

CITY OF LONDON LAW SOCIETY LAND LAW COMMITTEE

Minutes of a meeting held on 19 September 2012 at Hogan Lovells, Atlantic House, 50 Holborn Viaduct, London EC1A 2FG

In attendance	Jackie Newstead (Chair) Warren Gordon (Secretary) Professor Elizabeth Cooke (from the Law Commission) Colin Oakley (from the Law Commission) James Barnes Jamie Chapman Mike Edwards Martin Elliott Laurie Heller Pranai Karia Anthony Judge Daniel McKimm John Nevin Jon Pike Peter Taylor Nicholas Vergette
Apologies	William Boss Nick Brent Jeremy Brooks John Butler James Crookes Jayne Elkins Alison Gowman Charles Horsfield Nick Jones Emma Kendall Jeanette Shellard

1. MINUTES

The Minutes for the Committee meeting of 4 July 2012 were approved and are on the CLLS website.

2. LAW COMMISSION'S RIGHTS TO LIGHT PROJECT

Most of the meeting was taken up by a presentation by the Law Commission (Professor Elizabeth Cooke, the Law Commissioner, and her colleague, Colin Oakley) of some slides on its project on rights to light. The slides appear with these Minutes on the Committee's webpage. The formal consultation paper is likely to be published in February 2013.

Professor Cooke summarised the project which involves possible reform of law in an area in which there is a serious interest in the property industry. Once the Law Commission has received responses to its formal consultation, it will review with the Government next Summer, in the light of the responses, whether reform of the law in this area is worthwhile.

The areas discussed included:

- Should prescriptive rights to light continue?
- The measure of light;
- The test for whether there has been an actionable interference with a claimant's right to light was set out in the decision of *Colls v Home and Colonial Stores Ltd*. This has caused problems;
- Interaction with the planning system- planning is not within the Law Commission's terms of reference on this project;
- Compensation for infringement of the right to light;
- Remedies in the wake of the *Heaney* decision. Should there be limitations on the application of *Heaney*?
- Is the *Shelfer* test, relating to a court's discretion as to whether to grant an injunction to prevent a breach of the right, correct and should it be made statutory? At what point in the development process can a developer be confident no injunction will be granted? Should claimants be required to serve a notice by a certain point, otherwise the remedy will not be an injunction. Damages in lieu of an injunction. The current uncertainty over whether an injunction will be granted;
- Use of powers under section 237 of the Town and Country Planning Act 1990;
- The rights of tenants and whether their landlord can release their rights- much will depend on the drafting in their leases;
- The policy objective of seeking an appropriate balance between different interests;
- If a developer changes its proposals, how much protection does it have?

The Law Commission highlighted that an important part of a decision to legislate is the "Impact Assessment" on the financial implications and the scale of the problems of rights to light. The Law Commission relies on people in the property industry to provide the data to support any proposed legislative change. The Law Commission has provided the questions set out below, the answers to which will help the Impact Assessment (clearly, the Law Commission will ask more detailed questions in its formal consultation paper).

Law Commission's questions

"1. In the City, what percentage of developments do you think involve problems relating to rights to light? By "problems" we mean an issue that has to be negotiated, whether or not it in fact leads to litigation or to frustration of the development.

2. Is it possible to say what sort of transactions, again in the City, are most likely to encounter such problems?

3. Could you give us examples of the sort of problems that arise, and the sort of solutions or transactions that have to be undertaken in order to solve those problems? For example, deeds of release, litigation, section 237, insurance etc? Could you say which are the most frequently encountered? In particular, if any of the solutions involve unnecessarily complex arrangements, could you explain what is involved in implementing the solution (for example section 237 requires for the local authority to have an interest in the property; we are aware that this can involve an otherwise unnecessary sale and leaseback arrangement and potentially additional tax consequences).

4. Could you give examples of the cost of any of those transactions or solutions, in terms of the percentage of either the cost of development, or of profit to the developer, or of value of the completed development -or indeed any other measure that seems useful or relevant? Where insurance is the "solution" could you tell us anything about the scale of cost involved in premiums and excesses?

5. Have you any sense of the proportion of developments in the City in each year that are frustrated - either do not go ahead at all, or have to be dramatically modified - as a result of rights to light problems? Could you give any examples of the cost of a frustrated development?"

The Law Commission has concentrated on asking questions about City developments, but data about other areas in England and Wales will be equally welcome.

The next step is for Committee members to send any thoughts on the questions above or otherwise to the Law Commission and, subsequently, to respond to the Law Commission's formal consultation paper.

The Committee thanked Professor Cooke and Colin Oakley for coming to talk to the Committee about this very important topic and hoped to continue the dialogue as the project progressed.

3. BPF LEASE PROJECT

The British Property Federation has a project to produce an investment lease to try and make transactions quicker and less contentious. The aim of stage one of the process was to come to an agreement on the style, structure and content of an institutional lease for commercial premises let on longer (10 years plus) terms.

Stage two is a reporting stage in which various BPF landlord members consider the draft and notes outlining the decisions that are needed. If stage two proves successful and the parties can move to agreeing that the lease can be used by major institutional property owners going forward, stage three will involve adapting this lease for various different types of property class.

The lease is designed for a retail shopping centre and other leases or clear sets of amendments will be needed for industrial, office, leisure, standalone retail etc. Existing leases will not be modified to take these provisions into account. It may not be feasible to introduce this for existing shopping centres where there is an on-going asset management function and leases are ending and new leases are being granted. However, it should be possible for new developments and it may be possible on major refurbishments.

The Committee while commending the BPF on its project wondered whether any standard lease can hope to encapsulate the commercial points for every transaction.

Any feedback should be sent to Jackie Newstead by 17 October 2012.

- 4. CPD- 1.5 hours** (CPD reference CRI/CLLS).
- 5.** 2013 dates for Committee meetings to follow- at 12.30pm at Hogan Lovells LLP, Atlantic House, Holborn Viaduct, London EC1A 2FG.