

CITY OF LONDON LAW SOCIETY LAND LAW COMMITTEE

Minutes of a meeting held on 19 May 2010 at CMS Cameron McKenna, Mitre House, 160 Aldersgate Street, London EC1A 4DD

In attendance	Nick Brown (Chair) Warren Gordon (Secretary) Nic Berry Nick Brent Jeremy Brooks John Butler Alison Gowman Laurie Heller Simon Hillson Anthony Judge Jackie Newstead Mark Rees-Jones Jeanette Shellard Nicholas Vergette
Apologies	Edward Bannister James Barnes Martin Elliott Nick Jones Daniel McKimm Lewis Myers Jon Pike David Sinclair David Waterfield Mark Wheelhouse Martin Wright

1. MEMBERSHIP OF THE COMMITTEE

Nic Berry, a partner at Pinsent Masons, was welcomed as a new member of the Committee.

2. MINUTES

The Minutes for the Committee meeting of 24 March 2010 were approved.

3. LAND REGISTRY'S CONSULTATION ON E-TRANSFERS AND E-CHARGES

Anthony Judge has kindly carefully considered and produced a summary of the Land Registry's consultation paper on e-transfers and e-charges-<http://www1.landregistry.gov.uk/consultations/> . The consultation ends on 25 June 2010. The following comments reflect Anthony's summary.

The consultation relates primarily to electronic (e-) transfers and e-charges and the proposals are planned to take effect in 2011. The consultation envisages basic transfers, but it is important for the Committee to comment, because what emanates from the consultation will likely form the prototype for more complex transactions.

An important point to note is that the Land Registry's conception of electronic signatures is very different from "virtual signings", much considered of late by the legal profession. E-signing, for Land Registry purposes, is nothing like signing documents, more like authorising an on-line bank transfer.

The client will be able to e-sign by using an authentication grid card, or the client can delegate signing to their solicitor. This raises the issue of whether law firms should authenticate (sign) on behalf of their clients and there will be differing views in the profession. The Land Registry believes (despite the reservations of some) that, if there are two or more individuals as transferor, transferee or borrower, they can collectively delegate to a solicitor under section 11 of the Trustee Act 2000. The proposed rules allow for such collective delegation using a prescribed form. The Land Registry states that a power of attorney is unnecessary.

The consultation envisages standard wording on indemnity and other covenants. There should be the option to vary the wording. There should also be the ability to insert freehand drafting on e-charges.

The consultation proposes, essentially, e-lodgement rather than e-conveyancing- this is because there remains the "registration gap" between "making the e-transfer effective" and submitting the e-AP1 to apply to change the register. There will still be a period (which, admittedly, may be quite short) between when "completion" takes place and when legal title passes following the change of the register. The current proposals do not envisage pushing the proverbial button to complete and, as a result, automatically change the register. So, in theory, *Brown and Root* issues potentially remain.

The proposals have some inflexibility in the inability to change the e-transfer after all the e-signatures have been attached (without having to create a new e-transfer and electronic bundle). There should be flexibility to make a change late on (without having to create new e-documents) even after the e-signatures have been attached, provided, for example, the e-signatures are reapplied after the change has been made.

A key element of the proposals is when the e-transfers (and e-charges) take effect. The Land Registry suggests a number of options, but the one that appears most appropriate for transactions involving members of the Committee is that the e-transfer takes effect on

completion of the purchase of the registered estate, with the "Subscriber" (usually the solicitor acting for the transferor) having to notify the registrar, as soon as reasonably practicable, of the date when completion took effect. This would allow for the solicitor to notify the Land Registry, after the event, of the date of completion.

So, if completion took place on a particular day, but, for whatever reason, the Land Registry could not be notified until the following day, the e-transfer can still take effect on the preceding day. It is, however, unnecessary to include an obligation in the e-transfer for the transferor's solicitor to notify the registrar- this is better dealt with through undertakings. Both the solicitors for the transferor and transferee should be able to so notify the registrar.

The system will attach an e-charge to an e-transfer (although the transferor's solicitor will be unable to see the e-charge or know of its existence) and the e-charge can take effect automatically when the lender's solicitor notifies the Land Registry, or simultaneously with the e-transfer. In that regard, the e-charge can be "uncoupled" from the e-transfer, enabling separate notification of the e-charge taking effect.

All solicitors acting for parties to the e-transfer or the e-charge should be able to have access to the e-documentation, subject to restrictions where required.

There should be an ability to upload bespoke provisions, certainly for more complex transactions.

It was unclear how e-DS1s (which are used regularly on residential transactions) fit in with the Land Registry's proposals.

The proposals could increase the risk of fraud and the Land Registry should be able to prove to solicitors what real, practical benefits the proposed new system will bring. Otherwise, e-transfers (which are, initially, to be rolled out on a voluntary basis) will not be adopted by solicitors.

The Committee agreed to proceed with Anthony Judge's recommendations. Anthony will produce a response for the Committee's comments and for submission to the Land Registry prior to 25 June.

4. FEEDBACK ON CLLS SERVICE CHARGE PROVISIONS

Interest has been shown by the draftsmen of the RICS Service Charge Code in possibly referring to the CLLS service charge provisions (which are currently out for industry comment) in a new edition of the Code. This would be greatly welcomed by the Committee and the CLLS and Code draftsmen would liaise further on this.

5. CRC ENERGY EFFICIENCY SCHEME

There is currently a difference of approach as to whether landlords are passing CRC costs onto tenants. The property industry is grappling with a number of complexities in relation to CRC, including responsibility for CRC costs.

As to whether the CLLS Land Law Committee's long form certificate of title should be amended to take account of CRC, the Committee decided for the moment not to amend, but agreed to revisit that position over the next few months as the market achieves a more established position on CRC. There was some sympathy with the view that if leases covered CRC matters specifically, then this should be mentioned, but this was probably caught by the sweeper provisions and, in any event, there would be difficulty in wording the requirement.

6. GOOD HARVEST

The Court of Appeal is to hear the *Good Harvest* case at the end of June and any consideration of consequential changes to the certificate of title will be deferred pending the release of the Court's judgment.

7. LANDLORD'S INSURER'S WAIVER OF SUBROGATION- TENANT'S CONTRACTOR

This matter will be discussed at the July 2010 Committee meeting.

8. CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999 FRAMEWORK DOCUMENT

Lovells has produced a very useful document considering the use of rights under the Contracts (Rights of Third Parties) Act 1999 as an alternative to collateral warranties. The Committee considered that in most circumstances and subject to the drafting of the relevant appointment, the use of the Act in this context should be encouraged. The original intention was for a framework document to be produced by the Land Law and Construction Law Committees for using the Act on development transactions. A sub-group of the Land Law Committee (Jeanette Shellard, Laurie Heller and Edward Bannister) would follow this up with relevant members of the Construction Law Committee.

9. AOB

- At David Sinclair's request, the Committee approved Peter Taylor taking David's place on the Committee. The Committee thanked David for all his contributions to the Committee's work.
- While the rule against perpetuities, essentially, does not apply to property documents taking effect on or after 6 April 2010, a couple of quasi-perpetuity traps remain, i.e. section 149(3) of the Law of Property Act 1925 and paragraph 7(2) of Schedule 15 to the Law of Property Act 1922. The PSL groups may request the Government to consider also tackling those provisions.

10. CPD- 1 hour 45 minutes.

11. Remaining meetings for 2010 at 12.30pm: 14 July, 8 September, 17 November. All at CMS Cameron McKenna, Mitre House, 160 Aldersgate Street, London EC1A 4DD.