

CITY OF LONDON LAW SOCIETY LAND LAW COMMITTEE

Minutes of a meeting held on 22 March 2017 at Hogan Lovells, Atlantic House, 50 Holborn Viaduct, London EC1A 2FG

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

1. WELCOME

The Committee welcomed back Jeremy Brooks, now of DLA Piper, who replaces Alison Gowman on the Committee. Many thanks again to Alison for all her work for the Committee over the years.

2. **MINUTES**

The Minutes for the 25 January 2017 Committee meeting were approved and will be added to the Committee webpage.

3. **UPDATE ON PROJECT TO REVIEW CLLS REPORT ON TITLE**

Laurie Heller who leads the sub-group updated the Committee on the Report on title project.

The sub-group has yet to meet, but plans to meet soon. Members have kindly supplied examples of shorter form reports on title. Red flag reports are also of interest, but it was agreed that the CLLS report needs to go beyond just a list of key points.

The sub-group comprises Laurie Heller, Bruce Dear, David Hawkins, Pranai Karia, Jon Pike, John Nevin and Warren Gordon.

Action: The Committee's sub-group will begin the project to review the Report.

4. **LAND REGISTRY CONSULTATION ON CHANGES TO THE LAND REGISTRATION RULES 2003**

The Committee discussed the Land Registry's consultation on changes to the Land Registration Rules 2003 <https://www.gov.uk/government/consultations/proposals-to-amend-the-land-registration-rules-2003>

The proposals in the consultation look fairly positive and were welcomed by the Committee.

The biggest proposal is to put in place a statutory framework to allow the incremental introduction of secure electronic conveyancing and registration services. The framework will allow any disposition that must be registered to be carried out using digital documents with electronic signatures.

Simple domestic electronic mortgages will be the first of this type. Once that service is established, mortgages for corporate borrowers will follow suit and in due course there is an intention to introduce electronic transfers. Electronic leases may be introduced later if there is a user need.

There will be concerns about what type of network access agreement users of the digital documents will be required to sign up to.

No witnessing is required for an electronic signature (e-signature) as the signatory will have their identity assured through the GOV.UK Verify system which will be integrated into the Land Registry system. Land Registry is the certifying authority for the e-signature. Once the Land Registry is satisfied with the identity of the person, it will issue signing security credentials by SMS text messaging, or even by email.

Concerns were expressed about the limitations of the Verify system. How would it deal with a Power of Attorney for example? The Committee was concerned to ensure that the proposals do not increase solicitors' and clients' exposure to fraud.

Technologies like DocuSign are used by the corporate and finance groups of some City law firms. Land Registry should consider such technologies to ascertain compatibility with its proposals.

The Committee agreed that a response should be produced on their behalf which is broadly supportive of the proposals, especially in view of Land Registry's previous reluctance to move away from the requirement for wet ink signatures. The response will highlight concerns about whether the risk of fraud is increased by the proposals and whether Verify provides sufficient protection.

Action: Warren Gordon will draft and circulate a response for the Committee's comments. The deadline for responding is 5 April 2017.

5. **IMPLICATIONS OF "DREAMVAR" DECISION RE PROPERTY FRAUD AND SOLICITOR'S DUTIES**

The "Dreamvar" case (*Dreamvar v Mishcon de Reya*) related to a residential transaction, but there are serious implications for commercial as well as residential property transactions.

Mishcons who acted for the buyer were found liable by the High Court for breach of trust in paying away the completion proceeds, because primarily they had the "biggest pockets", even though the Court decided that they were not negligent. This unfairness for the buyer's solicitor emanates from the unsurprising inadequacy of the 2011 Code for Completion (relating to residential property transactions) to foresee this type of fraud.

The Code does not address the point that "the seller" does not necessarily mean the registered owner, but instead refers to the seller's solicitor's client, the person purporting to sell. With the latter meaning, the seller's solicitor does not breach its undertaking in paragraph 7(i) of the Code and the seller's solicitor's undertaking in paragraph 12(ii)(b) was complied with. The Code placed no clear obligation on the seller's solicitor in respect of fraud concerns relating to the registered owner of the property. One suggestion was for the Code to articulate that the seller's solicitor has a duty of trust in relation to the completion proceeds. The Law Society will consider possible changes to the Code, but it is very unlikely that the Code will be amended pending a possible Court of Appeal decision in the next year or so in which the Law Society may intervene.

In terms of how solicitors should respond to the Mishcons' decision and other recent decisions on property fraud and solicitor's duties, a member suggested that solicitors should amend client engagement letters to exclude their liability to the client for the fraud of other parties.

There is considerable debate in the profession about what the duties of the buyer's solicitor should be in relation to checking the identity of the seller. The recent cases have been inconsistent in their statements on this issue.

In *Patel v Freddy's Ltd* [2017] EWHC 73, a Deputy High Court judge and former Law Commissioner cautioned on the nature of seller's identity enquiries raised by the buyer's solicitor. She said "I accept, it is the task of the vendor's solicitor in a conveyancing transaction to check the identity of his or her client, establishing not only that the vendor's name is what the vendor says it is but also that the vendor really is the owner of the property. The purchaser's solicitor may need to check that the vendor's solicitor is a solicitor if he does not know the firm, and Mr Martin did so using the "Know Your Solicitor" procedure (checking with the Law Society); but it is not for the purchaser's solicitor to duplicate the actual checking of the vendor's identity, nor to check that the vendor's solicitor has done so."

In *Purrusing v A'Court & Co (a firm)* [2016], the buyer's solicitor paid for asking enquiries of the seller's solicitor in relation to the seller's identity and not properly following up on inadequate replies. The buyer's solicitor was found to be in breach of contract and/or duty to the buyer in failing to inform him that an enquiry had been raised, the purpose of which was to attempt to establish a link between the property and the apparent seller, and the answers received showed that the seller's solicitor had not verified and had not confirmed from the information available to it a link between the seller and the property, and consequently there was a risk in proceeding with the purchase.

In the light of the *Mishcons* case, there are an increasing number of enquiries being raised of buyer's solicitors to seller's solicitors in relation to the seller's identity. However, there is only so much that the seller's solicitor can confirm. Seller's solicitors will resist confirming that their client is indeed the registered owner of the property, because they cannot definitively confirm this. Some argue that the seller's solicitor should be able to confirm that it has carried out the required identity checks on its client, but this runs counter to the views of the High Court in *Patel v Freddy's* mentioned above.

The uncertainty of the legal position pending a Court of Appeal decision means that it is very difficult for representative or regulatory bodies at this stage to publish guidance on what the duties of solicitors should be including which enquiries should be raised. However, the Law Society and Land Registry plan to publish a joint note shortly that is intended not to set down the duties of solicitors, but instead to raise awareness as to those circumstances that may be indicators of fraud. Often there are more than just one indicator of fraud and the recent cases have highlighted that.

Buyer's solicitors should not necessarily rush to ask additional identity enquiries in the light of the recent cases if there are no obvious suspicious circumstances. However, if there are such circumstances (and this is where awareness notes like the Law Society/Land Registry joint note may be useful), further enquiries may need to be raised by buyer's solicitors who may need to alert their client.

On a connected point, Jayne Elkins circulated to the meeting her revised note on "Property fraud – issues to consider". The note will be emailed to the Committee and comments sought by the end of March 2017. Once the comments have been worked through, the revised note will be added to the Committee's webpage. Many thanks to Jayne for all of her work on the note.

6. CODE FOR LEASING BUSINESS PREMISES UPDATE

The Committee's comments on the initial proposals for revising the Code for Leasing Business Premises were passed to the relevant RICS drafting group, which has not met since before the last Committee meeting. There is a sustainability sub-group and Warren Gordon attended a recent meeting. The sub-group came up with certain principles for inclusion within the Code under the heading of Sustainability. The principles related to such matters as the impact of alterations on the property's energy efficiency; encouraging landlord and tenant cooperation over sustainability issues; considering the introduction of green lease provisions (and referring to the Better Building Partnership's Green Lease Toolkit); and the landlord and the tenant seeking to understand each other's expectations in relation to obtaining energy performance certificates including constraints on use of energy assessors. The principles need to be approved by the drafting group.

There was a further discussion about the approach being adopted by most firms to the drafting of Minimum Energy Efficiency Standards (MEES) related provisions in leases. Pranai Karia mentioned one approach that is used in the Model Commercial Leases (MCL). In the rights excepted and reserved to the landlord, the tenant is not obliged to consent to the landlord entering to carry out works to the let premises to improve their environmental performance. If the tenant refuses consent, the authors of the MCL state in a footnote that the landlord may be able to rely on an exemption in the MEES regulations to continue lawfully to let the premises if they have an "F" or "G" rating. If the tenant consents to the works, the landlord can recover the costs of those works under the lease.

Some concerns were expressed about whether this approach could be seen as going against the policy of the legislation. Others thought that landlords may want a right to enter to carry out such works without the tenant having absolute discretion over entry.

The biggest concern for landlords in relation to MEES appears to be the landlord ensuring it has varying degrees of control over which energy assessor provides the energy performance certificate if a tenant needs to obtain one.

7. THE TERMS AND CONDITIONS OF SEARCH PROVIDERS AND RELIANCE BY THIRD PARTIES

Following on from previous discussions, the Committee continued its consideration of the issue of whether a buyer or a buyer's lender can benefit from search results obtained by a seller (through the provision of a seller's pack or search results on an extranet etc). This is an increasingly important issue on transactions and also applies to the provision by landlords of search results to tenants or tenant's lenders via similar platforms. Should the Committee provide a guidance note on this topic?

The issue of whether a buyer or buyer's lender can rely on search results provided by a seller (whether in a certificate of title or other situation) is one that has been around for decades and has generally not been problematic for property transactions. It has always been the case that if a third party has procured a search result, there is a possibility that the client may not be able to rely on it.

For years, the reliance wording in local authority search results (CON29) was not entirely clear and only recently has this been clarified in the new CON29 (2016) forms.

Over the last 15 years or so, intermediaries such as Searchflow, TM and others have become involved in the searches process. They act as the conduit between the law firm and the data providers and the idea is to improve the efficiency of the process of obtaining searches. The increased focus of law firms on terms and conditions can probably be accounted for by their negotiation with the intermediaries over the latter's terms, especially in relation to matters of reliance, liability limits and insurance. An additional term increasingly offered is for the intermediary to indemnify the law firm ordering the search and the "Client" (as defined) against losses resulting from the data provider's negligence. The idea is that the firm/Client does not need to take separate action against the data provider and simply claims against the intermediary (who presumably may then seek to recover from the data provider).

A Committee member suggested that the key point is gaining an understanding of whether the client can bring a claim against a data provider if there is an intermediary involved and which data providers are responsible to whom. If there is an intermediary involved, will the data provider limit its liability to the intermediary and not extend it to the ultimate client? If the client cannot bring a claim directly against the data provider, consideration needs to be given as to whether the intermediary should be used for the relevant searches. Thames Water, The Coal Authority, National Grid and Canal & Rivers Trust (and perhaps others) do not appear expressly to allow reliance by third parties such as firms, their clients or other people for whom the firm obtains search results. It may be more inconvenient to obtain searches directly from the data provider, but it may create a clearer liability path.

It was suggested that the intermediary should provide an assurance to the law firm and client that using the intermediary does not prejudice the client claiming directly against the data providers.

While the intermediary may offer an indemnity as mentioned that may be of assistance, it will be subject to its particular terms that may constrain the value of the indemnity. For example, some terms and conditions make the intermediary's liability subject to the customer's compliance with the terms. This will be a concern for a buyer etc relying on the benefit of the intermediary's terms, which may be undermined (where the seller has obtained the search result) by the seller's non-compliance, which may have nothing to do with the buyer's transaction. If the terms are terminated by a breach of the seller, it is not equitable for this to impact on buyers, who already have the benefit of the terms following a transaction with the seller.

Firms have concerns about different forms of intermediaries' terms – basic, enhanced (old form), enhanced (new form) etc. It is important that an intermediary ensures where possible that there is one form to avoid confusion and it is publicised on the intermediary's website (rather than there being variations to certain terms documented in side arrangements with particular firms). It is, however, acknowledged that the intermediary may resist publicising the terms (for competition reasons) and some intermediaries will have alternative terms depending on their level of liability and cost payable by the customer. Despite that, there remains the overriding importance of consistency in the terms of the different intermediaries to give greater assurance to customers relying on them. However, having industry standard terms for all search results is unlikely to be acceptable and in that regard there may be competition law concerns.

There was a difference of opinion among Committee members as to whether the buyer's solicitors should raise an enquiry of the seller's solicitors about reliance on the search results and seek the relevant terms and conditions. One member considered this to be a valuable enquiry, but the majority present considered that at best the seller's solicitors would merely supply the relevant terms for the buyer's solicitors to make up their own mind. While it is increasingly common for sellers to commission searches in the interest of speeding up transactions, the Committee does not consider that it is the seller's or their solicitor's responsibility to negotiate any variance from standard terms to benefit another party who wants to rely on them.

The Committee includes the following comments in relation to the terms and conditions for intermediaries (and possibly data providers), although it is for each firm to assure itself that the terms and conditions are suitable for the particular transaction.

- Ensure the definition of Client/Customer is wide enough to cover the parties envisaged to require the benefit of the searches obtained by the intermediary.
- Are there any provisions for how liability is shared between the benefiting parties?
- There is usually a limit to the intermediary's liability and what is the basis of the limit on liability – is it an aggregate liability for all claims in the insurance period, or more favourably for the customer is it a limit for each and every claim?
- The intermediary should have an obligation to provide professional indemnity insurance cover with a minimum level matching the liability limit.
- What is the amount of any excess on the insurance?
- What protection do the terms give to buyers relying on the terms from the actions of the seller (where the seller's solicitor obtained the search results)?
- What other pre-conditions are there to the intermediary being liable? For example, do the terms state that the intermediary will not be liable in the event of a mistake by the underlying data provider (i.e., the search result is flawed)?

In view of the concerns about terms and conditions, the "no search insurance" products are perhaps increasingly attractive and potentially more economical than carrying out the searches themselves.

Since there was no obvious consensus among the Committee on the approach to be adopted towards the issue of the terms and conditions of search providers and reliance by third parties, it was considered likely that the Committee will not issue a formal guidance note on this topic. However, it is hoped that the observations in these minutes will generally assist. The sub-group of Jackie Newstead, Warren Gordon, Pranai Karia and Anthony Judge will give some final deliberations to some of the intermediaries' terms and conditions and will report back at a subsequent Committee meeting if appropriate.

Next time that the Committee's Certificate of title is reviewed, consideration will be given to including a statement that the provision of search results are subject to the terms and conditions of the search providers. A similar statement can be included in reports on title.

8. **LANDLORD'S DUTIES TO ASSIST IN PREVENTION OF FRAUD – GOVERNMENT CONSULTATION ON TOBACCO DUTY EVASION**

At Budget 2016 the Government announced its intention to consult on detailed proposals on sanctions to tackle illicit tobacco.

The consultation has now been published https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/592228/17_0216_Formal_Sanctions_Consultation_FINAL.PDF

The consultation seeks views on 4 potential additional sanctions which include a new statutory duty of care on landlords and landowners of properties or land.

The closing date for comments is **12 May 2017**.

HMRC believes in some cases that the landlord or landowners are aware of the fraud through the sale of illicit tobacco and turn a blind eye to their tenant's behaviour to ensure rental income is maintained. In some cases they believe that the landlord is complicit.

HMRC notes that it is common for lease agreements to have a clause expressly prohibiting illegal activities on the premises. To help discourage illicit tobacco trading or other illicit excise trading, HMRC proposes to write to relevant landlord and landowners associations directly requesting that they voluntarily add a clause to their standard lease agreements.

Additionally or alternatively, HMRC could legislate to impose a duty of care on landlords and landowners of properties or land, which are used in tobacco (or other excise duty) fraud and introduce a new civil penalty for non-compliance with requirements to take reasonable steps to ensure that their property is not used to evade duty.

The duty of care would only arise once the landlord or landowner has been notified that the tenant has evaded tobacco duty (or other excise duty). To minimise the burden on the

landlord or landowner, HMRC would provide for a defence for landlords or landowners who have taken reasonable steps to prevent future wrongdoings in or on their property.

This may involve a landlord or a landowner taking steps such as:

- Having provisions in all new leases making it clear that any illicit tobacco trading or any other illicit excise activity will terminate an existing lease.
- Undertaking periodic checks on the premises and requesting information relating to the tenant's business.
- Evicting anyone who subsequently violates these provisions.

It is questionable whether these examples are "on the right lines to ensure that the duty of care is reasonable and proportionate".

If the tenant then continues to deal in illicit tobacco or engage in other illicit excise activity and the landlord or landowner cannot demonstrate that they have taken steps to address the issue, then HMRC will consider further action against the landlord or landowner.

The British Property Federation may be looking into this Consultation.

Action: Daniel McKimm kindly agreed to draft a response on the Committee's behalf to the property related aspects of this consultation.

9. **INCLUSION OF ARBITRATION CLAUSE IN PROPERTY DOCUMENTS (REQUIRE ARBITRATION REFERENCE RATHER THAN THE COURTS)**

Mention was made by one Committee member that he had been encouraged by his litigation colleagues to use arbitration wording in property documents as the default arrangement for any dispute (and not just rent review). The rationale is that this is a speedier and more economic means of resolving a dispute than going to court. It was suggested that members may wish to contact their litigation colleagues to understand whether the rationale remains justified.

10. **STANDARD COMMERCIAL PROPERTY CONDITIONS**

Warren Gordon highlighted that the 3rd edition of the Standard Commercial Property Conditions will launch in May 2017.

11. **AOB**

CLLS's work on Brexit issues – the Chair agreed to be the point of contact for the Committee in relation to helping the CLLS representative on the "Brexit Committee". The latter consists of representatives from: the Judiciary, the Bar, the Law Society, the CLLS, City UK and GC100 and its purpose is two-fold: to formulate for Government strategies for Brexit to benefit the English legal system and legal profession; and to provide a single source of legal advice to the Government on wider Brexit issues.

Accessing Certificate of title - in the period 26 January – 19 March 2017, there have been 1,729 hits on the CLLS Certificate of Title Seventh Edition 2016 precedents page on the CLLS website.

CLLS event – advance notice of CLLS's Annual General Meeting and Champagne Reception on Monday 12 June 2017 at 6.00pm at Tallow Chandlers' Hall, Dowgate Hill, London, EC4R 2SH, to which all members of the CLLS are welcome. A formal notice is due to go out in April.

LENGTH OF MEETING – 1 HOUR 30 MINUTES

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