note on the use of the Contracts (Rights of Third Parties) Act 1999 as an alternative to collateral warranties, is being publicised by Lehmann etc. The note has been added to both committees' webpages.
- The Committee discussed other possible projects. It was considered that, in view of the importance of rights of light issues for developments in the City of London, a rights of light deed/crane oversailing licence would be a useful drafting project

for the Committee. Volunteers will be sought for this, as well as a project to review and possibly modernise the lease insurance provisions on the CLLS website.

10. **CPD- 1 hour (CPD reference CRI/CLLS).**
11. **Meetings for 2011 at 12.30pm: 16 May (note that this is a Monday), 13 July, 21 September and 23 November at CMS Cameron McKenna, Mitre House, 160 Aldersgate Street, London EC1A 4DD.**