

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

**Minutes of a meeting held on 4 July 2012 at Hogan Lovells, Atlantic House, 50 Holborn Viaduct, London EC1A 2FG**

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

**1. MINUTES**

The Minutes for the Committee meeting of 10 May 2012 were approved and are on the CLLS website.

**2. LEASE DRAFTING FOR GOLDACRE/LUMINAR CASES**

There will be a Land Law Committee sub-group project to investigate whether changes can be made to lease drafting to improve the position of landlords in the light of administrator/liquidator tactics highlighted by the *Goldacre* and *Luminar* cases. Jackie

Newstead and Peter Taylor have volunteered and Mike Edwards will be asked if he wishes to lead this project in view of his comments on pre-packs at the previous Committee meeting.

The following were the key points from *Leisure (Norwich) II Ltd v Luminar Lava Ignite Ltd (In Administration)* [March 2012] High Court.

Where rent is payable in advance and falls due for payment prior to the commencement of the liquidation or administration, then it is provable but not payable as a liquidation or administration expense, even though the liquidator or administrator retains the property for the purposes of the liquidation or administration for the whole or part of the period for which the payment in advance was payable.

Where rent payable in advance becomes due during a period when the liquidator or administrator is retaining the property for the purposes of the liquidation or administration, then the whole sum is payable as a liquidation or administration expense, even though the liquidator or administrator gives permission to forfeit or vacates before expiry of the period for which the payment in advance is due.

Where rent is payable in arrears and accrues due during a period when the administrator or liquidator is retaining property for the purposes of the liquidation or administration, the liquidator or administrator will be liable to pay as an administration or liquidation expense at least the rent that accrues from day to day for so long as he retains possession of the premises for the purposes of the liquidation or administration.

The Court's approach in *Luminar* was consistent with the *Goldacre* decision.

In the recent case of *Lazari v Game (UK) Retail* (May 2012- yet to be reported), Game went into administration the day after a quarter day and PwC, its administrators, told Lazari, the landlord, that they would not pay that quarter's rent, because they were not in occupation on the quarter day. PwC had granted to a third party a licence to occupy the premises without Lazari's consent. Lazari served a notice under section 146 of the *Law of Property Act 1925* detailing the breaches relating to non-payment of rent and alienation and also Game's administration, and applied to court for consent to forfeit. The Court held that, even though the administrators chose not to pay rent for the quarter, Lazari could still forfeit.

The Court held that there was no evidence of any prejudice to the administration in allowing the forfeiture. Whether the rent is technically payable or not, the administrator's refusal to pay rent is a prejudice that the landlord suffers and cannot be ignored under the guidance in *Atlantic Computers*.

It was noted that several major property companies are reported to be preparing a class action against an administrator of a retailer in order to change the law so that landlords can recoup losses when rent, due on the quarter day, is not paid and administrators are subsequently appointed and continue to trade the relevant stores.

### **3. DEFRA CONSULTATION ON PUBLIC RIGHTS OF WAY**

The Department for Environment, Food and Rural Affairs published a consultation document "Improvements to the policy and legal framework for public rights of way", on 14 May 2012.

Section 56 of the Countryside and Rights of Way Act 2000 contains a cut-off date of 1 January 2026 for certain rights of way created before 1949 to be recorded on definitive maps. If section 56 is brought into force, those not claimed and recorded by that date will be extinguished.

While the implementation of the 2026 cut-off date is a core proposal, the consultation makes it clear that there will be certain safeguards, for example, useful or potentially useful historical routes, including all of the rights of way that are currently in regular use, must be preserved.

The consultation, which ends on 6 August 2012, is not limited to the legal processes for recording historical public rights of way and also considers:

- whether improvements, similar to those identified for recording rights of way, should be applied to the creation, diversion and extinguishment of them;
- how to make it easier for landowners to progress proposals for the diversion or extinguishment of rights of way crossing their land, subject to the current public interest tests; and
- ways of improving how changes to rights of way are dealt with in relation to applications for planning permission.

The Committee will not be responding to the consultation- it was reassured by the proposal that rights of way that are currently in regular use must be preserved.

### **4. HM TREASURY'S CONSULTATION "ENSURING THE FAIR TAXATION OF RESIDENTIAL PROPERTY TRANSACTIONS"**

The Government announced a package of measures in Budget 2012 to ensure that individuals and companies pay a fair share of tax on residential property transactions and to tackle avoidance, including the wrapping of property in corporate and other "envelopes". HM Treasury's consultation "Ensuring the fair taxation of residential property transactions" is on two specific parts of this package:

- an annual charge on residential properties valued over £2 million owned by certain "non-natural" persons (broadly companies, partnerships including companies and collective investment vehicles); and
- the extension of Capital Gains Tax to the disposal by certain non-resident non-natural persons of residential property, interests in such property, or the envelopes in which they are held.

Concern was expressed by the Committee at the potential scope of the annual "SDLT" charge for residential properties valued over £2 million owned by certain non-natural persons and that this could unfairly catch bona fide investors and developers. For example, although there is an exemption for developers, the Committee could not see an equivalent for long term investors, so that an institution, for instance, acquiring a mixed use building, which includes an apartment worth more than £2 million, appears to be caught by the annual charge in respect of the apartment. Also the two year rule for developers appears unfair in relation to start-up businesses.

There was also discussion of how effective enforcement measures may be, where the party not paying the charge is offshore in a jurisdiction which is not conducive to enforcing judgments of the UK Courts.

The consultation welcomes views on, among other matters, how any exclusion of collective investment vehicles can be crafted to distinguish between widely-held funds and quite narrowly held ones that may be potentially used for avoidance.

The CLLS Tax Law Committee is responding to the consultation and the Committee will ask to see the Tax Committee's draft response before it is submitted, if possible. The consultation closes on 23 August 2012.

## **5. 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. Potential contributors are being contacted. 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.

Representatives of the Committee met with the Law Commission and the British Property Federation on 24 May 2012 to discuss the Law Commission's project, potentially, to reform the law on rights to light.

The Committee is keen to continue to liaise with the Law Commission on this project.

## **6. LAW COMMISSION REPORT ON EASEMENTS AND COVENANTS**

A response was sent on behalf of the Committee to the Ministry of Justice, generally, supporting the Law Commission's report "Making Land Work: Easements, covenants and profits à prendre".

**7. UPDATE ON INSURANCE PROVISIONS PROJECT**

The sub-group, which is considering insurance provisions in a commercial lease, has decided that the starting point for the new set of provisions will be some clauses kindly provided by Laurie Heller and comments are in the course of being provided by sub-group members. A fresh draft will then be circulated and a further meeting of the sub-group arranged, hopefully, to finalise the drafting.

**8. CLLS OPINION LETTER**

The form of overseas counsel's opinion letter in relation to overseas companies 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. Recent comments provided by Committee members will be incorporated and a final version circulated to the Committee. Assuming no further comments, the revised Opinion will be added to the CLLS website. Separately, Robert Leeder will be asked whether there is an equivalent to the CLLS for Jersey and Guernsey as it will be useful for the Committee to liaise with them as to the form of Opinion Jersey and Guernsey firms will, generally, be happy to give.

**9. CLLS CERTIFICATE OF TITLE (NEW 7<sup>TH</sup> EDITION)**

Comments are awaited from the CLLS Planning Law Committee on the impact of the Localism Act on the Certificate's provisions. Once those comments are provided, a final draft of the Certificate will be circulated to the Committee incorporating any changes emanating from those comments and a few other changes made since the Committee last saw the Certificate. The plan is still to launch the Certificate in September/October 2012 (together with accompanying confirmation letters and questionnaires).

**10. ASSETS OF COMMUNITY VALUE**

The draft Assets of Community Value (England) Regulations 2012 have been publicised <http://www.legislation.gov.uk/ukdsi/2012/9780111525791/contents>. Two volunteers were sought from the Committee to provide a summary at the next Committee meeting of the key points in the regulations. The CLLS Planning Law Committee is, apparently, also looking at this.

Post-meeting note: John Nevin kindly volunteered.

**11. FLOOD**

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

## 12. CITY PROTOCOL FOR DISCHARGING MORTGAGES

Anthony Judge has kindly agreed to lead the Committee sub-group on 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. The protocol should also consider the implications for discharges arising from the recent computer problems at Nat West. Peter Taylor, Nicholas Vergette, Jayne Elkins, Pranai Karia and Warren Gordon have also agreed to join the sub-group.

## 13. ENLARGEMENT

The Land Registry is currently considering feedback (including from the Law Society) to its proposals to change its practice on enlargement, so that it will not close any existing freehold title, whether as to whole or part, following enlargement, with the effect that the new freehold estate will subsist simultaneously with the existing freehold title. The Registry, previously, announced that it was delaying the introduction of the change of practice to allow for further consultation.

## 14. AOB

- The Law Commission has published a consultation paper on the Electronic Communications Code <http://lawcommission.justice.gov.uk/areas/electronic-communications-code.htm> . This, potentially, has an important impact and it would be sensible for a Committee sub-group to consider and produce a response to the consultation. Volunteers are requested from the Committee. The consultation closes on 28 October 2012.

Post meeting note: Jon Pike kindly volunteered.

- Peter Taylor agreed to feedback on a recent BIS consultation "Encouraging new business models - Proposal to amend the Estate Agents Act 1979" <http://www.bis.gov.uk/Consultations/proposal-amend-estate-agents-act?cat=open>
- Following the recent departures of three Committee members, their Committee positions will be advertised on the CLLS website and in the "City Solicitor" with a deadline of 31 August 2012 for responses.
- A record will be drawn up of Committee members' attendance at Committee meetings.
- The BPF short form of lease will be considered at a future meeting.

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

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