

Minutes for CLLS Land Law Committee meeting held on 24 June 2020 by telephone

Attendees: Jackie Newstead (Chair), Warren Gordon (Secretary), Anthea Bamford, Nick Brent, Jeremy Brooks, Jayne Elkins, Martin Elliott, Alison Hardy, David Hawkins, Laurie Heller, Vikki Hills, Matt Hooton, Stephen Josephides, Daniel McKimm, John Nevin, Brigid North, Tom Pedder, Franc Pena, Jeremy Shields, Sangita Unadkat, Ian Waring and Patrick Williams

1 Apologies and Appointment

Apologies: Jamie Chapman, Caroline DeLaney, Kevin Hart, Paul Kenny.

The Committee approved the appointment of Julian Pollock of Herbert Smith Freehills as a new Committee member. The Chair will notify Julian who is welcomed to the Committee.

2 Minutes

The Committee approved the Minutes for the May 2020 Committee meeting which are now on the CLLS website <http://www.citysolicitors.org.uk/storage/2020/05/Land-Law-Committee-Meeting-6th-May-2020.pdf>.

3 Corporate Governance and Insolvency Bill and other enforcement restrictions

The Committee provided the following comment on the Corporate Governance and Insolvency Bill - *"It will be helpful to ask the Government to clarify in the Bill what rent is caught by the new moratorium – is it just basic rent or (like the Coronavirus Act) does it also catch service charge and insurance payments/other amounts payable by the tenant?"*.

The House of Lords has completed its consideration of the Corporate Insolvency and Governance Bill. This returns to the House of Commons on 25 June and is expected to receive Royal Assent on Friday 26 June 2020.

Key measures in The Corporate Insolvency and Governance Bill include:

- Introduction of a new 20-day renewable moratorium period. This must be overseen by a licenced insolvency practitioner (known as a "Monitor", a new statutory role). During the moratorium period, businesses are protected from creditor action (no legal action can be taken against a company without leave of the court) so that they may seek specialist restructuring advice or a rescue. It is available regardless of whether a company's inability to pay its debts is COVID-19 related. This new measure has no retrospective effect.
- Introduction of a new restructuring plan for companies in financial distress, which include new cross class "cram down" (CCCD) procedures that allow a class of creditors to be bound by the restructuring plan even if they do not agree to the plan. CCCD prevents dissenting classes of creditors (and/or shareholders) from blocking a restructuring that is in the best interests of the company. Safeguards are provided for affected creditors including that a court sanctions the plan as fair and equitable. This new measure has no retrospective effect.
- Prohibition on suppliers of goods and services to the company using termination clauses triggered by the company entering an insolvency procedure or the new moratorium or beginning the new restructuring plan procedure (known as an

“ipso facto” clause). Suppliers will not be able to use such contractual terms to threaten a rescue of the business. This ban on ipso facto clauses is intended for contracts for goods and services – while this does not appear to include leases, it may be relevant for example to asset and property management agreements. The ban has no retrospective effect. Consideration will be given to including a footnote on this in the Committee’s property management agreement and asset/development management agreement.

- Temporary suspension of parts of insolvency law to prevent statutory demands from being served until 30 September 2020 and restricting winding up petitions from being presented until 30 September 2020 if the pandemic is the reason the company is unable to pay its debts. These provisions can be extended by regulation if necessary. The provisions have retrospective effect, for statutory demands from 1 March 2020 and for winding up petitions from 27 April 2020.

Consideration will need to be given as to whether “Insolvency event” definitions or termination provisions in leases and other agreements need to be updated to take account of the new insolvency events, although the ban on ipso facto clauses needs to be borne in mind for certain agreements.

The Government has also confirmed it will:

- extend the time period for the moratorium on forfeiture of commercial leases for non-payment of rent (defined to include all sums payable under a lease) from 30 June to 30 September 2020 (this offers a “breathing space” for tenants; it does not waive the tenant’s liability); and
- restrict the use of Commercial Rent Arrears Recovery unless the equivalent of at least 189 days’ unpaid rent is outstanding during the period to 30 September 2020. This means that CRAR will not be available unless there is more than two quarters’ rent outstanding.

4 New Code of Practice

The Government published on 19 June 2020 a new voluntary Code of Practice for the commercial property sector in the United Kingdom, which is intended to reinforce and promote good practice amongst landlord and tenant relationships as they deal with the income shocks caused by the COVID-19 pandemic. The Code does not change the underlying legal relationship or lease contracts between the landlord and the tenant and any guarantor. Various leading landlord and tenant organisations have endorsed the Code. The Code applies until 24 June 2021.

The Code contains a number of key principles: Transparency and collaboration; Unified approach; Government support; and Acting reasonably and responsibly.

The Code sets out options of new rental arrangements that could be agreed to by the landlord and the tenant. They are intended as suggestions and parties are not obliged to adopt them, nor are they an exhaustive list. To quote a few examples: deferring whole or part of the rent for one or more payment periods; rent-frees; moving from quarterly to monthly payments for a set time; use of turnover rents; the rent concession in return for say a reversionary lease on reasonable terms or the removal of a tenant’s break right.

The new Code of Practice can be accessed [here](#).

A reminder that the RICS’s new [Code for Leasing Business Premises](#) is effective from 1 September 2020.

5 Land Registry and signatures

The Land Registry has made further changes in relation to its acceptance of the [Mercury signature process](#) Option 1 (Land Registry's acceptance of Mercury is until further notice).

The Land Registry now accepts that corporate entities can use Mercury to execute by 2 directors/director and secretary etc, as an alternative to a director in the presence of a witness. However, details are sparse. It is not clear for example whether they require the 2 signatures to be on one page – unless and until they clarify otherwise, it is sensible to provide that the signature page in the document sent to the Land Registry includes both signatures on that one page. Land Registry's [practice guide 8](#) does not yet refer to 2 directors (see section 12).

The parties to the document have to be represented by a conveyancer if the Mercury signature process is used.

Land Registry has now provided further details of the deeds that it accepts, for the time being, may be signed in accordance with Mercury Option 1 and they include:

- A deed that effects one of the dispositions referred to in section 27(2) and (3) of the Land Registration Act 2002.
- A discharge or release in form DS1 or DS3.
- Equivalent deeds in respect of unregistered land.
- A power of attorney, other than a lasting power of attorney.

As part of its acceptance of the Mercury process, the Land Registry has announced greater flexibility on plans. A disponent's (e.g. seller's) conveyancer might sign the plan (perhaps by a typed in signature) as agent for the disponent before emailing them, so that the final execution copy of the deed sent to the disponent includes the signed plan. Conveyancers need to satisfy themselves that that they are duly authorised to sign as agent. Alternatively, the disponent might type in their name on the plan by way of signature before returning it to the conveyancer in accordance with the Mercury process.

Land Registry does not currently accept e-signature platforms, but is discussing this with PSLs and other stakeholder groups.

The Committee was supplied with a clause from a large law firm's form of legal opinion, which included specific assumptions / caveats where electronic signatures have been used. The Committee considered that these types of assumption are often covered by more generic assumptions as to valid execution (for example in the Certificate of title, Schedule 1 paragraph 2.1).

6 Undertakings project

A sub-group of the Committee has produced a standard form of letter from borrower's solicitors addressed to the lender's solicitors and the security agent, which contains undertakings relating to completion of the financing. This covers matters such as registration at the Land Registry, Stamp duty land tax/Land transaction tax, deeds and notices. There are no COVID-19 caveats for the undertakings and they can be included if necessary at the time.

Please can the Committee provide any comments by **10 July 2020** on the document and once any required changes are made, the document will be added to the Committee's webpage.

Many thanks to the members of the sub-group – Vikki, Ian, Martin and Franc.

7 Rent deposit deed project

The sub-group met last Friday and has updated and made other minor changes to the Committee's current standard rent deposit deed. The revised deed was circulated to the Committee.

There is a new disputes clause aimed primarily at resolving technical accounting disputes. The financial test in the repayment of deposit provision refers to the commonly encountered test based on final audited unqualified accounts for the tenant for [three] consecutive accounting years showing for each year annual pre-tax net profits exceeding say three times the rent plus VAT. The Committee considered that it would be helpful to include some alternative financial tests such as average net profits and average net assets. The Committee agreed to retain the financial collateral provision.

The sub-group will amend the deed to include the alternative tests and the deed will be recirculated to the Committee shortly. The Committee is requested to provide any comments before the end of July.

8 Certificate of title project

The drafting project on the new edition of the Certificate of title is ongoing with the sub-group currently working on the front-end of the Certificate and Schedule 5. A further report will be provided at the September Committee meeting.

9 COVID-19 drafting

The Committee has been provided with a set of drafting produced by PSLs from a number of firms which can be included in agreements to cater for delays caused by the pandemic. The CLLS will be consulted on whether, for how long and on what basis drafting offered to the Committee by 3rd parties can be included on the CLLS's website.

10 BREXIT

This has been very quiet because of the pandemic, although there is likely to be more to do in late Summer.

11 Negative interest rates

There was no consensus among the Committee as to whether drafting needs to be included to deal with the potential consequences of negative interest rates. Noting that some finance documents have floors, this is a matter that the Committee will keep under review.

12 For next meeting

The following items will be carried over to the September meeting - Update on publicity of sub-station lease document and other CLLS projects; and Use of disclaimers for documents on Committee's webpages.

13 Length of meeting - 1 hour 30 minutes.

14 Date of next meeting

9 September 2020 at 12.30pm. The Committee will decide shortly before the 9th whether and to what extent the meeting will be in person.
