

CITY OF LONDON LAW SOCIETY LAND LAW COMMITTEE

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

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

1. WELCOME AND APPROVAL OF MINUTES

Welcome to Paul Kenny from Travers Smith, who subject to CLLS procedures, replaces Anthony Judge on the Committee.

The Minutes for September's Committee meeting were approved and will be added to the CLLS website.

2. CLLS SHORT FORM REPORT ON TITLE

The sub-committee is finalising the Short form Report on title and hopes to have it ready for the January 2018 Committee meeting.

3. CONSULTATION ON PROPOSED NEW RICS CODE FOR SERVICE CHARGES IN COMMERCIAL PROPERTY

The RICS launched a consultation on 25 October on a replacement document for its existing Code for Service Charges in Commercial Property, 3rd edition. The new document is intended to go live from 1 April 2018. It is a “Professional Statement”, which has professional conduct implications for RICS surveyors and regulated firms. There are eight mandatory requirements, breach of which could have legal and/or disciplinary implications.

Many aspects of the professional statement are the same or similar to the existing Code and users should, therefore, benefit from familiarity with the statement.

The Committee supports the RICS’s commercial service charge document being elevated to a professional statement. It considers that the eight mandatory requirements are appropriate and most managing agents and landlords should be able to comply with them. The Committee is concerned about the situations where an RICS regulated surveyor is employed by a non-regulated property company, or an RICS regulated firm is employed by perhaps an overseas organisation that is not regulated by the RICS. If the mandatory requirements are too wide-ranging, they can cause real problems for the RICS regulated individual or firm who may wish to comply, but is prevented from doing so by the employer or client. This is especially problematic in the light of the legal and/or disciplinary consequences for those departing from those requirements.

In that regard, the Committee considers (and it agrees with the professional statement) that it is appropriate that matters of timeliness in the issuing of budgets to occupiers and detailed statements of actual expenditure should be principles of best practice rather than mandatory requirements. There had been concern in the property industry that having precise time limits for the issuing of such information as a mandatory requirement would cause serious problems for RICS regulated people or firms employed or instructed by organisations not regulated by the RICS.

In terms of other comments:

1 The Committee wonders whether reference should be made to the service charge provisions in the Model Commercial Leases, in addition to the references to the City of London Law Society and Practical Law Company drafting, as examples of Code compliant provisions.

2 In relation to management fees, the professional statement at paragraph 2.4.2 states “This professional statement cannot override the terms agreed between the parties and recorded in the lease. However, where the lease limits the amount or quantum of the fee recoverable from occupiers it is a matter between the owner and occupier and should not prevent or limit the manager's ability to charge a commercial fee that reflects the

requirements of this professional statement. In certain circumstances, this may result in a shortfall in the recovery of service charge costs on behalf of the owner, but the overriding principle should be to achieve best-practice principles for the management and administration of services charges in commercial property.” The Committee questions why the owner should necessarily suffer the shortfall in this situation and not be able to recover from the occupiers. If the manager charges a commercial fee, the owner should be able to charge this to the occupiers and include provisions to that effect in the lease.

3 The professional statement advocates the use of alternative dispute resolution (ADR) as industry best practice. It should be noted that most leases do not include ADR provisions. The Committee would point out that ADR provisions are not necessarily universally seen as helpful. Even if there is provision for ADR, there is no obligation on the parties to agree a resolution using that method. While perhaps not an ideal route, recourse to courts at least provides greater certainty of outcome. There is also greater certainty with an arbitration or expert provision.

The Committee was asked to provide by Wednesday 29 November any further comments on the consultation document.

The Committee proposes to submit a short response and the deadline for responses is 6 December 2017.

4. UPDATE ON PROPOSED NEW RICS CODE FOR LEASING BUSINESS PREMISES

The RICS proposes to launch in 2018 a replacement for its Code for Leasing Business Premises. In addition to the code itself, as currently, there will be a template heads of terms and occupier guide.

The objective of the new code is to improve the quality and fairness of initial negotiations on lease terms and to promote the issue of comprehensive heads of terms, and will, therefore, be a key document for agents in particular.

The new code will be a Professional Statement, which includes mandatory requirements, breach of which could have legal and/or disciplinary implications for RICS surveyors and regulated firms. In accordance with the code’s objective, the mandatory requirements relate to the general approach to negotiations and also to what the heads of terms must contain. For example, the heads must identify rent reviews date and the basis of review, but there is no mandatory requirement for the review to be upwards only or otherwise. Another example is that the heads must contain information on the rights to assign, sublet, charge or share the premises, but there is no mandatory requirement as to what those rights must be.

So the mandatory element is to ensure that the heads identify certain highlighted information in relation to the proposed lease. The code continues to adopt a best practice (but non-mandatory) approach as to what the terms of the lease should be, for example, the onerousness of the repair obligation, or the conditions for assignment or subletting.

Whilst the draft professional statement is not at a formal consultation stage, Warren Gordon will feed back to the RICS the following key observations made by the Committee at the Committee meeting.

- Layout needs to be improved – the Code should stand out more from the surrounding regulatory information.
- Paragraph 3.5 should be limited to advising tenant to obtain professional advice as to the implications of contracting out. Landlords should not need a “good reason” to contract out.
- Pre-Conditions for tenant’s breaks in 3.6 should include on-account service charge payments and, possibly more widely, undisputed sums owed.
- Does 4.1 cover the situation where following agreement of the heads of terms there are ongoing discussions over whether the tenant should provide a rent deposit or guarantee? It was suggested that the words “any requirement for” are removed. It should also be clear whether the amount of the rent deposit also has VAT added.
- In 6.5, subleases of part can be excluded from statutory renewal rights if landlords wish.
- Is the reference in 7.5 to principles, the “core principles” or the whole professional statement?
- 9.3 “protect value” is too limited. It should also reflect the impact of the alteration on the building (beyond the premises) such as air-conditioning.
- 10.2 – leases hardly ever require the policy terms to be fair and reasonable.

5. VAT ON SEARCHES

Firms should be considering the approach to VAT and electronic searches in the light of the “Brabners” decision, both going forward and for electronic searches in the last 3-4 years where no VAT was charged to the client. An update will be provided on this topic at the January 2018 Committee meeting, by when the Law Society guidance should have been issued.

6. UPDATE ON GREENFIELD TELECOMS AGREEMENT/LEASE AND ROOFTOP TELECOMS AGREEMENT

Alison Hardy will circulate revised greenfield and rooftop communications agreements to the Committee for comments.

7. UPDATING CITY CORPORATION'S STANDARD WAYLEAVE AGREEMENT FOR THE NEW ELECTRONIC COMMUNICATIONS CODE

The Committee will consider revisions for the new Electronic Communications Code to the City of London Corporation Standard wayleave agreement on which the Committee worked extensively. The sub-committee members will comprise Warren Gordon, Alison

Hardy, Laurie Heller and Paul Kenny. Other volunteers from the Committee are requested to work on updating the standard wayleave for the new Code.

8. CONSULTATION ON SANCTIONS TO TACKLE ILLICIT TOBACCO

The Government has issued its response on its Consultation on sanctions to tackle illicit tobacco. The Government will approach landlord and landowner representative bodies early in the new year for next steps and the Committee may wish to be involved. A link follows to the Summary of responses.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/657737/Summary_of_Responses_document.pdf

9. COMMITTEE'S RESPONSE TO CONSULTATION ON ABOLITION OF LEASEHOLD HOUSES

The Committee responded to the Government's consultation on abolition of leasehold houses and a link to this follows. This is also on the CLLS website.

<http://www.citysolicitors.org.uk/attachments/article/114/Consultation%20-%20Tackling%20unfair%20practices%20in%20the%20leasehold%20market.pdf>

10. LOBBYING REPRESENTATIVE BODY FOR ELECTRICITY SUPPLIERS IN RELATION TO POINTS OF CONCERN ON ONEROUS ELECTRICITY SUB-STATION LEASES

The Committee may look to lobby the Energy Networks Association and, if not them, OFGEM about the terms required by operators in sub-station leases. Can standard terms be developed across the industry and what can be done about unreasonable terms or requirements particularly from smaller operators?

11. AOB

- Brexit will be on the agenda for the January meeting to consider its impact on environment, energy, planning, procurement and movement of people and the market.
- Please let Jackie Newstead know if Committee members wish to be considered for Vice-Chair of the Committee. CLLS requires Committees to have Vice-Chairs going forward, although appointment as Vice-Chair is no indication that the individual will necessarily replace the Chair when they step down.
- CLLS has suggested that Committees should play a role in training junior lawyers. Committee members are asked to provide their thoughts as to whether this is something the Committee should be doing.
- Committee members were asked to spread the word among colleagues about the work of the Committee and the CLLS.

12. **Length of meeting:** 1 hour 30 minutes. Where appropriate, please note this in professional development records.

13. **Dates for 2018 Committee meeting dates** - 24 January, 21 March, 16 May, 27 June, 26 September and 21 November, all at 12.30pm at Hogan Lovells LLP, Atlantic House, 50 Holborn Viaduct, London EC1A 2FG.