

Minutes for CLLS Land Law Committee meeting on 29 September 2021 by audio conference

Attendees: Jackie Newstead (Chair), Warren Gordon (Secretary), Jeremy Brooks, Caroline DeLaney, Martin Elliott, Alison Hardy, David Hawkins, Laurie Heller, Matt Hooton, Stephen Josephides, Tom Pedder, Franc Pena, Julian Pollock, Sangita Unadkat, Ian Waring and Patrick Williams.

1 **Apologies:** Nick Brent, Jamie Chapman, Jayne Elkins, Kevin Hart (from the CLLS), Vikki Hills, Paul Kenny, Daniel McKimm, John Nevin, Brigid North, Jeremy Shields.

2 Approval of Minutes for May 2021 Committee meeting

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

3 Certificate of title

The current form of the proposed new 8th edition of the Certificate of title was circulated to the Committee in advance of the meeting. The Committee was reminded of the current state of play. Schedule 5 (Letting Documents) has been updated to better reflect the Model Commercial Leases, but certainly not to replicate the MCL form. A couple of Committee members have provided comments on Schedule 5 which largely accept the new approach adopted, but offer really helpful suggested changes.

The Committee will look for opportunities to streamline the statements to improve the process for producing the Certificate. The idea is to achieve a balance between having a Certificate that provides sufficient certainty for the recipient on the key elements of an institutionally acceptable letting document, but at the same time removing some of the more intricate drafting (an example cited previously was in the VAT statements) to facilitate the Certificate's production.

The Committee has previously discussed front end changes to the Certificate, which have largely been agreed.

The task for the Committee and its Certificate sub-group is to provide further comments on Schedule 5 and on the remainder of the Certificate. Bearing in mind that the basic format of the Certificate dates from 2012 and was last updated in 2016, the Committee will consider what changes in law or practice should be reflected e.g. is it appropriate to mention green lease drafting such as obligations relating to the impact of alterations on a property's environmental performance, or drafting that is more voluntary in nature relating to co-operation and data sharing between the landlord and the tenant? The sub-group will consider this further.

A note has been very kindly provided by David Hawkins on points to consider for the Certificate if the property is located in Wales and the Committee thought that further consideration should be given to whether the Welsh legal position should be covered e.g. on the land transaction tax, residential landlord and tenant law, planning and the applicable law provision. David kindly agreed to ask a colleague to look into this further.

In terms of the importance of considering the issue of caps on liability, a note will be added to the new Certificate to remind certifying firms to check internal procedures as to the policy on and level of caps on liability. It was noted that PI top up for Certificates is generally expensive and difficult to obtain (especially for firms with lower PI cover).

Tom Pedder updated the Committee with the progress of the CLLS Construction Law Committee on the proposed form of Construction report. They have produced some draft

updated construction statements for inclusion in the Certificate, which are currently being discussed by the Construction Committee, who are also looking to finalise a guidance note on construction reporting which would be relevant to the Certificate. It is envisaged that the guidance note would be included in the Note to users within the Certificate. It will be useful if one of the Construction Committee can join the next Certificate sub-group meeting to provide an update on the report and likely timings.

The current draft Certificate envisages there being a form of Planning report and the Chair will reach out to the CLLS Planning Law Committee to seek their involvement and follow up on earlier emails.

A couple of Committee members are also looking at a new section for the Certificate on residential tenancy issues. This could take the form of additional statements in relevant parts of the Certificate referring to specific key legislation such as the Landlord and Tenant Act 1987.

Actions: i. Please can Committee members send through further comments on the form of Certificate circulated ii. A meeting of the Certificate sub-group will be arranged for the next few weeks. iii. David Hawkins to ask colleague to look into Certificate's possible treatment of Welsh law iv. the Chair to reach out to the CLLS Planning Law Committee v. Construction statements and guidance and residential statements to continue to be pursued.

4 Committee's response to the Law Commission's consultation on its 14th Programme of reform

The Committee responded to the Law Commission's consultation on its 14th Programme of reform in relation to Commercial leasehold and the response can be found at [Committees-response-to-Law-Commissions-consultation-on-Generating-ideas-for-the-Law-Commissions-14th-Programme-of-law-reform-Commercial-Leasehold.pdf](https://www.citysolicitors.org.uk/committees-response-to-law-commissions-consultation-on-generating-ideas-for-the-law-commissions-14th-programme-of-law-reform-commercial-leasehold.pdf) ([citysolicitors.org.uk](https://www.citysolicitors.org.uk))

5 Impact of Supreme Court judgment in Harcus Sinclair LLP and another v Your Lawyers Ltd [2021] UKSC 32

The Committee discussed the impact of the Supreme Court judgment in [Harcus Sinclair LLP and another v Your Lawyers Ltd \[2021\] UKSC 32](#) from July 2021 on the giving of undertakings by limited liability partnerships (LLPs).

The decision has caused concerns and the implications are being considered by The Law Society. The following is a summary of the salient points.

While the Supreme Court in this case did not have to decide whether a solicitor's undertaking could be enforced against a solicitors' LLP (Harcus Sinclair) or other corporate entity ("incorporated law firms") under the court's supervisory jurisdiction, this question, being one of general public importance, was a reason for the giving of permission to appeal to the Supreme Court, and the Court provided its views.

The availability of rapid summary enforcement of solicitor's undertakings under the court's supervisory jurisdiction has been a significant support for the reliability of such undertakings and for the propriety of accepting them. The mere existence of such swift means of enforcement makes it inherently unlikely that a solicitor would fail to comply, and the undertaking does not depend for its enforcement upon it being given contractually, supported by consideration.

The Supreme Court's view was that, as matters stand, a solicitor's undertaking would not be enforceable against an LLP (or other incorporated law firm), because it is not an officer

of the court, nor a solicitor. The Court, with considerable reluctance, did not consider that this case was an appropriate occasion for making a decision whether, and if so how far, to extend the court's inherent jurisdiction. First, because the decision would have been obiter only – it was not a case about solicitor's undertakings. Second, a properly informed decision would much better be made with the assistance of submissions from the Law Society, the Solicitors' Regulation Authority etc. Third, this question was probably better dealt with by legislation than by the courts, because of the availability of procedures for consultation which the court lacks, and the Court hoped that Parliament will consider this further.

The Court was concerned about whether those dealing with incorporated law firms including solicitors' LLPs were sufficiently aware that undertakings given by them are not currently buttressed by the court's supervisory jurisdiction.

Cordery on Legal Services states "Given that most solicitors now practise through some form of entity, the practical effect of the decision of the Court of Appeal in *Harcus Sinclair* is that most undertakings can now only be enforced by a breach of contract claim. Alternatively, an aggrieved party can hope that the risk of being reported to the SRA will encourage compliance. This clearly falls well short of the protections that made undertakings such a powerful tool, and clients and law firms alike may want to review their reliance upon them"

While the Court thought that the lacuna may be addressed by ensuring the relevant undertaking is given personally by a solicitor, as well as, or in the alternative to, the incorporated law firm for which the solicitor acts, that may not always be a satisfactory solution where summary enforcement is sought, if the individual solicitor lacks the power within their incorporated law firm to ensure that compliance occurs.

In practice, the Committee's view was that there would be a lot of reluctance for an individual solicitor to have sole accountability under the court's supervisory jurisdiction. It was also noted that the court is rarely called on to exercise its supervisory jurisdiction to enforce undertakings. The risk of being reported to the SRA for breach of an undertaking and the associated reputational damage will continue to be key incentives for compliance by a solicitors' LLP. Each firm's undertaking, however, needs to be judged on its own merits.

The Committee looks forward to the outcome of the Law Society's deliberations.

Action: The Committee will reach out to the Law Society so that a coordinated approach can be adopted. It was acknowledged that this decision is relevant to undertakings impacting on all areas of law and Kevin Hart will be asked whether other CLLS Committees are considering this.

6 APSL/LPSLG sub-group's papers on deeds in the light of e-signing / Mercury

With the proliferation of electronically and Mercury signed deeds, attention has turned to whether and how document and deeds retention practice needs to change to accommodate these new signing methods. A group comprising members of the Association of Property Support Lawyers and the London Property Support Lawyers' Group has produced some suggested amendments to contractual obligations, undertakings and representations in some of the key real estate standards produced by among others the Law Society and City of London Law Society, together with an accompanying working paper including suggested good practice and proformas.

The group says that the aims of the project include promoting consistency in deeds retention and record keeping; helping adapt market practice for contract provisions, certificate of title statements and standard undertakings to save time and reduce avoidable

disputes; and promoting a practice that can accommodate differing views as to what can constitute an "original" or an "additional original" for those deed formats where there is currently no consensus or clear authority.

The Committee considered that this is an excellent and timely project and will be very happy to provide its thoughts on the suggested amendments and working paper.

Action: Committee members are kindly requested to provide any feedback to Warren Gordon on the APSL/LPSLG sub-group's papers on deeds in the light of e-signing / Mercury.

7 Borrower's solicitor's undertakings document

Last year the Committee produced a form of letter from the borrower's solicitors to the lender's solicitors and the security agent/trustee including undertakings from the borrower's solicitors in relation to SDLT/LTT returns, HM Land Registry applications, deeds and notices.

The Committee has received a couple of pieces of feedback on the document. They will be discussed at the November Committee meeting.

8 Residential leasehold reform – implications of Leasehold Reform (Ground Rent) Bill

The Leasehold Reform (Ground Rent) Bill was published in May 2021 and is working its way through Parliament (its third reading in the House of Lords was on 14 September 2021). It applies to leases of dwellings but, in its current form, will not have retrospective effect. The Bill prohibits a ground rent under a residential lease for a term exceeding 21 years for a premium (a so-called "regulated lease") – only a peppercorn is permitted. The Bill will not capture leases granted pursuant to an agreement for lease exchanged before the Bill comes into force.

The Bill has been amended to make it clear that the prohibition of ground rent does not extend to other sums reserved as rent by a lease, such as service charge or insurance premiums.

Some Committee members noted that the impact of the prohibition of ground rents on the approach of investors/developers to residential property may be to change some appraisals, although for some there may already be a built-in assumption about the inability to recover ground rents in future.

9 Monsolar IQ Ltd v Woden Park Ltd: Interpretation of rent review provisions by Court of Appeal

This [decision](#) from June 2021 on the interpretation of an index linked rent review clause, although on unusual facts, suggests that index-linked rental provisions that seek to achieve a duplication in rental increase and exponential rise by basing the increase in the index on the index figure at the start of the lease but applying it to the passing rent, may not be upheld by the courts on the basis that they can give rise to absurd, uncommercial results.

10 Implications of the National Security and Investment Act

The National Security and Investment Act 2021 received Royal Assent on 29 April 2021. It is not fully in force yet, but the Government has indicated that this will take place on 4 January 2022. The Act establishes a new regime for government scrutiny of, and intervention in, certain acquisitions and investments to protect national security. The

regime applies to specified categories of transaction or investment involving 4 so-called "trigger events" relating to the acquisition of control over a qualifying entity (such as a corporate entity or partnership) and 1 trigger event relating to the acquisition of control over a qualifying asset (which includes land).

The features of the regime include a mandatory notification system which requires proposed acquirers of shares or voting rights (above a specified threshold) in companies and other entities undertaking specified activities in the UK in certain sensitive sectors (such as communications, data infrastructure, energy or civil nuclear) to obtain approval from the Secretary of State to the acquisition before it is completed. If the acquisition is not notified, it will be void. The mandatory notification does not apply to acquisition of control over a qualifying asset. A voluntary notification is possible if the transaction may raise national security concerns. The Government has call-in powers within specified timeframes which apply not only prospectively but also retrospectively to relevant transactions completed from 12 November 2020.

Such call-in powers take account of 3 risk factors - "acquirer risk" (e.g. the country of origin of the buyer is a hostile state); "target risk" (e.g. is the relevant land used for any of the sensitive sectors, or is it in proximity to a sensitive site?); and "control risk" (e.g. acquiring the land interest and controlling the use of the land could pose a threat to national security). The Government has said that overall the Secretary of State expects to call in acquisitions of assets (such as land) rarely and significantly less frequently than acquisitions of entities. However, there may be increased use in potentially at risk land transactions of condition precedents relating to undertaking the voluntary notification procedures.

The sanctions for a failure to comply include powers for the Secretary of State to impose conditions on, or prohibit or unwind the transaction, and large fines and/or imprisonment.

Committee members have so far had little experience in practice of the new regime, but this is likely to change from the start of 2022.

Action: Discuss in early spring 2022 impact of the National Security and Investment Act.

11 Update on future projects re the CLLS sub-station lease

Warren Gordon approached those involved in the original CLLS sub-station lease project to ascertain interest in further work on seeking to standardise sub-station leases and process. There was interest from a few and the Committee will look to progress this if there is an uptake in interest.

12 Update on publicity of new rent deposit deed, turnover rent report and other CLLS projects; Use of disclaimers for documents on Committee's webpages

Discussion of this item was deferred to the November Committee meeting.

13 Suggested changes to the CLLS Overseas legal opinion

This will be held over to the November Committee meeting.

14 Is pandemic related drafting still being regularly encountered?

Some members commented that they were now not regularly encountering this. Sometimes in hotel management agreements, but not more generally.

15 AOB

a) **Vice Chair of the Committee**

Committee members have been encouraged to apply for the position of Vice Chair of the Committee **and members should contact the Chair or Kevin Hart within the next fortnight if interested.**

b) **The new Trust Registration Service**

Committee members were asked if they have any experience of or involvement with the extended Trust Registration Service e.g. it appears that it could apply to nominees holding on trust for separate beneficiaries. Members had not personally encountered this Service.

16 Length of meeting: 1.5 hours.

17 Remaining 2021 meeting: 24 November 2021. It is intended that this will be a hybrid in-person/dial-in meeting.