

CITY OF LONDON LAW SOCIETY LAND LAW COMMITTEE

Minutes of a meeting held on 23 November 2016 at Hogan Lovells, Atlantic House, 50 Holborn Viaduct, London EC1A 2FG

In attendance	Jackie Newstead (Chair) Warren Gordon (Secretary) Nick Brent Jayne Elkins Martin Elliott Alison Hardy David Hawkins Laurie Heller Victoria Hills Nick Jones Anthony Judge John Nevin Tom Pedder Jon Pike Jeremy Shields Sangita Unadkat
Apologies	James Barnes Jeremy Brooks Jamie Chapman James Crookes Bruce Dear Caroline DeLaney Alison Gowman Pranai Karia Daniel McKimm Peter Taylor Ian Waring

1. NEW MEMBER

Franc Peña of Clifford Chance has joined the Committee and his first meeting will be the January 2017 one.

2. MINUTES

The Minutes for the 28 September 2016 Committee meeting were approved and will be added to the Committee webpage.

3. 2016 UPDATE OF 7TH EDITION OF CERTIFICATE OF TITLE AND ANCILLARY DOCUMENTATION AND REPORT ON TITLE

The 2016 Update of the Certificate of title and ancillary documentation have been launched and appear on the Committee webpage -

http://www.citysolicitors.org.uk/index.php?option=com_content&view=category&id=141&Itemid=469.

The new documentation is being used and appears to have been well received.

Articles have been written for industry publications – Jackie Newstead has produced a Q&A for Lexis and Warren Gordon was quoted in Estates Gazette and has produced an article which Kevin Hart of CLLS is offering to various publications.

The Committee will look to publish the Certificate in the Encyclopaedia of Forms and Precedents and Kevin will liaise with Lexis.

An equivalent Scottish version of the 2016 Update of the Certificate and ancillary documentation has been published on the Property Standardisation Group's website <http://www.psglegal.co.uk/>.

There has been considerable demand for Word versions of the documentation (since currently the CLLS website only has pdf versions). Warren has circulated Word versions to a large number of firms and the CLLS has been sent the Word versions to add to the website if at all possible.

A sub-group of the Committee will consider the existing Report on title <http://www.citysolicitors.org.uk/attachments/article/114/report-on-title.doc> and Laurie Heller, Bruce Dear, Jon Pike, John Nevin and Warren Gordon have agreed to be involved. Since there is an existing CLLS wrapper for reports on title, it was considered that the CLLS Report on title should be independent of the Certificate documentation. It was agreed that the Report could be used for a corporate acquisition of properties where property is not the most significant asset and may have little or no capital value. Consequently, there is less detail in the reporting on title and the lease and letting documents than in the Certificate.

The members of the sub-group are given licence to look at the Report afresh and make any necessary changes to a document that is almost 10 years old. Some of the changes for the 2016 Update of the Certificate especially in relation to its front-end provisions will be reflected in the revised Report.

Actions: Addition of Word versions of Certificate and ancillary documentation to CLLS Website. Progress consideration of Report on title.

4. **DIGITAL INFRASTRUCTURE WAYLEAVE AGREEMENT**

The City of London Corporation standardised wayleave agreement has been taken up by many major operators, Westminster council and others. Vodafone seems slow to take up the agreement <https://www.cityoflondon.gov.uk/business/commercial-property/utilities-and-infrastructure-/Pages/Wayleaves.aspx>

Philip Saunders of the City of London is following up with some of the operators.

The Committee considered that it was important for member firms to promote the wayleave to their fee earners and clients. It was also important for operators and property owners to become more familiar with the wayleave and in that regard the provision of training on the wayleave by member firms would be very helpful.

There are several other potential projects in relation to digital infrastructure. The Greater London Authority appears interested in possibly sponsoring a project to create a standard lease for mobile installation – the Committee would again be involved in the drafting and the City of London would support the project. There was interest among certain operators in this project.

The new Electronic Communications Code may come into force next year and the Committee and the City of London may wish to create an equivalent of the standardised wayleave agreement for the new Code.

Actions: It was suggested that Philip Saunders be asked whether it would be possible for the London councils to insist (where relevant) on the adoption of the standardised wayleave as a condition of planning. Encourage take-up of wayleave and training for operators. Future wayleave/lease projects.

5. **LAW COMMISSION'S CONSULTATION ON ITS 13TH PROGRAMME OF LAW REFORM**

The Committee responded to the Leasehold aspect in particular of the Law Commission's Consultation on its 13th Programme of Law Reform. Part of the response was an endorsement of the Property Litigation Association's response.

The Committee's key point was that that the contracting out warning notice and declaration mechanism under the Landlord and Tenant Act 1954 be abolished and replaced by a requirement for a contracted out lease to have a clear warning at the top of the lease as to the statutory rights that the tenant loses. This would greatly reduce the administration and associated costs, yet at the same time warn the tenant that he is giving up statutory rights in entering into the lease.

A link to the Committee's response follows –

<http://www.citysolicitors.org.uk/attachments/article/114/Response%20to%20the%20Law%20Commissions%20consultation%20on%20its%2013th%20Programme%20of%20Law%20Reform%20%2030%2010%2016.pdf>

6. **CODE FOR LEASING BUSINESS PREMISES**

Jackie Newstead (representing the Committee) and Warren Gordon (representing the Law Society) had attended a couple of meetings of the "Technical content review" sub-group. This sub-group looked at the Landlord Code and has come up with a number of recommendations as to how it can be improved. There are six sub-groups considering different aspects of the Code documentation. The recommendations of the sub-groups will be discussed at a meeting of the overall working party on 30 November.

The RICS representatives would like to make the Code an RICS Professional Statement. The implications of doing so are:

- The Code would be branded as an RICS publication, although the badges of partner organisations (other stakeholders such as the Law Society, CLLS etc) would be displayed on the cover of the document.
- Ownership of the copyright for the content of the document would pass to RICS.

The specific status of an RICS Professional Statement means that compliance with the document would be mandatory for RICS professionals at all levels. As this group is likely to form the main target for the Code, the RICS sees this as being absolutely fundamental to achieving greater adoption of the Code.

In terms of comments on the Landlord Code itself:

- In the event of a break being successfully exercised, the landlord should be obliged to refund to the tenant rents previously paid and relating to the period after the break date.
- In terms of break conditionality, the reference in the current Landlord Code to the tenant leaving behind no continuing subleases should be extended to the premises being free of other third party rights, unless the landlord has consented to them.
- The Landlord Code is likely to be more circumspect on upwards or downwards rent reviews. The suggestions in the current Landlord Code in that regard have not been adopted in practice. There will be a greater emphasis on alternatives to upwards only reviews such as index linked reviews and turnover rents for retail leases.

Action: Committee members are asked to express any concerns about whether mandatory status of the Code would cause problems for their clients.

7. **SEARCH PROVIDERS' TERMS AND CONDITIONS**

There was a concern that the profession was insufficiently aware about whether or not the terms and conditions of search providers permitted the passing on of search results obtained by a seller's solicitor for the benefit of a buyer etc (such as in a sales pack situation). This was not helped by differing versions of providers' terms and conditions.

Even if the main providers (such as the NLIS channels) allowed for third parties such as buyers or lenders to benefit from the searches, third parties may not be able to benefit from the underlying searches themselves, which may have their own conditions.

If the terms do not allow for buyer/lender reliance, consideration should be given to the relevant contract requiring the seller to hold the benefit on trust for the buyer.

Actions: Jackie Newstead, Jeremy Shields and Pranai Karia will consider this issue with a view to a possible note of advice on the pitfalls and what to do. It was suggested that an extra question could be added to the CPSEs asking whether the buyer or its lender is able to rely on the search results provided by the seller's solicitor.

8. **HMRC'S CONSULTATION ON CHANGES TO PROCESS FOR FILING SDLT RETURNS AND PAYING SDLT**

The Committee submitted a response to HMRC's consultation on changes to the process for filing SDLT returns and paying SDLT -

<http://www.citysolicitors.org.uk/attachments/article/114/Response%20to%20consultation%20on%20Stamp%20duty%20and%20tax%20changes%20to%20the%20filing%20and%20payment%20process%20-%2007%2010%2016.pdf>

The Committee thanked Martin Elliott for his contributions to the response.

9. **APPROACH BEING ADOPTED BY MOST FIRMS TO THE DRAFTING OF MINIMUM ENERGY EFFICIENCY STANDARDS RELATED PROVISIONS IN LEASES, ACTING FOR LANDLORDS AT LEAST**

This topic was raised by Pranai Karia who was unable to attend the meeting, so the main discussion will be deferred to the January Committee meeting. A brief discussion highlighted that the primary concern related to ensuring that the landlord keep control of the obtaining of energy performance certificates, so as to avoid tenants obtaining EPCs with an "F" or "G" rating.

10. **MODERN SLAVERY ACT 2015 – IMPLICATIONS FOR PROPERTY**

Nick Brent provided a very useful summary of the implications of the Modern Slavery Act 2015 for property, key points of which are set out below.

Under section 54 of the Act, an annual modern slavery and human trafficking statement is required for all financial years ending on or after 31 March 2016 for all commercial organisations, including those within the property sector, which are:

- Carrying on any part of their business in the UK; and
- Generating a minimum total turnover of £36m per annum.

The aim of the statement is to make supply chains more transparent, whilst also increasing awareness of the issues surrounding modern slavery and human trafficking. The statement should outline the steps that the company (for example) has taken over the past financial year to ensure that none of the offences under the Act are being committed by the company itself, or by any party contributing towards its "supply chains" (which expression is given an everyday meaning). The statement should be published prominently on the company's website.

This has implications for both landlords/property owners and tenants.

Implications for tenants:

A landlord will form part of the tenant's supply chain for the purposes of the Act, as the landlord provides services to the tenant.

A tenant that has reporting obligations under the Act will, therefore, have to perform due diligence on its current (or prospective) landlord, ensuring that the statement that the landlord publishes is accurate and compliant with the Act.

On the grant of a new lease, a tenant may choose to raise an additional enquiry regarding the landlord's compliance, or lack of, with the Act.

A tenant may seek to include a landlord's "compliance with laws" obligation in the lease, but this is likely to be resisted by landlords.

Implications for landlords/property owners:

Tenants are unlikely to form part of a landlord's supply chain, unless they are providing additional services to the landlord. However, landlords should still be conscious of the potential for reputational damage caused by tenants being subject to the Act's reporting obligations, but failing to publish a statement. For that reason, some landlords will include in leases a tenant's obligation to comply with the Act, although this is covered by the tenant's normal compliance with statutory requirements obligation.

There is general uncertainty as to whether or not it is reasonable for a landlord to withhold consent to a proposed assignment on the basis that the assignee with reporting obligations has failed to comply with the Act.

The Act is also relevant where a landlord/property owner contracts with a property management company, fund or asset manager, agent or other company, which in turn contracts with third-party companies to carry out routine maintenance, cleaning, security

or other services. Each third-party company contributes to the landlord's/property owner's supply chain. The construction and leisure and hospitality industries are a higher risk area. The landlord/property owner must satisfy itself that none of the companies contributing to its supply chain are engaging in modern slavery or human trafficking, prior to publishing its statement. As well as raising enquiries with the property management company etc, landlords/property owners should be looking to include in relevant contracts a compliance with laws obligation on the property management company etc.

Penalties include corporate criminal liability.

Action: The Act has implications for landlords/property owners and tenants, and consideration should be given to raising additional enquiries and including extra drafting.

11. NOTE FOR WEBSITE ON THE FACTORS THAT COULD INDICATE A PROPERTY FRAUD AND SHOULD MAKE A CONVEYANCER SUSPICIOUS AND SOME PRACTICAL SUGGESTIONS

Jayne Elkins kindly put together a note highlighting "What might be warning signs of fraud?" and handed round paper copies. Comments are sought from the Committee on the note. There is a very worrying increasing occurrence of fraud in the property industry (as well as elsewhere) and it is important for guidance to be issued to practitioners highlighting indicators of fraud and key risk areas. The Law Society and Land Registry are currently reviewing their joint Property Registration Fraud note. Any extra information such as Jayne's note is to be welcomed and the note will in due course appear on the CLLS website.

Action: Comments on Jayne's note.

12. AOB

The CLLS Livery Committee has its annual dinner on 31 January 2017, which provides an excellent opportunity for members of the various CLLS committees to get together. Please contact the CLLS if interested.

LENGTH OF MEETING – 1 HOUR 15 MINUTES

COMMITTEE MEETING DATES FOR 2017 - 25 JANUARY, 22 MARCH, 17 MAY, 5 JULY, 20 SEPTEMBER AND 22 NOVEMBER AT 12.30PM AT HOGAN LOVELLS LLP, ATLANTIC HOUSE, HOLBORN VIADUCT, LONDON EC1A 2FG.