

## CLLS Land Law Committee

### Key points from Emergency meeting on 3 April 2020

#### Attendees

Jackie Newstead (Chair), Warren Gordon (Secretary), Kevin Hart (CLLS), Anthea Bamford, Jeremy Brooks, Jamie Chapman, Jayne Elkins, Martin Elliott, David Hawkins, Vicki Hills, Matthew Hooton, Daniel McKimm, John Nevin, Brigid North, Tom Pedder, Jeremy Shields, Sangita Unadkat, Ian Waring and Patrick Williams

#### 1 Forum for meeting

The call reception quality was good although Microsoft Teams will be considered for future meetings.

#### 2 Statutory declarations for contracting out etc

While an article on PLC suggested a willingness to have the swearing of statutory declarations done virtually such as by Skype, the Committee was not comfortable with that approach. It is customary for the declarant to be physically present when the solicitor administers the statutory declaration. The general view of the Committee was that the declarant should be physically present. Member firms are putting together informal lists of solicitors in neighbourhoods or members of their firms with spouses/partners/other people in their households who are solicitors and who can "do swears". The solicitor needs to have a practising certificate, be independent e.g. not work for either the tenant's or landlord's law firm and not obtain any personal benefit from the matter. Where there is more time available (at least 14 days between the warning notice and the point of contractual commitment), a simple declaration is available as an alternative which will be administratively simpler. In terms of who at the tenant company gives authority to the tenant's solicitor to make the declaration, some member firms would accept the authority of a General Counsel, even if they are not a director and there is no specific Board authority. Some member firms are happy to rely on a confirmation from the tenant's solicitor themselves that they have authority.

#### 3 Land Registry

Land Registry – nothing further has been received from them (since the last meeting) on whether they will accept an alternative to wet-ink. They have offered more flexibility on land charges - A change of practice was announced 1 April 2020 to allow most Land Charges applications to be made by email attaching PDF copies of application forms and any supporting evidence.

There have been delays with the return of priority search results. Most surprisingly members had experience of an OS1 with prior pending applications taking between 4 and 8 days to get results back. Normally there would be no or little delay. Members are reminded to allow plenty of time to do the priority search. Bear in mind the limitations of repeating the priority search if the application is not delivered to Land Registry within the first priority period. If the completion of the disposition is delayed to an extent likely to preclude the delivery of the application within the priority period, a second search application may be made, whether the priority period under the first official search certificate is still subsisting or has expired. However, the issue of the second official search certificate will not operate to extend the priority afforded by the first. It will provide a second priority period, so the second official search certificate will not provide priority over any application lodged before its priority period commences.

The Committee considered that Land Registry should extend the priority periods in view of the current crisis.

The CLLS and Law Society met this week to coordinate a joint petition to Land Registry on key matters of concern.

#### **4 Mercury and Land Registry**

Each firm will have its own policy on whether they are prepared to give the true copy certificate on the Portal if they have only seen a Mercury scanned signed document, or whether they require to see the wet-ink signature pages or obtain a certificate from another conveyancer who has seen the wet-ink pages.

Some firms take the view that section 91 of the Land Registration Act 2002 only applies to e-signatures and they consider that a Mercury signature is not an e-signature, so it is legitimate to certify it is a true copy on the basis that the Mercury scan is an original (founded on the Law Society Practice Note).

We know from senior Land Registry officials over the years that their view of an original (certainly in the case of dispositions) means a wet-ink document and some firms in light of that view may decide that, even though they regard a Mercury scan as an original, they cannot certify it as such given the Land Registry's view and so require sight of a wet ink original. Of course that is dependent on the wet-ink signature pages being received by the solicitors. Currently, there is still scope to have the pages couriered.

By way of reminder, Mark Hapgood QC in his 2009 Opinion confirmed that it was possible to have multiple originals as a result of using Mercury Option 1: the first original would be the electronic one using pdf counterparts; the second would be a print-off of the electronic version (i.e. the final version with a copy of the pdf signed signature page attached); and the third would be a print-off of the final version, with the 'wet ink' signature page attached, and that one could be used to file with Land Registry etc.

#### **5 Land Registry certificates**

In the previous note, we mentioned that if a solicitor about to do a Land Registry Portal application does not have a wet ink original, the Land Registry application form has the option for the applying solicitor to give the following:

"we certify that this attachment is a true copy of a document which is certified by a conveyancer to be a true copy of the original".

While a solicitor can rely on a certificate from a conveyancer, if the client held the wet-ink document and was prepared to confirm this, the Committee's view was that this did not work unless the client themselves was a conveyancer.

The query was asked how did the Land Registry define "conveyancer". [Practice Guide 67](#) on Evidence of identity states -

##### **"3.1 Conveyancer**

When we refer to a 'conveyancer' we mean an authorised person within the meaning of section 18 of the Legal Services Act 2007 who is entitled to provide the conveyancing services referred to in paragraphs 5(1)(a) and (b) of Schedule 2 to that Act, or a person carrying out those activities in the course of their duties as a public officer. It also includes an individual or body who employs or has among their managers such an authorised person who will undertake or supervise those conveyancing activities (rule 217A of the Land Registration Rules 2003). Please note that to come within the definition of conveyancer in rule 217A of the Land Registration Rules 2003 an individual must be

authorised under the Legal Services Act 2007 to provide conveyancing services; in effect they must have a practising certificate.

A paralegal is not a conveyancer. A paralegal is someone who assists legal firms – they may sign application forms on behalf of a conveyancing firm that is an authorised person if they are authorised to do so by that firm. They cannot, however, verify identity.

Not all Chartered Legal Executives are conveyancers, only those who have been authorised by CILEx Regulation to undertake reserved instrument activities. We have agreed with the Chartered Institute of Legal Executives (CILEx) and CILEx Regulation, however, that all Chartered Legal Executives can verify identity even though some may not be conveyancers. While all Chartered Legal Executives may verify identity, only CILEx Conveyancing Practitioners and Chartered Legal Executive Conveyancing Practitioners can provide certificates to comply with Form LL restrictions.”

The reference is to a person being entitled to provide conveyancing services. Does this include overseas lawyers in an overseas office of a UK practice?

Yes, it may do. Schedule 3, paragraph 3 of the Legal Services Act 2007 provides that such a person would be an exempt person and therefore able to provide the conveyancing service in inter alia the circumstances specified below. For example where the overseas lawyer did the activity at the direction and under the supervision of say a solicitor in England and the connection test at (4) below is satisfied.

3(1) This paragraph applies to determine whether a person is an exempt person for the purpose of carrying on any activity which constitutes reserved instrument activities (subject to paragraph 7).

(3) The person (“E”) is exempt if—

(a) E is an individual,

(b) E carries on the activity at the direction and under the supervision of another individual (“P”),

(c) when E does so, P and E are connected, and

(d) P is entitled to carry on the activity, otherwise than by virtue of sub-paragraph (10).

(4) For the purposes of sub-paragraph (3), P and E are connected if—

(a) P is E’s employer,

(b) P is a fellow employee of E,

(c) P is a manager or employee of a body which is an authorised person in relation to the activity, and E is also a manager or employee of that body.

#### *European lawyers*

7 A European lawyer (within the meaning of the European Communities (Services of Lawyers) Order 1978 (S.I. 1978/1910)) is an exempt person for the purposes of carrying on an activity which is a reserved legal activity and which the European lawyer is entitled to carry on by virtue of that order.

## **6 Searches**

Thames Water and some local authorities are not providing search results. Lack of search results so far has not been so significant as to create a material rise in the obtaining of search insurance products.

## **7 Landlord and Tenant**

It was reported that increasingly on negotiations for new leases, tenant's solicitors are asking for a rent suspension when tenants cannot use or access their premises because of the pandemic. Landlord's solicitors are generally resisting the inclusion of this drafting because it is often drafted very widely and extensively (for example covering all obligations) and an alternative may be for the parties to agree a specific rent holiday/free for this. There are concerns among landlord advisors about this type of rent suspension provision becoming standard in future even after the pandemic is over and the British Property Federation is looking into this. The concern here is that the landlord is taking all the risk, especially where it cannot obtain insurance. Landlords may be more prepared to give on the tenant's obligation to keep open premises in terms of the specified exceptions. If the tenant had the conflict of complying with a statutory requirements covenant or complying with a keep open covenant, one firm had received advice that the tenant's compliance with the law may qualify the keep open covenant.

## **8 Next meeting**

The next emergency meeting will be on 17 April at 11am.

**Warren Gordon**  
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