**CITY OF LONDON LAW SOCIETY LAND LAW COMMITTEE**

**Minutes of a meeting held on 17 November 2010 at CMS Cameron McKenna, Mitre House, 160 Aldersgate Street, London EC1A 4DD**

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| **In attendance** | **Nick Brown (Chair)**<br>**Warren Gordon (Secretary)**<br>**Nick Brent**<br>**Jeremy Brooks**<br>**John Butler**<br>**Martin Elliott**<br>**Laurie Heller**<br>**Anthony Judge**<br>**Jon Pike**<br>**Mark Rees-Jones**<br>**Jeanette Shellard** |
| **Apologies** | **James Barnes**<br>**Nic Berry**<br>**Jayne Elkins**<br>**Alison Gowman**<br>**Simon Hillson**<br>**Nick Jones**<br>**Daniel McKimm**<br>**Jackie Newstead**<br>**Peter Taylor**<br>**Nicholas Vergette**<br>**David Waterfield**<br>**Mark Wheelhouse**<br>**Martin Wright** |

## 1. MEMBERSHIP

Lewis Myers has resigned from the committee, having left SJ Berwin.

## 2. MINUTES

The Minutes for the Committee meeting of 23 September 2010 were approved.

## 3. PERPETUITY-TYPE TRAPS

The failure to abolish the perpetuity-type traps in:

**paragraph 7(2) of Schedule 15 to the *Law of Property Act* 1922**; and

**section 149(3) of the *Law of Property Act 1925***

appears to have been an oversight. It appears that the matter may be referred to the Lord Chancellor's office for possible change under a Regulatory Reform order.

**Post-meeting note: A number of representations have been made on this issue by PSLs and it was considered that further CLLS representation was unnecessary.**

## 4. CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999 NOTE

The CLLS Construction Law committee has produced an updated version of its May 2010 note on the use of the Contracts (Rights of Third Parties) Act 1999 ("Act") as an alternative to collateral warranties. The Committee commended the Construction Law committee on this well-written note.

The note addresses concerns about step-in rights (benefiting, for example, funders) in the context of the Act, reflecting generally held views. While there is still a debate over this, most banks accept the use of the Act as an alternative to collateral warranties (the economics of which, generally, do not work).

The main concern identified relates to the Act speaking of third parties obtaining the benefit of **rights** under contracts to which they are not a party, but not imposing **obligations**. This has led some funders to argue that step-in rights included in "Third Party Rights" (which impose on funders an obligation to pay and perform) will not be triggered by the employer serving a notice under the Act, thus rendering one of a funder's key protections ineffective. The Construction Law committee believes that these concerns are misplaced and should not be seen as a reason for rejecting Third Party Rights.

It is considered that as long as the relevant step-in rights are expressed to be conditional on the payment of outstanding sums, then it is when the funder issues its step-in notice that it assumes the obligation to pay, not when the Third Party Rights are granted.

Where this issue remains a significant concern then, as a fallback, the ability to call on a direct agreement in favour of the funder, either containing step-in provisions alone or all rights normally granted, could be retained, although, of course, the Act's purpose is to reduce the amount of paperwork.

The Committee reaffirmed that it supports the use of the Act in preference to collateral warranties. The Chair would revert to the Chair of the Construction Law committee to that effect, suggesting that this be a joint initiative between the two committees with the note making this clear.

The note will become an article which the committees should look to place in major industry journals, using the services of Lehmann Communications. Industry bodies such

as the British Property Federation will need to be notified of the position of the committees.

Jeanette Shellard mentioned that she has some Third Party Rights drafting for an agreement for lease and Laurie Heller and Mark Rees-Jones agreed to consider this and possibly send it to the Construction Law committee.

Committee members were asked to liaise with their construction colleagues to encourage the use of Third Party Rights where possible.

Many may adopt a hybrid solution using both Third Party Rights and collateral warranties, the Act for where there are a large number of benefiting tenants in a multi-let building, but a more bespoke solution for a funding situation and end purchaser.

There may be difficulties in practice with using Third Party Rights for sub-contracts (knowing whether the sub-contract has been signed and obtaining a copy of the sub-contract), with collateral warranties sometimes being used for sub-contractors, even where the Act is used for a contractor.

## 5. LANDLORD'S INSURER'S WAIVER OF SUBROGATION- TENANT'S CONTRACTOR

At previous meetings, there have been discussions concerning the difficulties currently being experienced by tenants and their contractors in persuading landlords to extend their building insurance to cover fitting out or refurbishment works to be carried out by tenants to their premises in a multi-let building. Bill Gloyn's article in Property Week highlighted the problem.

The reality of the situation, often, does not match the treatment under the JCT contracts, which require the employer to arrange joint names insurance against specified perils for the structure and contents, which are the responsibility of the employer. The relevant provision also requires the employer to arrange all risks cover for the works. Where the tenant is the employer (but does not arrange the building insurance), it is unlikely that he can comply with those requirements.

If the landlord insuring party is not willing to obtain a waiver of the insurer’s recovery rights against the offending party, the JCT contract will need amending.

The key point is that tenants (employing contractors) and their advisers should be aware of this potential risk and ensure, where possible, that their position is protected.

## 6. CRC ENERGY EFFICIENCY SCHEME

There was a discussion about whether drafting should be inserted into leases to deal with the CRC Energy Efficiency Scheme, in the light of the Government's announcement that recycling payments are to be abolished. This may make it more straightforward to incorporate the recovery of CRC costs into service charge provisions and, since CRC costs are now regarded by many as a tax, it may, depending on the drafting, be caught by a pre-CRC tenant's covenant to pay outgoings. However, in the absence of express reference to CRC in the lease, recovery cannot be guaranteed.

There was some speculation but no conclusion on whether provision in the lease for the express recovery from tenants of landlord's CRC costs would have an adverse impact on rent review, from a landlord's perspective, on the basis that this is onerous for the hypothetical tenant.

## 7. CLLS CERTIFICATE OF TITLE

A meeting will be set up in January 2011 for a sub-group of the Committee to discuss a possible new (7th) edition of the CLLS certificate of title. A list of possible issues has been produced which will provide a starting point for the discussions and some PSLs have also provided comments.

## 8. CLLS SERVICE CHARGE PROVISIONS

The sub-group of the committee (plus RICS Service Charge Code draftsmen, Peter Forrester and Chris Edwards) is meeting on 8 December to finalise the service charge provisions (for a shopping centre and separate provisions for an office building). It is intended that the new Service Charge Code will refer to the CLLS provisions (along with another separately produced set of service charge provisions) as examples of Code compliant provisions.

Once the sub-group and the land law committee are both happy with the provisions, they will be added to the CLLS website and will be publicised more widely, using Lehmann Communications.

## 9. CHANGES TO CONFLICTS RULES IN NEW SRA CODE OF CONDUCT

With the focus of the new Code being on "outcomes" and not giving special treatment to particular areas of practice, concern has been expressed in the profession at the removal from the proposed new Code of most of the specific rules and guidance on how to deal with conflicts in a conveyancing context. This may create greater uncertainty over whether a solicitor can act for more than one current client on a conveyancing transaction. Concern was also expressed that outcomes (4) and (5) in Chapter 3 treat conveyancing transactions more restrictively than other transactions. There may also be issues in determining whether the sole purpose of the transaction is the conveyance of land, for example, where a special purpose vehicle holding legal title to a property is sold.

The new Chapter 11 provides that where a solicitor acts for a seller of land, they must inform all buyers immediately of the seller's intention to deal with more than one buyer. There may be difficulties for the solicitor in determining when the seller has such intention.

**POST-MEETING NOTE: A sub-group of the committee is meeting on 21 December to discuss a response from the Committee to the SRA's consultation on the new Code.**

**10. OFT DRAFT GUIDANCE ON APPLICATION OF COMPETITION LAW TO LAND AGREEMENTS**

In October 2010 the Office of Fair Trading ("OFT") issued a consultation on its draft guidance on the application of competition law following the revocation of the Land Agreements Exclusion Order. The Competition Law committee and representatives of the Committee met the OFT in November to discuss the guidance.

The Committee had a general discussion about the guidance. It would have been helpful if, where possible, there could be more definite guidance (aimed at a property rather than a competition lawyer), rather than a mere statement of the law.

One area of ambiguity was how a "market" is defined, which is crucial in determining whether there has been a breach of competition law. Some of the examples cited by the OFT raise concerns over the potential application of competition law, particularly in view of the very serious penalties for a breach- up to 10% of turnover of the relevant party.

Concern was expressed about the possible danger of, for example, an unenforceable restrictive covenant in a lease that was fundamental to the grant of the lease, striking down the entire lease, perhaps retrospectively, in the absence of an explicit severance provision.

Anthony Judge kindly agreed to take the lead on making some written submissions on the guidance on behalf of the Committee, in conjunction with the Competition Law committee.

**11. AOB**

A small update is needed to the introductory notes to the CLLS rent deposit deed on the CLLS website to take account of the new Companies House forms for registering the charge in the deed (MG01 rather than 395).

**12. CPD-** 1.5 hours.

**13. Meetings for 2011 at 12.30pm: 19 January, 23 March, 16 May, 13 July, 21 September and 23 November at CMS Cameron McKenna, Mitre House, 160 Aldersgate Street, London EC1A 4DD.**