

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

**Minutes of a meeting held on 25 May 2016 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>Nick Brent</b> <b>Jamie Chapman</b> <b>Martin Elliott</b> <b>Alison Hardy</b> <b>Kevin Hart</b> <b>David Hawkins</b> <b>Laurie Heller</b> <b>Victoria Hills</b> <b>Pranai Karia</b> <b>Tom Pedder</b> <b>Sangita Unadkat</b> <b>Ian Waring</b>
<b>Apologies</b>	<b>James Barnes</b> <b>James Crookes</b> <b>Bruce Dear</b> <b>Caroline DeLaney</b> <b>Mike Edwards</b> <b>Jayne Elkins</b> <b>Alison Gowman</b> <b>Nick Jones</b> <b>Anthony Judge</b> <b>Daniel McKimm</b> <b>John Nevin</b> <b>Jon Pike</b> <b>Darren Rogers</b> <b>Peter Taylor</b> <b>Nicholas Vergette</b>

**1. WELCOME**

Welcome to Victoria Hills from Freshfields Bruckhaus Deringer who was attending her first meeting.

## 2. **MINUTES**

The Committee approved the minutes for the March 2016 Committee meeting and they will be added to the CLLS website.

## 3. **LAW COMMISSION CONSULTATION ON LAND REGISTRATION ACT 2002**

The majority of the meeting was taken up with a discussion of aspects of the Law Commission's consultation on the Land Registration Act 2002. The Committee agreed that it will endorse the PSLs' detailed response, but would also add its own comments on certain select areas, especially those discussed at the meeting. They include the following bullet points, which will form the basis of the Committee's response. A meeting has been set up with the Law Commission to discuss the Consultation on 13 July at 12.30pm at Hogan Lovells. The deadline for responding to the Consultation is 30 June 2016 although there is a little flexibility in that regard.

- Supporting Law Commission's proposal not to reduce length of term for lease to be compulsorily registrable. However, the Committee will suggest that easements contained in leases that are not compulsorily registrable should not themselves be compulsorily registrable. If the Law Commission insists that such easements should continue to be compulsorily registrable, the easements entry should provide details of the lease that contains the easements.
- An estate in mines and minerals can be owned by someone other than the registered proprietor of the "surface title". Where an estate is owned in mines and minerals separately from the surface title, the estate is not currently subject to compulsory first registration. The Committee considered that compulsory first registration should be extended to estates in mines and minerals and that the owner of the surface title should always be informed when an application is received by Land Registry to register an estate in mines and minerals. The title number to the estate in mines and minerals should be referred to on the surface title. Some concern was also mentioned about the ownership of airspace which may become more of an issue with the increasing prevalence of drones.
- The Law Commission highlighted a concern about unilateral notices. Under the current procedure, there is no requirement for the beneficiary of the notice to produce evidence in support of the right claimed. That may hamper attempts between the parties to negotiate a solution if there is a dispute over the existence of the right. It was acknowledged by the Committee that the current unilateral notice process provided a fairly flexible method to protect agreements relating to land. It was also useful because the agreement itself does not need to be sent to Land Registry which overcomes potential problems with Land Registry rejecting "virtually signed" documents. Concern was expressed by some at the meeting as to whether the need for evidence might make the unilateral (or replacement "summary" notice) process less useful. Another reason why the unilateral notice process is sometimes used is to ensure that confidential agreements do not have to be sent to Land Registry. If evidence in relation to such confidential

agreements which of itself may be confidential will be required in future, members questioned what Land Registry would do to protect the evidence from disclosure in view of the requirement for public disclosure (subject to limited exceptions) of information held by Land Registry. Some members saw merit in the requirement to produce evidence, since this may prevent what happened when chancel repair and manorial rights ceased to be interests with overriding status at the end of 12 October 2013. A large number of unilateral notices were registered by PCCs and others, and while many were removed on application by the registered proprietor, the entry of the notices was disconcerting. However, the Law Commission proposes that a notice should be entered if the reasons given as to why the interest still binds the title are not groundless. Land Registry may conclude that the reasons for noting a chancel repair liability are not groundless, because of the uncertainties in the law, hence the notice may be entered anyhow. The Law Commission should revisit the “not groundless” test as part of considering the basis for entering a notice.

- The Committee agreed with the Law Commission’s proposal to extend the protection of section 29 of the LRA 2002 (which applies to registrable dispositions) to unregistered interests such as estate contracts (sale contracts, agreements for lease, options) or the benefit of a restrictive covenant. The current position is that if an estate contract is noted on a title, while it gives that interest priority over interests subsequently created, it will not have priority over unregistered interests created earlier even if they have not been noted on the title. Enabling unregistered interests to benefit from section 29 would mean that the noted estate contract would have priority over unregistered interests created earlier but not noted on the title. The Committee supported this proposal.
- The Law Commission has detailed proposals in relation to the rectification of the register following a fraud. Fraud is the cause of at least half the total amount paid by Land Registry by way of indemnity in recent years, so consequently rectification and indemnity are key areas of focus for the Law Commission. Assume registered proprietor A is the victim of a fraudster B who transfers the property to an innocent third party C. How can both A and C be protected? The Law Commission considered that rectification of the register must be available against C, otherwise, A is left without the land and without an indemnity. While there will be a degree of discretion to take account of the particular circumstances of each situation, the key features of the Law Commission’s proposals are:
  - that where the registered proprietor’s name is removed (or omitted) from the register by mistake (i.e. A), then the law should be weighted in favour of returning the land to him.
  - to retain the protection that the law currently affords to a registered proprietor in possession in determining who should retain the land.

- to introduce a “long stop” so that after ten years rectification of the register should generally cease to be available. The main exceptions to this long stop arise where: (a) the person whose name was mistakenly removed or omitted from the register remains in possession; or (b) the registered proprietor caused or contributed to the mistake by fraud or lack of proper care. The operation of the long stop would not, however, affect the ability of a party to claim an indemnity. Some members of the Committee questioned why there should be a ten year long stop fearing that the time limit may be missed due to a lack of awareness about the mistake. This would be particularly the case with bare land. Others considered that ten years seemed long enough, but the Law Commission can be quizzed as to the reason why they chose ten years.
  - to ensure that where a charge (a mortgage) is registered by mistake (for example, because the charge was forged) or is granted by a registered proprietor whose own registration is a mistake, then the chargee should not be able to oppose rectification of the register, but should be confined to receiving an indemnity. The Law Commission stated that this proposal reflected the fact that the chargee’s interest is financial only. The Committee opposed this proposal, considering that the chargee’s interest may extend beyond a financial one and, therefore, the chargee should be able to benefit from both rectification and indemnity remedies.
- One of the most controversial aspects of the Consultation relates to the proposals on indemnity. The Law Commission resists the introduction of a cap on Land Registry’s liability and the Committee supports that. It is worth remembering that Land Registry has an existing statutory right of recourse (where it has paid out under the indemnity) against a party at fault. The Law Commission comments that a current concern is that while Land Registry carries the risk of transactions once they are entered on the register, Land Registry is not best placed to detect fraud and those who may be better placed – such as conveyancers and mortgage lenders – may not be incentivised to develop best practice, because they will not necessarily bear the cost. The Law Commission considers whether any reforms should be made to ensure that the financial consequences of fraud fall on the minority of conveyancers and lenders who fail to conduct their business in a professional manner and to exercise all due diligence in their dealings with land, as a means of encouraging best practice. The key point are the Law Commission’s questions whether a duty of care that conveyancers may owe Land Registry in respect of applications that they make should be enhanced and whether a statutory duty of care should be introduced. Some Committee members considered that if the conveyancer failed to comply with its existing professional requirements, there should be some comeback. However, if there is an existing statutory right of recourse, why does this need to be expanded into a statutory duty of care? This will be the main point on which the Committee responds. The Committee is also seriously concerned by the Law Commission’s suggestions of removing the ability of mortgagees to obtain an indemnity from Land Registry in certain circumstances, or imposing a specific statutory duty on

mortgagees to verify the identity of borrowers. The Law Commission consultation has to be seen in the context of the BIS consultation on Land Registry privatisation and that the approach of a privatised Land Registry may differ from a publically owned Land Registry especially on the issue of indemnity and enforcement of any statutory duty of care.

- The Law Commission provides some thoughts on electronic conveyancing and, particularly, the key conclusion that while simultaneous completion and registration should remain the goal of electronic conveyancing, it is not practical to move directly to such a model from paper-based conveyancing. So the Law Commission proposes that the requirement of simultaneous completion and registration should be removed from the LRA 2002. The Law Commission also makes proposals to ensure that overreaching continues to operate in the context of electronic conveyancing. It may be helpful for the Committee to flag the increasing use on transactions of virtual and other digital signatures and whether the Law Commission can make any proposals to begin to move Land Registry away from its requirement for wet ink signatures.
- Although not connected to the LRA 2002, the Law Commission is determining projects for its next programme of reform and has asked for evidence of issues in relation to the Landlord and Tenant Act 1954 and Landlord and Tenant (Covenants) Act 1995. The Government has previously been involved in detailed discussions to amend the 1954 Act to deal with concerns with the legislation and it makes sense to send the Law Commission the proposals emanating from those discussions. Warren Gordon is aware that this information will be sent through separately and he has also supplied information to the Law Commission about concerns with the 2 Acts.
- Pranai Karia mentioned an issue at the meeting in relation to deeds of priorities which can be considered for inclusion in the Committee's response.

#### 4. **BIS CONSULTATION ON LAND REGISTRY PRIVATISATION**

The Committee was reminded that a response had been sent on the Committee's behalf (excepting certain firms) to the BIS consultation on Land Registry privatisation.

<http://www.citysolicitors.org.uk/attachments/article/114/Response%20to%20the%20Government%20consultation%20on%20moving%20Land%20Registry%20operations%20into%20the%20private%20sector.pdf>

#### 5. **UPDATE ON WAYLEAVE PROJECT AND DIGITAL INFRASTRUCTURE WAYLEAVE AGREEMENT**

An update was provided on the wayleave project to create an industry standard digital infrastructure wayleave agreement. The operators have now provided further comments on the agreement. The number of points at issue has reduced and the key ones focus around indemnity. The drafting sub-group of Warren Gordon, Laurie Heller and Alison Hardy will meet on 27 May to agree a response to the comments. There is some time

criticality now to the project so any comments from the Committee on the form of document should be fed back as soon as possible.

**6. UPDATE ON PROGRESS WITH REVISIONS TO 7<sup>TH</sup> EDITION OF CERTIFICATE OF TITLE**

The project to review and create an updated version of the 7th edition of the Committee's Certificate of Title continues. The next meeting of the sub-group is on 6 June 2016 at 12.30pm at Olswang.

**7. NEW LOCAL SEARCH FORMS FROM 4 JULY 2016**

A reminder that the new local search forms CON29 and CON29O (including enquiries on community infrastructure levy and assets of community value) go live on 4 July 2016. Please click on <https://www.lawsociety.org.uk/news/stories/con29-and-con29o-enquiries/> for further details.

**8. CODE FOR LEASING BUSINESS PREMISES QUESTIONNAIRE.**

The Committee was reminded to respond to the questionnaire <https://communities.rics.org/connect.ti/clbp/viewQuestionnaire?qid=4082083> circulated on the Code for Leasing Business Premises. The deadline is 7 June 2016. The responses will help to inform the form of the new Code. The Law Society, RICS and BPF have set up a working party to consider the new Code and there will be input from various stakeholders. Volunteers are requested to represent the Committee on the working party.

**9. ATTACK ON CAVEAT EMPTOR RULE IN CONSUMER PROPERTY TRANSACTIONS**

There was a brief reminder of the impact of the Consumer Protection from Unfair Trading Regulations 2008 on trader to consumer property transactions and the undermining of caveat emptor in that context. Please click on the following link for further information on a little known topic <http://www.olswang.com/articles/2016/03/attack-on-caveat-emptor-rule-in-consumer-property-context/>

**10. AOB**

10.1 Kevin Hart mentioned 2 Bills of relevance to the Committee (from the Queen's Speech). The Neighbourhood Planning and Infrastructure Bill on which the Planning Law committee will lead but the Committee should liaise with them. The Bill also enables Land Registry privatisation. The second Bill is the Law of Property Bill hopefully to give effect to the legislation included in the Law Commission's report on Easements, Covenants and Profits a prendre.

10.2 At a future Committee meeting, there will be a discussion concerning enquiries raised by firms, relying on searches obtained by other firms, in relation to the terms and conditions of the search providers. On a different note, Pranai mentioned that his search provider

had highlighted stone mining searches and wondered if any other members had encountered this, which they had not.

10.3 Jayne Elkin's item on factors indicating fraud will be included in the agenda for the July meeting.

11. **CPD 1 HOUR 15 MINUTES - NB: CPD REFERENCE IS CRI/CLLS.**

12. **REMAINING 2016 COMMITTEE MEETING DATES - 13 JULY, 28 SEPTEMBER AND 23 NOVEMBER, ALL AT 12.30PM AT HOGAN LOVELLS LLP, ATLANTIC HOUSE, HOLBORN VIADUCT, LONDON EC1A 2FG.**