

Minutes for CLLS Land Law Committee meeting on 26 January 2022 by Teams

Attendees: Jackie Newstead (Chair), Warren Gordon (Secretary), Matthew Rous (CEO of the City of London Law Society), Jeremy Brooks, Jamie Chapman, Caroline DeLaney, Martin Elliott, David Hawkins, Laurie Heller, Vikki Hills, Matt Hooton, Paul Kenny, Daniel McKimm, John Nevin, Brigid North, Tom Pedder, Franc Pena, Julian Pollock, Sangita Unadkat and Ian Waring.

1 Apologies: Nick Brent, Jayne Elkins, Alison Hardy, Kevin Hart (from the CLLS), Stephen Josephides, Jeremy Shields and Patrick Williams.

2 Welcome

The Chair introduced to the Committee and welcomed to the meeting Matthew Rous, the new CEO of the CLLS. Matthew took up his appointment as Chief Executive of the CLLS in January 2022 (replacing David Hobart). He leads the Society's work on promoting City law firms and City solicitors. Prior to that he spent 26 years in the Diplomatic Service, with postings around the world and from 2017 to 2021 he served as Chief Executive of the China-Britain Business Council. Matthew intends to attend a number of Committee meetings each year.

Representatives of the Committee will continue to meet with the Law Society and Matthew kindly agreed to join those catch-ups.

3 Approval of Minutes for November 2021 Committee meeting

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

4 Certificate of title

The drafting group met briefly last week and plan, hopefully, one further main meeting to agree the form. The current draft of the 8th edition was circulated to the Committee ahead of this meeting and the discussions included the following aspects of the Certificate. The drafting group will work on the detail of this at its next meeting.

- The Valuers clause will be removed and instead a footnote will highlight the points referred to in the clause.
- The new share sale wording in clause 4 (the Confirmation of statements provision), which entails little change to the existing "Seller" wording – the "Seller" definition will be important.
- The form of certificate clause 5, to highlight that this is subject to any disclosures.
- There will be a statement that "We have not investigated whether the National Security and Investment Act 2021 applies to the Transaction" reflecting the difficulties for the certifying firm of confirming whether the Act applies in all the circumstances of the transaction and also to avoid a certifying firm unwittingly taking on any liability if the Act does apply and this is not highlighted in the Certificate.
- The Schedule 3 statement that Benefits have been protected will be stated to be subject to any Disclosure.
- There will be no statement for TUPE, which was considered to be an inappropriate topic for the Certificate.

Action: Drafting group to meet in February to seek to agree the form of the Certificate.

5 Commercial Rent (Coronavirus) Bill for COVID rent arrears

The Property Litigation Association and the Property Bar Association have each submitted evidence to Parliament, highlighting areas of concern with the current drafting of the Commercial Rent (Coronavirus) Bill in relation to the proposed binding arbitration process for resolving outstanding disputes over lockdown rent arrears. The concerns include the following:

- Arbitrators are given considerable latitude on the viability of a tenant's business with there being a lack of guidance as to what constitutes viability and affordability. This is likely to lead to an inconsistent approach among arbitrators.
- There is a risk of procedural unfairness arising from arbitrators' lack of flexibility to consider relevant evidence after the "final proposals" have been submitted.
- The parties are not obliged by the Bill to make full disclosure of all relevant evidence and this could lead to further argument and delay.
- It is unclear how the Government proposes to control the fees of the arbitration process, which may lead to unfairness for the parties.
- There is uncertainty over whether the Bill's proposals are feasible in terms of whether there will be enough arbitrators to deal with the claims in accordance with the Bill's timeframes.

- A number of parties appear to fall outside the ambit of the Bill such as guarantors and head tenants. It is unclear if a management company is bound by an award.
- The Bill is silent about proceedings pre-dating 10 November 2021.
- There is no provision dealing with service of documents.
- The Bill, in its current form, could destabilise negotiations between landlords and tenants, and key provisions require redrafting.

Further details can be found [here](#).

The Government [recently circulated](#) details of the Application process to become an approved arbitration body, but they fail to address most of the concerns highlighted above.

Action: This topic will be further addressed at the March Committee meeting.

6 Queries raised on 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.

First, the undertaking states that 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 feedback was that a lender's solicitor receiving the benefit of the undertaking would require the borrower's solicitors to make the Land Registry application within the priority period even if the DS1 etc. have not been received. For existing charges, unless there is a restriction on the title, the Land Registry would register the new charge and leave the old charge on the title until the DS1 is produced. If there is a restriction, the Land Registry will raise a requisition but at least the application will be on the day list and, unless cancelled, benefit from the priority period.

The Committee thanked the correspondent for the feedback, but considered that the undertaking was pitched in the right place and any departure from this would be for lenders to negotiate on a case by case basis.

The second point raised concerns that the borrower's solicitors may be exposed if their borrower client withdrew instructions between the undertaking being issued and the actions covered by the undertaking being satisfied. Again thanking the correspondent for the feedback, the Committee considered that this situation is relatively rare, and if of particular concern (perhaps due to a lengthy gap between issue of the undertaking and completion of the financing), is likely best solved with situation specific solutions.

7 Impact of the National Security and Investment Act 2021

The UK's National Security and Investment Act 2021 came into force on 4 January 2022. The UK now operates a regime that allows the Government to screen a wide variety of transactions for national security purposes. This regime may impact on corporate or asset transactions involving real estate and there may be a mandatory or voluntary notification to the Secretary of State. Members should familiarise themselves with the legislation.

8 Government's announcement on the cladding crisis

The Government has given residential property developers a deadline of early March 2022 to agree a fully funded plan of action to fix the cladding crisis in England. The Government has also announced a reset of its approach to protect tenants from the impact of the cladding crisis.

Michael Gove, the Secretary of State at the Department for Levelling Up, Housing and Communities, has written a letter to residential developers in which the Government states its expectation of clear commitments from developers to:

- Agree to make financial contributions this year and in subsequent years to a dedicated fund to cover the full outstanding cost to remediate unsafe cladding on 11-18 metre residential buildings;
- Fund and undertake all necessary remediation of residential buildings over 11 metres that the developers have played a role in developing (this includes both 11-18 metres and 18 metres+); and
- Provide comprehensive information on all residential buildings over 11 metres, which have historic fire-safety defects and which developers have played a part in constructing in the last 30 years.

The Secretary of State is prepared to take all steps necessary to make this happen, including restricting access to Government funding and future procurements, the use of planning powers, the pursuit of companies through the courts and the imposition of a solution in law if necessary. The Government will announce a decision on which companies are in scope to make funding

contributions, but it is expected to cover all firms with annual profits from housebuilding at or above £10 million.

It is proposed that there will be new protections for tenants living in their own flats: with no bills for fixing unsafe cladding and new statutory protections for tenants within the Building Safety Bill.

The Government also intends to introduce amendments to the Bill to retrospectively extend the legal right of building owners and tenants to demand compensation from their building's developer for safety defects up to 30 years old. The Bill currently covers defects up to 15 years. The Committee queried whether it was clear from the legislation who is treated as a developer.

Lenders are encouraged by the Government to continue to minimise the use of EWS1 forms for medium and lower rise buildings. This is part of the Government's proposal to restore common sense to building assessments and the market, which includes an assumption that there is no risk to life in medium and low-rise buildings unless there is clear evidence of the contrary.

9 Further thoughts on ESG drafting

With the prevalence of articles and discussions in the property industry about ESG and sub-topics such as green lease drafting, the Committee will at the March Committee meeting share thoughts on how members are encountering ESG and connected issues.

Action: Members are requested to share insights on ESG and green lease drafting at the March Committee meeting.

10 Government proposes changes to Electronic Communications Code following Consultation

The Government published its [response](#) on 24 November 2021 to the consultation on changes to the Electronic Communications Code.

The proposed changes include the following:

- A new duty for operators to consider ADR, with potential costs consequences for parties who refuse to engage.
- A new process for use against unresponsive landowners whereby operators can apply to the First-tier Tribunal to impose Code rights for a maximum of 6 years.

- Changes are to be made to the definition of “occupier” so that if an operator exclusively occupies land, it will be able to obtain Code rights from the landowner or the party with rights to control the use of the land.
- Changes are to be made to the Landlord and Tenant Act 1954 to ensure that the procedures for dealing with renewal disputes and the terms of any new Code agreement are more closely aligned to Part 5 of the Code. Jurisdiction to deal with 1954 Act disputes is also being transferred to the First-tier and Upper Tribunal.

The changes are contained in the [Product Security and Telecommunications Infrastructure Bill](#) which is currently going through Parliament.

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

Action: Kevin to provide an update at the March Committee meeting. Matthew Rous also agreed to take away the point on the use of disclaimers.

Matthew also mentioned the Social welfare solicitors qualification fund which seeks to tackle the issue of a deficit of junior social welfare solicitors. For more information on this, please click [here](#).

12 Suggested changes to the CLLS Overseas legal opinion

A correspondent had provided some suggested comments on the form of Opinion and the Committee thanked the correspondent for providing them. The Committee will consider these as part of its next review of the Opinion which will take place this year.

Action: Volunteers are requested for this project to review the form of the CLLS Overseas legal opinion.

13 Minor update to the Asset and development management agreement [Asset and Development Management Agreement – The City of London Law Society ~ CLLS \(citysolicitors.org.uk\)](#)

A couple of minor changes have been made to the Asset and development management agreement, to the Notices provision and services provided. The changes are referred to in the linked document.

14 AOB

- The Trust Registration Service (TRS) – this may capture many real estate owning structures and may impact on the on boarding process for trust clients. The Fifth Money Laundering Directive significantly expanded the scope of the TRS’s requirements, because the registration obligations are no longer limited to trusts that pay UK tax. Therefore, all express trusts need to register, unless they are specifically excluded. The deadline for registration has been extended by HM Revenue & Customs to 1 September 2022. Click [here](#) for further details.
- The Chair will discuss with the CLLS the position of Vice Chair of the Committee.

15 Length of meeting – 1.5 hours

16 Dates for 2022 meetings, all at 12.30pm and hybrid in person/virtual: 23 March, 25 May, 20 July (possibly to be cancelled due to holidays), 21 September and 23 November.

Warren Gordon
Senior Professional Support Lawyer