

Minutes for CLLS Land Law Committee meeting on 9 September 2020 by audio conference

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

1 Welcome and Apologies

The Committee welcomes as a new member Julian Pollock from Herbert Smith Freehills and looks forward to his contributions.

Apologies: Paul Kenny.

2 Approval of Minutes for June Committee meeting

The Minutes for the June Committee meeting were approved and are on the Committee's webpage.

3 Update on Land Registry's approach to e-signatures

On 27 July HM Land Registry approved the use of e-signatures but only in accordance with their requirements set out in paragraph 13 of Practice Guide 8. On Monday 7 September they made a few tweaks to their guidance. Such e-signatures can be used for registrable dispositions and certain other deeds such as discharges and powers of attorney (other than a lasting power of attorney). The requirements need only be satisfied for a registrable disposition or the other deeds they mention. So they do not apply to a document protected with a notice (on most occasions), and for example an entry can be made in respect of an e-signed deed of variation of a restrictive covenant, even though the deed does not comply with the requirements.

In terms of HMLR's requirements, there are a number of key points. An e-signing platform such as (but not limited to) DocuSign must be used. Advanced or qualified electronic signatures are not currently allowed.

HMLR require a witness to input a one-time password provided by the platform to access the relevant deed for signing and DocuSign for example currently does not provide such two-factor authentication for witnesses. Workarounds give rise to confidentiality concerns. So many firms are avoiding using witnesses where HMLR's permitted e-signature process applies, instead where possible using 2 directors etc.

All the parties must have conveyancers acting for them (with narrow exceptions), so this will be an issue for example in the case of an unrepresented discharging lender who wishes to e-sign. For a power of attorney, only the donor need have a conveyancer. Where an attorney signs a deed, HMLR do not require a conveyancer to act for the attorney.

A conveyancer is responsible for setting up and controlling the signing process through the platform. This means that a client (who is not a conveyancer) cannot control the e-signing process, which may be inconvenient for certain organisations.

The dating of the document must be done within the platform e.g. do not date in wet ink a printed out version.

The individual conveyancer making the application to HMLR must give a certificate in a prescribed form where there is an e-signed document. The form is "*I certify that, to the best of my knowledge and belief, the requirements set out in practice guide 8 for the execution of deeds using electronic signatures have been satisfied.*" It is more difficult to give this certificate where the conveyancer does not control the signing process, because for example that is done by another firm. The conveyancer receives some assurance from the interim "certificate of completion" provided by DocuSign (or equivalent for another platform), which provides an audit trail for the e-signing. Some firms will also ask the firm controlling the signing process to provide them with a certificate in the form required by HMLR to help them to give the certificate to HMLR. The certificate will be read by HMLR as referring to the requirements as they are at the time the deed is e-signed.

Discussions among the PSL community suggest that there have not been many applications sent to HMLR with e-signatures and HMLR's requirements are a likely explanation for this.

HMLR's permitted process is only a short term solution to e-signatures. HMLR appear to be very keen on qualified electronic signatures (which is a more secure process) and this may be introduced in the near term. It is not known what the timescales will be or whether their current permitted process will cease to be permitted if and when the new process comes in or whether there will be a transitional period. Currently, qualified e-signatures are generally not used by firms.

4 Response on two Law Society Practice Notes on the use of virtual execution and e-signatures

The Committee was provided with a draft Q&A produced by the Law Society on how to use e-signatures and complete virtual executions. The Law Society were seeking comments. A number of Committee members provided comments which were sent to the Law Society (and circulated to the Committee). It was made clear that this was not a formal response from the Committee as a whole.

5 Impact of planning changes including changes to the Use Classes Order on property documents

On 1 September 2020 significant changes were introduced to the Use Classes Order. So for example old Class A1, A2, A3, B1 and certain D1 and D2 uses will fall within and be replaced by a new single Class E. The new Class E – a general "commercial, business and service" use class - covers retail, food, financial services, indoor sport and fitness, medical or health services, nurseries, offices and light industry. Class E will also include a new category of 'other services which it is appropriate to provide in a commercial, business or service locality'.

Documents such as leases have or are in the course of being changed to replace the old use class with the equivalent new one. The replacement exercise is not always straightforward as some of the old uses such as A4 and A5 are now sui generis. The revised use classes do not apply to Wales.

While the revised use classes are now the law, a judicial review application has recently been made by Rights: Community: Action, a non-governmental campaign organisation, which is due to be heard between 8 -15 October and challenges the lawfulness of recent legislative planning changes including to the use classes and the general permitted development order.

The grounds for the judicial review are that the Secretary of State unlawfully failed to carry out an environmental assessment pursuant to the relevant EU Directive, or to have

due regard to the Public Sector Equality Duty, or to consider the weight of the evidence against the reforms, including prior consultation responses and the advice of experts.

The claimant's application to suspend the operation of the new legislation until the disposal of the claim, was withdrawn.

If the judicial review application is successful, there will be uncertainty about the effectiveness of references to the revised use classes in leases and other documents. As a result, until this situation is resolved, some firms will continue to refer to the old use classes in new documents, but make it clear that the reference to the 1987 Use Classes Order is to the Order in force as at 31 August 2020 (the day before the new law came into force). Some firms will not refer to the use classes, instead simply describing the use e.g. retail shop for the sale of etc.

However, for now, the revised use classes are the law and that may impact on existing leases (admittedly a minority) where the 1987 Order is not stated to be as at the date of the lease and, therefore, what was say an A1 use becomes the much wider Class E.

6 Pandemic related property documents

Rent deferral and rent suspension arrangements and alternatives to market rent such as turnover rent continue to be the subject of discussion between landlords and tenants in the context of the pandemic. Of relevance in that regard is the Government's voluntary code of practice (published in June 2020 and touched on at the June Committee meeting) to encourage commercial tenants and landlords to work together to protect viable businesses in the light of the pandemic. The new code can be accessed [here](#) and it lasts until 24 June 2021. This code does not appear especially influential; commercial dynamics seem more of an influence to parties' behaviour.

Other property documents introduce provisions to cater for delays caused by the pandemic and permitting time extensions to obligations, termination rights etc.

The moratorium on forfeiture of business leases for non-payment of rent continues until 30 September 2020. There has been a lot of recent legislative change in relation to obtaining possession of residential property.

In terms of rent concessions made in respect of the March quarter day 2020, notices are being served by landlords on former tenants and former guarantors to protect their position under section 17 of the Landlord and Tenant (Covenants) Act 1995 in relation to the 6 month limit beginning with the due date (which is the March quarter day), in case the tenant defaults on the date when the deferred rent is to be paid.

7 Government's consultation on proposals to require the provision and publication of data on contractual controls of land

The Government is [consulting](#) on proposals to require the provision and publication of certain data on contractual controls of land. The Government considers that better data on land ownership and control is required to achieve its vision for the planning system, to improve the development process and to increase the public's understanding of who exercises control over land. Its particular focus is on rights of pre-emption, options and conditional contracts and its consultation seeks views on how best to improve transparency around them and what additional data should be made public. Some beneficiaries of those rights will have concerns about the public disclosure of what may be quite detailed sensitive information.

The Government proposes to have some additional data on those rights on the land register and to publish—free of charge—a contractual control interests dataset. Other

data collected will be limited to official use and shared across government for the purposes of national security, law enforcement and financial stability. Details of the proposed additional data requirements and what can appear in the land register or dataset can be found in Annex A to the consultation. Price/fee information will not appear in the land register or dataset, but other information such as a lockout period will appear in the dataset and start date and longstop date in the land register and dataset.

Those rights are currently and generally protected by a notice at HM Land Registry and the proposal is to adapt through new legislation the current agreed notice system to incorporate the collection of additional data. So parties to contractual control interests would not be able to apply for an agreed notice at HMLR until the additional data has been supplied and the ability to use a unilateral notice will be removed. In case the beneficiary of the interest eschews using a notice and seeks to use a restriction to protect their interest, the Government will consider whether such interest should not be capable of protection by a restriction.

The Government intends to retain current HMLR procedures for excluding prejudicial information (i.e. the exempt information document system), but not where it is additional data that needs to be provided under the new regime.

Responses to the consultation are to be provided before 23.45 on 30 October 2020.

The Committee's view was that the proposals extended too widely, impacting on transactions that had nothing to do with the mischief that the Government was seeking to address, land banking. For example, it was inappropriate for it to apply to pre-emptions in a shopping centre which have their own commercial justification that has nothing to do with stymying development opportunities. Equally, it should not apply to rights where the beneficiary of the right will occupy. Instead, consideration should be given to the proposals applying only to organisations that have rights of the relevant type affecting land in aggregate above a particular threshold (say in square feet). While the proposal is to collect the data via the transactional/Land Registry process, it was noted that as an alternative there could be a duty on organisations to report (as a corporate responsibility) where the threshold mentioned was exceeded. Also the request for information about the rights needs to be more focused and workable, again aimed at tackling the mischief.

The Committee considered that the proposals in this consultation are potentially significant and intends to provide a response. **Please let Warren know by close of business 16 September if you wish to be involved.** The Committee will liaise with the PSL groups on a response.

8 Final comments on Rent Deposit Deed

The Committee was provided with the final form rent deposit deed in the papers for the Committee meeting. Jayne Elkins subsequently had a few comments shown in the attachment which are accepted by the drafting sub-group. The Committee has no further comments and the document will be added to the Committee's webpage. **CLLS will explore with Project Associates publicity for the document. Warren will mention it to the PSL community.**

9 Publicity for undertakings document

There has been some good publicity for the Committee's new undertakings document (Borrower's solicitor's undertakings for benefit of lender's solicitor and security agent/trustee re post-completion matters). Estates Gazette had a headline referring to the document and it has been mentioned to the CLLS's Financial Law Committee and the

Loan Market Association. The Committee intends the document to be a useful standard generally acceptable to firms to avoid unnecessary negotiation.

We have had an interesting point raised as to why the obligation to make the Land Registry application within the priority period is conditional on the borrower's solicitors having received the DS1 in respect of existing charges to be discharged and evidence of identity for unrepresented parties. The point was that from a lender's perspective the borrower's solicitors should be required to make the application within the priority period even if the DS1 and evidence of identity have not been received, to protect the lender's priority. The point will be considered by the drafting sub-group.

10 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 November Committee meeting.

11 Code for Leasing Business Premises

The [Code for Leasing Business Premises](#) became effective on 1 September 2020 and the Committee will keep under review and discuss at future meetings the impact of the Code on heads of terms, negotiations and the content of leases.

12 VAT and landlord and tenant barter transactions

HM Revenue and Customs has released [guidance](#) confirming that they do not consider that a number of commonly agreed landlord and tenant lease concessions (given in exchange for landlord favourable lease variations) should be classed as barter transactions for VAT purposes. Such classification has had VAT implications for both landlords and tenants and caused extra administration.

The guidance clarifies that certain lease variations agreed to by tenants for rent concessions should not be considered as taxable supplies (i.e. they are not a barter for VAT purposes), for example:

- where a landlord gives a rent free, rent reduction or rent holiday and the tenant does nothing in return and there are no other changes to the lease;
- where the tenant agrees to extend the term of the lease or agrees to a variation to a break clause in the existing lease; or
- where the tenant agrees to take a new lease with new terms.

There are still a number of landlord and tenant deals where the VAT barter regime is relevant.

Separately on VAT, on 2 September, HMRC published [Revenue and Customs Brief 12 \(2020\)](#) (following some ECJ decisions) to provide that fees and compensation/damages paid for early withdrawal from an agreement (such as a break in a lease) are normally treated as consideration for a supply of goods or services and are, therefore, generally liable to VAT. This has retrospective effect meaning parties may need to account to HMRC for back payments of VAT (4 year time limit for adjusting returns).

13 Law Commission's new reports on residential leasehold and commonhold reform

The Law Commission in July published 3 [reports](#) on residential leasehold and commonhold reform, covering the right to manage, leasehold enfranchisement and commonhold. The Committee will follow with interest what happens next.

14 Due diligence product for operational assets

A correspondent has suggested that it would be helpful for the Committee to produce a due diligence product for real estate operational assets when the asset is only a small part of the overall transaction and the product could be used in tandem with an insurance product.

The Committee thanked the correspondent for her interest, but considered that the Committee's short form Report on title was a suitable document designed for the type of situation referred to. The Committee is happy to consider any specific comments that she may have on the Report.

15 Update on publicity of Committee projects; and Use of disclaimers for documents on Committee's webpages

The precedents statistics for 8 March - 2 September 2020 are:

Main Precedent page – 2,776 hits
Certificate of Title – 3,389
Draft Legal Opinion - 315
Wayleave Agreement - 456
Service Charge Provisions - 99
Insurance provisions on rack rent leases - 106
Deeds on rights to light - 75

Total 7,216

Also 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.

In terms of the disclaimers on the website for the CLLS's precedent documents, this will be discussed at the main CLLS committee next week.

The Committee will look to continue to work with Project Associates (the CLLS's PR agency) to publicise its projects.

The CLLS AGM takes place virtually on 15 September at 6pm ([details](#) are on the CLLS website).

16 AOB

Mention was made of possible reform of the Landlord and Tenant Act 1954 and the BPF has set up a working party. This will be discussed by the Committee when there are further details.

17 Length of meeting – 1 hour 30 minutes.

18 Next meeting - 25 November 2020 at 12.30pm. Likely to be virtual.