CITY OF LONDON LAW SOCIETY LAND LAW COMMITTEE

Minutes of a meeting held on 24 March 2010 at Allen & Overy, One Bishops Square, London, E1 6AD.

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

1. MEMBERSHIP OF THE COMMITTEE

John Trevethan of Pinsent Masons has resigned from the committee. John suggested that another Pinsent Masons' partner, Nic Berry, take his place on the committee. This was approved by the committee.

2. MINUTES

The Minutes for the Committee meeting of 18 November 2009 were approved.

The Chair will follow up with Marc Hanson, Chair of the CLLS Construction Law committee, in relation to further developments on the framework document for using the Contracts (Rights of Third Parties) Act 1999 on development transactions.

3. CLLS SERVICE CHARGE CLAUSES

A sub-group of the Land Law committee has agreed a draft set of service charge provisions. The idea of the provisions is to achieve an institutionally acceptable position, that also accords with the key principles of the RICS Code of Practice on service charges in commercial property.

The starting point for the draft was the service charge clause from the standard leases of Lovells and Berwin Leighton Paisner. The context chosen was a shopping centre since this presents the most service charge issues. However, the provisions can be readily adapted to different contexts.

Prior to the committee meeting, the draft provisions were sent to the two main groups of professional support lawyers, who have provided comments, some of which have been incorporated in the draft.

While the provisions are detailed, users should not feel constrained to use the entire set. The provisions will, hopefully, come to be seen as a benchmark for an institutionally acceptable but Code compliant service charge clause and, therefore, users may choose to incorporate particular parts of the provisions (for example, the tenant's protection provisions, or the weighting provisions) to supplement their own lease provisions.

The current draft of the provisions may be seen as more tenant-friendly than many firms' current standards, reflecting the latter's lack of compliance with the principles of the Code. A key tenet of the Code is "no gain, no loss", achieving a fair balance between the landlord and the tenant, which the draft provisions seek to reflect. In today's difficult economic climate, these provisions are perhaps a little more realistic and more likely to "get the deal done", but in a way that does not harm the institutional landlord.

There was a brief discussion on a few of the provisions. It was noted that the list of services in the provisions does not reflect the Jones Lang LaSalle "industry standard service charge cost headings"- it was felt that to do so would make the service charge drafting a little too unfamiliar.

It was decided at the meeting that the views of certain key institutional landlords and retail tenants would be sought to gauge the market acceptability of the provisions, before they are publicly released. Those committee members tasked at the meeting with obtaining views would report back to the Chair on their progress.

Committee members are asked to provide any remaining comments on the service charge provisions to Warren Gordon.

The committee was grateful to Clive Ashcroft, Head of Legal Services at Land Securities, for supplying their "Clearlet" lease, which will assist the drafting of the provisions.

The committee considered it would be useful for Clive to attend a future meeting to provide his perspective, as a client, on the solicitor's role. The Chair will speak to Clive to arrange this.

4. CONCLUSIONS ON VIRTUAL SIGNING OF DEEDS AND REAL ESTATE CONTRACTS

The Committee noted that the Law Society has issued a practice note on the execution of documents at virtual signings or closings, a link to which follows- http://www.lawsociety.org.uk/productsandservices/practicenotes/executionofdocs/4447.article

There was a brief discussion on whether the committee should produce a standard protocol to ensure consistency of approach to virtual signings. Certain other CLLS committees had decided not to produce such a protocol and the committee decided there was, probably, no need for such. The options for virtual signing presented in the Joint Working Party's note/Law Society's practice note are fairly self-explanatory and the solicitors for the parties to the virtual signing would need to agree any other specific requirements at the time to reflect the particular circumstances. It was noted that certain firms had produced their own protocols.

The point was made that section 8 of the Electronic Communications Act 2000 appears to envisage that further legislation would be needed to modify the provisions of existing legislation in order to authorise or facilitate the use of electronic communications for certain purposes, including "the doing of anything which under any such provisions is required to be or may be authorised by a person's signature or seal, or is required to be delivered as a deed or witnessed"- section 8(2)(c). It was argued that only with such legislation would certainty be achieved. This was not the view of the Counsel whose Opinions on virtual signings were obtained by the committee. In any event, such further legislation appears unlikely.

Consideration would also be given as to whether an article on virtual signings for Estates Gazette should be produced by members of the Committee.

In conclusion, documents can be virtually signed effectively in accordance with the Joint Working Party note and Law Society Practice Note, but the committee has reservations about the virtual signing process in relation to documents requiring registration at the Land Registry (who do not accept pdf signatures and have their own form of e-signatures) and, for that situation, the parties should arrange where possible for wet ink signatures to be readily available.

5. CRC ENERGY EFFICIENCY SCHEME

The outcome is still awaited of the consultation (organised by the BPF) on possible lease drafting for the CRC Energy Efficiency Scheme. A sub-group of the committee (comprising Jeanette Shellard and Mark Rees-Jones) will consider any suggested drafting once it is released.

The committee discussed various aspects of CRC including the following points.

It may be easier for landlords to charge tenants a fixed amount (per square metre/foot) on the service charge to reflect the cost to the landlord of CRC. This is not a very accurate measure (leading to tenant objection), but reduces the administration and inconvenience of having to precisely calculate what each tenant should pay. The complexities of CRC may make it difficult to fairly apportion the cost to each tenant.

The cost of administering CRC may be a more controversial cost to recover from tenants than the cost of buying allowances.

If tenants reimburse the landlord for the cost of the allowances, they will presumably look to the landlord for a share of the recycling payments received by the landlord from the Environment Agency.

6. IMPLICATIONS OF "GOOD HARVEST" DECISION

The High Court's decision in Good Harvest Partnership LLP v Centaur Services Limited [23 February 2010] has significant implications for landlords, tenants and tenant's guarantors. The Court decided that, where there is an assignment of a lease (which is a "new tenancy" under the Landlord and Tenant (Covenants) Act 1995), an outgoing tenant's guarantor cannot give a direct guarantee for the assignee's performance of the tenant's covenants in the lease. The decision has also reinforced doubts held by some as to whether the outgoing tenant's guarantor can guarantee the outgoing tenant's obligations in the authorised guarantee agreement.

It is likely that this decision will be appealed, but, as the law currently stands, the position is clear in relation to the outgoing tenant's guarantor's direct guarantee for the assignee's performance. This is a point to be borne in mind by landlords, tenants and tenant's guarantors and their advisors both in relation to leases and other ancillary documentation already completed and also current transactions.

In view of the fact that it is possible the decision may be overturned on appeal, the committee does not, for the time being, propose to change those sections of the CLLS long form certificate of title impacted by this decision- paragraph 8.4 of Schedule 4 and the box in Part 8A of Schedule 5 which states "Name of every unreleased former tenant who has entered into an authorised guarantee agreement and of every unreleased former guarantor who has entered into a guarantee of that authorised guarantee agreement." A note has been added next to the link on the CLLS website to the certificate of title, alerting readers to the Good Harvest decision. The committee will review the certificate following any further court decision on this issue.

The decision reinforces the importance of landlords looking primarily at the assignee when considering an assignment and what the assignee can offer security-wise. As commentators have highlighted, the decision may also be adverse to tenants who may find it more difficult to obtain landlord's consent to intra-group assignments because of

problems with maintaining an adequate covenant strength for the assignee. The decision may also persuade tenants to underlet rather than assign.

Having a party as a joint tenant rather than a guarantor overcomes any doubt about them entering into an AGA for an assignee, but this is often an impractical solution.

While it may be commercially logical for an outgoing tenant's guarantor to guarantee the outgoing tenant's AGA obligations (or even the assignee), following the Good Harvest decision, legally, this is ineffective, at least in relation to the assignee, and possibly also in relation to the outgoing tenant's AGA. The committee awaits any further court decision on this issue.

7. REPEAL OF THE COMPETITION ACT 1998 (LAND AGREEMENT EXCLUSIONS AND REVOCATION) ORDER 2004

The Government has recently decided that it will repeal the statutory instrument that currently exempts most leases and assignments from the application of the Competition Act 1998 prohibition of agreements that prevent, restrict or distort competition (see http://www.berr.gov.uk/files/file54193.pdf).

Since the Competition Act came into force, the Land Agreements Exclusion Order has provided that the prohibition does not apply to any agreement which creates, alters, transfers or terminates an interest in land, to the extent that a party accepts restrictions or obligations in its capacity as a holder of an interest in the relevant land. Accordingly, restrictive covenants in leases have generally not required any competition law assessment, though the application of the exclusion to other commercial arrangements relating to land has been more ambiguous.

The proposed removal of the exclusion was triggered by the concerns over restrictions imposed by supermarkets that prevent competing grocery outlets being set up, and also concerns over pub ties. However, it does mean that whole new categories of restrictions could now be subject to competition law (and potentially prohibited and, therefore, not legally enforceable). The most obvious issues would be in relation to agreements aimed at excluding certain retailers from a development, but other real estate related commercial arrangements could come under more scrutiny.

Most restrictive covenants will undoubtedly remain unaffected by this move on the basis that their effect on competition in any conceivable relevant market is minimal.

The repeal does not take effect until 6 April 2011, but, under competition law, existing arrangements could be caught by the prohibition from that date even if they were lawful at the time they were entered into.

There was a recent meeting organised by the Office of Fair Trading concerning the repeal, attended by members of the CLLS Competition Law committee and also Mark Heighton, a partner at CMS Cameron McKenna, who provided the property perspective. The OFT will be producing some guidance on how it considers that the Competition Act 1998 prohibition will apply to land agreements. Whilst not legally binding, this guidance

should assist businesses (and their solicitors) to consider the impact of the revocation on their agreements. The committee will revisit this issue following the release of the guidance.

8. AOB

Insurance of tenant's contractors

Certain large landlords refuse to include in their insurance their tenant's contractors in respect of fitting out or other works. This creates an exposure for the contractor, with the landlord refusing to seek from its insurer a waiver of subrogation rights against the contractor. A sub-group of the committee will look further into this issue, liaising with the CLLS Construction Law committee. This issue will be discussed at the next committee meeting.

Section 83 of the Fires Prevention (Metropolis) Act 1774

The Law Commission has considered whether section 83 of the Fires Prevention (Metropolis) Act 1774 ought to be repealed, amended or left alone. This provision was originally intended to prevent arson and fraud. Its language is antiquated and its meaning is not clear. However, it has occasionally featured in recent case law. It has been used to enable persons interested in insured property, but who are not policy holders, to claim insurance monies following a fire.

In March 2009 the Law Commission published a short introductory paper and received 14 responses. In February 2010, they published a summary of the responses received. Most respondents argued for section 83 to be preserved, either as it is at the moment or with only minor amendments.

The Commission concluded that "On balance although there is a good case for reform, the case is just not strong enough".

Land Registry consultation on e-conveyancing

The Land Registry has recently issued a consultation (which closes on 25 June 2010) on the rules to support e-transfers and e-charges as part of an e-conveyancing transaction. There follow links to the consultation papers:

Consultation document

Consultation questionnaire (Word)

Anthony Judge has agreed to co-ordinate a response on behalf of the committee to the consultation.

9. CPD- 1 hour 15 minutes.

10. Remaining meetings for 2010 at 12.30pm: 19 May, 14 July, 8 September, 17 November. All at CMS Cameron McKenna, Mitre House, 160 Aldersgate Street, London EC1A 4DD.