

CITY OF LONDON LAW SOCIETY LAND LAW COMMITTEE

Minutes of a meeting held on 10 May 2012 at Hogan Lovells, Atlantic House, 50 Holborn Viaduct, London EC1A 2FG

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

1. WELCOMES

Mike Edwards from Clifford Chance LLP and Prania Karia from CMS Cameron McKenna LLP were welcomed. Their committee membership (and that of Charles Horsfield from Macfarlanes LLP) will be confirmed once the requisite advertising process for the positions has been completed.

This is the first meeting of the new Chair of the Committee, Jackie Newstead. The Committee looks forward to a fruitful period under her leadership.

2. MINUTES

The Minutes for the Committee meeting of 21 March 2012 were approved and are on the CLLS website.

3. UPDATE ON RIGHTS TO LIGHT PROJECT

The right to light sub-group met on 2 May. The deed of release is essentially agreed. Since a right to light deed of release is often just the culmination of a long and complex process, the sub-group considered that a particularly useful part of this project would be a note or checklist to accompany the deed.

This will probably be a one or two page document that will include the comments of a right to light expert; City Corporation comments on the procedure under section 237 of the Town and Country Planning Act 1990 perhaps with an example of the Corporation's own form of deed of release; and an insurance section. The note will not cover law (already adequately dealt with in textbooks), but will have useful practical comments on timing; the appointment of rights to light experts; the role of tenants and mortgagees; the reciprocity of release; and the danger of injunctions.

Mike Edwards expressed an interest to become an additional member of this sub-group.

The British Property Federation is keenly interested in rights to light having produced a draft Rights of light protocol. The Law Commission is in the early stages of a project potentially to reform the law on rights to light.

Representatives of the Committee will meet with the Law Commission and BPF on 24 May to discuss law reform on rights to light and this may be useful for the Committee's right to light project.

4. LAW COMMISSION REPORT ON EASEMENTS AND COVENANTS

It was agreed that a supportive response to the Law Commission's report "Making Land Work: Easements, covenants and profits à prendre" would be sent by the Committee to the Ministry of Justice. While some may have one or two differing views from that expressed in the report, as a whole, the report was applauded for the excellent suggestions for reforming the law in this area, for example, in relation to positive covenants and also granting easements to the same party in the context of a transfer/mortgage of part.

5. CITY PROTOCOL FOR DISCHARGING MORTGAGES

It was agreed that a sub-group would be set up to produce a protocol for discharging mortgages on completion. The CLLS Financial Law Committee and Association of Property Bankers will be contacted to ascertain whether they wish to be involved. This area causes a lot of problems in practice and it was considered that standardised, best practice in a protocol may be useful. Anthony Judge, Peter Taylor, Nicholas Vergette, Jayne Elkins, Pranai Karia and Warren Gordon agreed to join a sub-group on this topic.

6. UPDATE ON INSURANCE PROVISIONS PROJECT

The sub-group which is considering insurance provisions in a commercial lease last met on 22 March, when there was a lengthy discussion about the insurance treatment of tenant's fit-out, especially where the landlord has contributed to the cost. The sub-group decided that the starting point for the new set of provisions will be some clauses kindly provided by Laurie Heller and comments are requested from sub-group members. It was suggested that the issue of landlord's insurers refusing to insure tenant's contractors should be discussed at the next sub-group meeting, as well as terrorism wording in insurance policies.

7. CLLS OPINION LETTER

The form of overseas counsel's opinion letter in relation to overseas companies etc on the Land Law Committee page of the website has not been updated in some time. A small sub-group was set up which made some changes to the form. Further comments were made at the 10 May Committee meeting about the opinion. Should it refer to the actually executed document? Should there be a comment on what constitutes "duly executed" by the entity that is the subject of the opinion? In the light of those comments, it was considered appropriate to re-circulate the opinion to the Committee for further comments.

8. CLLS CERTIFICATE OF TITLE

It was agreed that the 7th edition of the Certificate would be unveiled this September/October (after the Olympics and Summer break) together with accompanying confirmation letters and questionnaires.

9. ASSETS OF COMMUNITY VALUE

Mention was made of "assets of community value" under the Localism Act 2011 and the latest position. After the meeting, Warren Gordon circulated the following email to the Committee-

"At the last meeting we briefly discussed "assets of community value" under the Localism Act 2011. Below are some comments from DCLG which I was sent in February 2012 and provide further information on the enforcement process and suggest that the conveyancer will still need to provide the confirmation to the Land Registry re. the restriction. I was told that the regulations which I and others saw were subject to clearance and Parliamentary approval and the plan was to lay these in April. I am not aware that this has happened yet.

DCLG comments- One of the areas we discussed was how the enforcement/compliance arrangements would work. We took on board the concerns you raised and have since had success in persuading the Land Registry to take a more straightforward approach to the process for registering change of ownership of a listed asset. The Land Registry are now willing to accept confirmation from the conveyancer that the disposal has been compliant with the Assets of Community Value legislation. The local authority will not have a role here other than to apply for a restriction to be placed, or removed, from the

Register. As I think we mentioned when we met, we will be amending the Land Registration rules, and we will share the details of these changes with you as soon as we can.

We also discussed the impact of the Protected Period (see s95(4) and 95(6) of the Act). The protected period is the 18 month period that runs from the date at which the local authority is notified of the owners intent to sell a listed asset. Whilst this applies, after the initial interim and potential full, moratorium period no further moratorium periods can be triggered. If the property has not been disposed of during the 18 month the owner will have to reinform the local authority and repeat the interim moratorium period."

The Committee should review the Assets of Community Value regulations once issued.

10. FLOOD

Flood clearly remains a key issue for the property industry. The Law Society will be issuing a practice guide on flood (as well as a revised environmental practice guide), which will provide further guidance on the approach solicitors should take to this issue. When the practice guide is issued, the Committee will consider how it wishes to respond and whether there are any valuable consequential projects which it wishes to undertake.

11. ENLARGEMENT

The Land Registry's current practice, if a lease satisfies all the requisite conditions for enlargement, is to close the title to any existing affected freehold reversion, or to close the freehold title as to part where the lease affects only part of this title, and the former tenant unilaterally acquires a **new** fee simple estate. However, the Registry is uncertain whether this practice is correct for particular technical reasons. Some legal commentators are of the view that the former landlord's freehold disappears following enlargement, while others take the view that it is possible to have more than one registered freehold title to registered land.

As a result of this uncertainty, the Land Registry proposes a change of practice so that it will not close any existing freehold title, whether as to whole or part, following enlargement. If the application for enlargement is approved, the new freehold estate (for which the Registry will require a form FR1) will subsist simultaneously with the existing freehold title.

The Committee regarded this as a confusing state of affairs. After the meeting, the Registry announced that it was delaying the introduction of the change of practice to allow for further consultation.

12. UNDUE INFLUENCE RENDERING GUARANTEE UNENFORCEABLE

Trustees of Beardsley Theobalds Retirement Benefit Scheme v Yardley from September 2011 highlights that in certain circumstances a guarantee for tenant's obligations can be rendered unenforceable, because the guarantor has been unduly influenced, and landlords should be checking that guarantors have been made aware of the implications of the guarantee they are about to provide.

The High Court held, on the facts of the case, that the guarantee was unenforceable, because the guarantor had been unduly influenced to sign it, the nature of the transaction having been misrepresented to him. The landlords argued that, even if there was undue influence, they had no constructive knowledge of that and were, therefore, still entitled to enforce the guarantee. The Court, however, disagreed. The landlords and their advisers knew about the company's precarious financial position and should, therefore, have checked that the guarantor was financially sound and aware of the risks he was undertaking.

This decision raises important issues for landlords dealing particularly with an individual guarantor for a tenant, where the tenant appears to be in a financially precarious position. The Court's comments on what the landlord should do in that situation are worth noting.

13. MEMBERSHIP

The Chair will discuss with Robert Leeder the process for advertising the Committee position of members who leave the Committee.

14. AOB

Mike Edwards suggested that the approach to pre-packs would be a useful subject for discussion at the next Committee meeting. Also it would be useful to discuss the BPF short form of lease.

15. CPD- 1.5 hours (CPD reference CRI/CLLS).

16. Dates for Committee meetings for the remainder of 2012: 4 July, 19 September and 21 November, all at 12.30pm at Hogan Lovells LLP, Atlantic House, Holborn Viaduct, London EC1A 2FG.