

CITY OF LONDON LAW SOCIETY LAND LAW COMMITTEE

Minutes for CLLS Land Law Committee meeting on 28 January 2021 by audio conference

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

1. Approval of Minutes for November 2020 Committee meeting

The [Minutes](#) for the November Committee meeting were approved and are on the Committee's webpage.

2. Update on Certificate of title project

The possible front-end disclosures and changes to Schedule 5 have been circulated to the working group and comments have been requested. We have received various other suggested changes for the 8th edition, but initially the group will focus on the front end and Schedule 5 of the Certificate.

Separately Brigid North and Sangita Unadkat are progressing the introduction of residential property related elements into the Certificate. The intention is to add statements to Schedule 3 which require a disclosure if there is residential use and if any of the relevant enfranchisement rights apply. There may also be a need to add equivalent statements to Schedule 4 for leasehold properties to which, for example, rights of first refusal or to manage apply. These statements would be designed to (a) alert the draftsman to the potential for statutory rights to apply where there is residential use or qualifying leases, and (b) address concerns that lenders have in

respect of the various statutory rights that may apply in mixed use properties. Consideration is also being given to how to address residential Letting Documents.

The CLLS Construction Law Committee will be discussing the construction section of the Certificate of title with a view to identifying the appropriate content and format for construction disclosure within Certificates of title. This is expected to pick up on a number of the principles contained within their guidance for borrower reporting on construction documents, which they have also been working on recently.

3. Preliminary discussion on project to create a note analysing turnover lease provisions and issues

As agreed at the last Committee meeting, the primary purpose of this project is not to produce another standard turnover provision, but instead to produce a note highlighting points to watch on turnover rent drafting (including points that have been increasingly sought by tenants during the pandemic and/or as a result of insolvency situations) and what types of provisions are out there and where examples can be found. Drafting may follow in due course if the working group considers this will assist.

Laurie Heller circulated a questionnaire to elicit members' experiences of turnover rent drafting and welcomed responses. **Action point: Please respond to Laurie with comments.**

There was a discussion of key points that members have encountered in relation to turnover drafting in recent times.

The spate of CVAs in recent years has seen many turnover rent arrangements imposed on landlords. Turnover rents are not just confined to retail, hospitality and leisure but also in other sectors. EBITDA arrangements are rarely used (except in a hotel context) and cause issues with reconciliations.

Should the turnover rent be limited to when the original tenant occupies and not extend to any assignee or undertenant? Many are personal arrangements. What is the mix of market-based rent and turnover rent? To what extent are on-line sales, the return of items purchased on-line and "click & collect" accounted for in the turnover definition? It can be difficult for landlords to police what tenants are doing turnover-wise and transparency is key. Should the turnover rent cease or how should it be calculated if the tenant breaches the keep open covenant? There is a danger for landlords of their properties becoming merely showrooms, with little or no turnover actually being generated from them, which will undermine the turnover rent. Should GDPR provisions be included in view of the involvement of sensitive data?

4. Impact of Brexit on property documents

While Brexit will predominantly impact on such areas as procurement and environment law, it may require certain, in the main minor, changes to real estate documentation. Possibly the most important change is to ensure that the drafting provides for English courts to have exclusive (as opposed to non-exclusive) jurisdiction. Exclusive jurisdiction provides the greatest certainty and is likely to continue to be enforceable across the EU under the Hague Convention.

Consideration should be given to replacing other European references in real estate documents such as in interpretation, environmental and VAT provisions. The Committee's Property Management Agreement has European references in the context of GDPR and possible changes are being considered.

Also in licences to alter, agreements for lease and development agreements, members have encountered amendments by which parties have to act reasonably and give extensions if there are delays for example due to a shortage of supplies because of Brexit. This may be covered in any event by existing time extension provisions. Also be careful of ultimate longstop dates and whether they remain appropriate in the light of delays due to Brexit. These are similar points to those encountered for COVID.

5. Decision in Rights Community Action case on judicial review of planning changes including changes to the Use Classes Order

The judicial review claim was dismissed by the High Court, but the Court granted permission to apply for judicial review on certain grounds. Rights Community Action intend to appeal, but the timing for the appeal is uncertain. In view of this, referring in new leases to a use class of the Use Classes Order as at 31 August 2020 (rather than the revised Use Classes) continues to be a sensible way to proceed for the moment. The Model Commercial Leases are adopting this approach.

6. Law Society's Q&A on e-signatures and Mercury

The [Q&A](#) was drafted by a working group of the Law Society's Company Law Committee and focuses on electronic signatures in commercial law matters. It is a companion to the Law Society's (and CLLS's) earlier practice notes on execution by virtual means (Mercury signatures) and execution using an electronic signature.

It represents the views of the Company Law Committee as to general practice in commercial and contract law and provides extremely helpful answers to important questions (reiterating many points from the earlier practice notes), but it does not focus on the specific requirements of registries such as HM Land Registry. Among the answers of interest are the following.

The answer to question 9 confirms the statement in the 2016 electronic signatures practice note that, although not supported by legal authority, execution in accordance with section 44(2) of the Companies Act 2006 can be achieved by each of two authorised signatories (such as directors) signing the deed (using an electronic signature or another acceptable method) in counterpart (but not where a company seal is affixed). The answer to question 11 confirms that signing using a combination of execution methods is permitted, provided that each party uses a valid signature method, and signing in counterpart may facilitate this. And the answer to question 15 confirms, in the context of Mercury signatures and perhaps going beyond what the earlier Mercury practice note stated, that an additional "soft copy" PDF original can be compiled from the Mercury-compliant final document and signed signature page, into which a date can be included using a PDF writer tool or stylus.

In a real estate context, it is worth emphasising again that the information in this Q&A document must be read subject to HM Land Registry's practice requirements where relevant.

7. Law Commission call for evidence on smart contracts

On 17 December, the Law Commission published a [call for evidence](#) on smart contracts. By smart contracts, they mean legally binding contracts in which some or all of the terms are recorded in or performed by a computer program deployed on a distributed ledger. Smart contracts may take the form of a natural language contract where performance is automated by computer code, a hybrid contract consisting of natural language and coded terms or a contract which is written wholly in code. Smart contracts are expected to increase efficiency and certainty in business and reduce the need for contracting parties to have to trust each other since the trust resides instead in the code.

The call for evidence covers "What is a smart contract?" Formation of smart contracts; Interpretation of smart contracts; Remedies and smart contracts; Consumers and smart contracts and Jurisdiction. The paper sets out the Law Commission's current understanding of the law and practice, and asks consultees for their views, but it does not make any proposals for law reform. The call for evidence closes on 31 March 2021.

While the Committee is very happy to contribute to a response from another CLLS Committee, it will not provide its own response since the subject matter does not currently impact significantly on the work of Committee members. Members had encountered smart contracts with hotel room/serviced accommodation bookings, but those arrangements are usually short term and real estate lawyers tend not to be involved.

8. Pandemic related property documents

The Committee noted that documents and drafting (of types discussed at previous Committee meetings) continued to be used to address the problems caused by the pandemic and new lockdowns. It was also noted that the moratorium under the Coronavirus Act 2020 on forfeiture of business leases for non-payment of rent (and restrictions on the use of commercial rent arrears recovery) was extended to 31 March 2021. For residential property, evictions in England will not be enforced until the end of **21 February 2021**, with certain exceptions. The prohibitions on winding up petitions and related protections (also discussed at previous meetings) have been extended to 31 March 2021.

9. Any further points on undertakings document

The Committee's form of [undertakings document](#) from borrower's solicitors for the benefit of lender's solicitor and security agent/trustee re post-completion matters, has been published and feedback is also welcomed.

An interesting point has been 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. Government's announcement on residential leasehold reforms

The Government has now given an initial [statement](#) in response to certain elements of the Law Commission's proposed reforms on residential leasehold published in July 2020. The Government's response at this stage is brief, showing its current direction of travel. It mainly focuses on the proposals in relation to enfranchisement and lease extension. Key points include marriage value will be abolished; lease extensions for both flats and houses will be for a 990 year term (as opposed to the current considerably shorter terms) all at a zero ground rent; and there is a further commitment by Government to restrict ground rents to zero on all new leases including retirement leasehold properties. Where leaseholders already have a long lease, they will be able to buy out the ground rent without the need to extend the term of the lease. The Government has said that it will translate its proposals into law as soon as possible, starting with legislation to set future ground rents to zero in the upcoming session. The Government will also be establishing a new Commonhold Council as a partnership of industry, leaseholders and Government that will prepare homeowners and the market for the widespread take-up of commonhold. Warren will contact the Law Commission in relation to how the Committee can be involved with the Commonhold Council. Residential leasehold reform will be included as a standing item for future meetings because of the change in this area.

11. Measures to prevent local authorities from using loans from the Public Works Loan Board to buy investment assets primarily for yield

At the end of November 2020, HM Treasury announced measures (in the form of new lending terms) to prevent local authorities (LAs) in England, Scotland and Wales from using loans from the Public Works Loan Board (PWLB) to buy investment assets primarily for yield. This would not impede LAs' ability to pursue service delivery, housing, and regeneration under the prudential regime. The PWLB will not lend to an LA that plans to buy investment assets primarily for yield anywhere in their capital plans, regardless of whether the transaction would notionally be financed from a source other than the PWLB. The PWLB is the main lender to local government, accounting for around two thirds of LA debt.

If a seller is proposing to sell an investment property to a LA primarily for yield, consideration should be given to asking the LA whether it is using a loan from the PWLB to buy the property and, if it is, clarification should be sought as to the basis for the LA doing so in view of the Government's related measures and guidance. There may be some concern about the impact on the seller if a PWLB loan is used by a LA to buy an investment asset primarily for yield. The Government guidance so far provided suggests that HM Treasury will look to the LA for redress (e.g. return of the loan), although one option is for HM Treasury, where the transaction was in clear breach of the rules etc, to require that the LA agree a plan to unwind the transaction to a reasonable timetable. It is unclear how that would impact on existing contractual obligations with the seller. Even if a PWLB loan is not being used to buy such investment asset, the LA must not refinance it with a PWLB loan. The point must also be considered if acting for a LA on such a transaction.

12. Potential impact of National Security and Investment Bill on property transactions

Under the National Security and Investment Bill, a new statutory regime is created to enable the Government to scrutinise and intervene in transactions to protect national security. The Secretary of State can "call in" statutorily defined acquisitions of control over qualifying entities and assets, in order to carry out a national security assessment. Proposed acquirers of shares etc. in companies operating in sensitive sectors of the economy will be required to notify and obtain the approval of the Secretary of State before the acquisition is completed. The mandatory notification relate to corporate acquisitions rather than asset acquisitions (such as of land). Voluntary notification is available, for example to avoid a call-in after the event. The call-in power can be exercised after the trigger event has taken place, even if there was no mandatory notification. The Bill includes powers to retrospectively capture any acquisition that takes place after 11 November 2020. The nature of the sensitive sectors was recently consulted on and was proposed to include data infrastructure, energy, telecommunications, transport and defence among other sectors.

The Secretary of State expects to intervene very rarely in asset transactions, but is more likely to intervene where assets are integral to a "core area" entity's activities or, in the case of land, the asset is in a sensitive location.

The sanctions for non-compliance are very serious including the unwinding of transactions, multi-million pound fines and imprisonment of up to 5 years.

The impact on real estate is still being established, but it would seem that for certain corporate and asset deals, this legislation could lead to delays and potentially jeopardise transactions. It may be difficult for example to identify how close to a sensitive site a property needs to be, to be caught by the legislation.

13. Update on publicity of sub-station lease document, rent deposit deed and other CLLS projects; Use of disclaimers for documents on Committee's webpages

Feedback has been provided on the use of the Committee's sub-station lease document and while it is currently not used that regularly, it is seen as a positive development. There is some interest in having further standard leases and due diligence guidance. **The working group should encourage its members to use the documents themselves. The sub-station lease will also be added to the CLLS Precedents documents section.**

Other matters will await the March meeting.

14. Issues to be raised at forthcoming meeting of Chairs of the CLLS Specialist committees

The Chair will raise the issues of the National Security and Investment Bill and what the CLLS is doing in relation to Brexit. The Chair will report back on what is said.

15. Reform of RPI delayed

On 25 November 2020, the UK Government and UK Statistics Authority (UKSA) published their response to the joint consultation on the timing of the reform to the Retail Prices Index (RPI). UKSA previously announced that they wished eventually to bring the methods and data sources of the Consumer Prices Index into RPI, including owner occupiers' housing costs (CPIH).

The UKSA has concluded that its preferred statistical method for bringing the methods and data sources of CPIH into the RPI remains that as set out in the consultation. After the implementation of CPIH methods and data sources into the RPI, the RPI and CPIH will continue to be calculated separately in the manner set out in the consultation on an ongoing basis and will be published as separate indices and growth rates. The introduction of the new data source and methods to the RPI will see its annual measured rate of inflation be lower, on average, by 1% point per annum.

The proposals require the consent of the Chancellor if they were to be implemented before 2030, since RPI is used in two specific index-linked gilts. The Chancellor has decided that he will be unable to offer his consent to the implementation of such a proposal before the maturity of the final index-linked gilt in 2030. So while the UKSA has stated that its policy is to address the shortcomings of RPI in full at the earliest practical time, the earliest time from both the legal and practical point of view is now **February 2030**. After that date, the UKSA can implement changes to RPI unilaterally.

So there will be no change to the RPI methodology until 2030. However, consideration needs to be given to alternatives to RPI for arrangements being entered into now that will subsist in 2030, and also for example for new Landlord and Tenant Act 1954 protected leases referring to RPI that contractually expire pre-2030, because the starting position is they would be statutorily renewed on the same terms.

16. Suggested changes from a PSL to Land Law Committee's overseas legal opinion

A PSL has kindly suggested some changes to the Committee's overseas legal opinion. The Committee offered its thanks for the suggested amendments and will consider whether they justify updating the standard at this stage. **Please can members send any comments to Warren?** A working group may be set up to consider this further.

17. AOB

- ? On 27 January a UK Government consultation was launched on possible changes to the Electronic Communications Code. Please click [here](#) for the Consultation document and how to respond. The closing date for responding is 24 March 2021. The Government will consider the responses received and provide a consultation response outlining the final policy position and any proposed legislative changes. **Please can members let Warren know if they consider the Committee should respond? Warren will ascertain whether the Law Society plans to respond.**

18. Length of meeting

1.5 hours.

- 19. Next meeting: 24 March at 12.30pm probably by dial-in; Remaining 2021 dates - 26 May, 28 July, 29 September and 24 November.**