CITY OF LONDON LAW SOCIETY LAND LAW COMMITTEE

Minutes of a meeting held on 19 January 2011 at CMS Cameron McKenna, Mitre House, 160 Aldersgate Street, London EC1A 4DD

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

1. MINUTES

The Minutes for the Committee meeting of 17 November 2010 were approved.

2. 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 ("TPR") as an alternative to collateral warranties. It was unclear what progress was being made with publicising the note (which will be stated to be a joint initiative of the CLLS Construction

and Land Law committees). The Chair will follow this up with Marc Hanson of the Construction Law committee and Lehmann Communications.

While reactions to the use of TPR at a recent RICS conference were negative, there are more positive responses elsewhere. The JCT is looking at the possibility of publishing the CLLS note and the BCO is considering a guidance note on the issue for its members. PLC may be consulted on whether they will publicise the note. Peter Taylor agreed to report back on reactions to TPR at the RICS Society of Construction Law Annual Conference.

Jeanette Shellard had circulated an email from a construction colleague suggesting an effective way of dealing with TPR for sub-contractors, which is seen by some as one of the more difficult areas for TPR.

3. CLLS CERTIFICATE OF TITLE

A meeting of a sub-group of the Land Law committee took place on 13 January 2011 to discuss a possible new (7th) edition of the CLLS certificate of title. There follows a note of that meeting, that formed the basis of the discussion at the committee meeting.

Summary of meeting to discuss proposed new edition of CLLS Certificate of Title, held on 13 January 2011 at CMS Cameron McKenna

Attendees:

Nick Brown- CMS Cameron McKenna; Warren Gordon- Olswang; Daniel McKimm- Allen & Overy; Jackie Newstead- Hogan Lovells; Jayne Elkins- Field Fisher Waterhouse; Mark Rees-Jones- Clifford Chance.

1 Use and purposes of the CLLS Certificate of Title

The meeting first considered the use of and purposes behind the CLLS Certificate of Title ("the Certificate"). The Certificate is most frequently used in a lending context (for example, solicitors for the buyer borrower providing the certificate to the buyer's lender); corporate transactions (such as the sale of the shares in a property holding corporate vehicle); the disposal of fractions of a property holding vehicle (for example, in a limited partnership context); in large transactions such as portfolios; or for tenders where there are a number of bidders.

The Certificate was intended to create some standardisation and uniformity of approach- prior to the introduction of the Certificate, each firm had its own.

The Certificate can also streamline the due diligence process particularly on large transactions, saving time and cost.

Some of the concerns with the Certificate emanate from it not being used for its intended purposes. It is not designed to be a management tool or a report on title, although it was noted that valuers may use it for key letting information. It may be that the CLLS short

form Report on Title could be more appropriate, or the Certificate could be approached slightly differently, depending on the circumstances. The notes to users in the new edition of the Certificate can emphasise those points.

It was also noted that the regulatory implications of the Certificate (requirement for SRA's approval to its form) are only relevant where the Certificate is used in the context of a "standard" mortgage on standard terms. Since the Certificate is usually used, in a mortgage context, where material terms of the mortgage are negotiated, the concern about using the precise form of Certificate for regulatory reasons does not apply. However, the Certificate remains important as a well-respected standard, generally accepted by the legal and lending marketplace.

2 Specific issues on the Certificate

2.1 Is it the responsibility of the firm giving the Certificate to, in effect, advise on the enforceability of provisions, or should it merely provide the information in the knowledge that the recipient of the Certificate will take its own professional advice on the contents of the Certificate?

At present, the CLLS Land Law Committee's view that it is for the recipient to take its own advice, is set out under paragraph 3 of General Points in the Note to Users to the Sixth Edition. The issue has been raised again in the context of the *Good Harvest* decision. At the heart of the Certificate is a statement that there is a "good and marketable" title. Presumably, if the issue of interpretation is so significant as to affect that statement, a disclosure/comment should be made in the Certificate.

The meeting agreed that while the provider of the Certificate must clearly disclose all relevant information, he does not need to provide a legal analysis- that is for the recipient's advisers to do.

There was a discussion as to whether the Notes to Users should be used to encourage the Certificate provider to supply information which will inevitably be requested by recipients, for example, foreign legal opinions and should the Certificate expressly address the issue of whether there is a legal opinion in respect of execution by a foreign company?

There was no strong consensus for supplementing information already provided by the Certificate and it was considered that the qualification in paragraph 2.4 of Schedule 1 to the Certificate (which assumed that all documents had been validly executed and are within the powers of the parties) covered execution by foreign companies. The Notes to Users can emphasise that the Certificate does not specifically consider whether companies had the power to enter into documents.

2.2 Appropriateness of "Seller" references in the Certificate

The Certificate contemplates the situation where the Company is in the process of acquiring the property from the Seller. There are a number of instances where there are alternative references to information being supplied by the Seller. It was considered that the Notes to Users can elaborate on the approach of the Certificate to a "Seller" situation.

This can include where the Company's solicitor provides the Certificate to a lender in connection with the funding of the property acquisition from the Seller, or to a buyer in connection with the Seller's sale of shares in the Company which owns the property.

2.3 **Banking references-** The Certificate contains some potentially sophisticated definitions of Loan Documents, Charge, etc. The meeting considered they are appropriate.

2.4 **Appropriateness of Letting Document statements**

Perhaps the most novel and controversial aspect of the Sixth Edition of the Certificate are the statements in relation to the Letting Documents in schedule 4. A key reason behind the statements is to discourage providers of the Certificate from simply regurgitating large sections of the Letting Documents, which is not helpful for the recipient.

It is for the provider, not the recipient, to judge whether the statements need to be qualified. The Notes to Users already highlight that such qualifications only need to be made where there is a "material" difference between the wording of the statement and the relevant provision in the Letting Document. A crucial element in "materiality" for those purposes is whether the difference goes to value.

There are still those who insist on using the format in the Fifth Edition, which calls, specifically, for a greater disclosure of material from the relevant Letting Document.

While the meeting considered that the statements in schedule 4 remain appropriate, the lay out of the Certificate can be improved. Rather than the qualifications being in Schedule 5 at the end of the Certificate, there should be a box below each statement allowing for statements to be individually qualified where appropriate. This should improve the useability of the Certificate. (NB Consider a similar approach for the statements in Schedules 2 and 3). The Certificate will make it clear that disclosure against one statement will be deemed to be disclosure against all other statements in the Certificate.

Multi-lease situation

There have been repeated calls for a standard form of schedule 4 where the Certificate is dealing with a multi let property. While this has been resisted in the past, the London Property Support Lawyers Group has produced such a schedule http://www.citysolicitors.org.uk/FileServer.aspx?oID=557&lID=0 the inclusion of which (or something similar) will be considered for the new edition. Such a schedule may simplify the process of producing the statements for the Letting Documents and qualifications, where there are a large number of such documents.

2.5 **Application of Schedule 3 to the Certificate**

Schedule 3 is aimed at a ground rent lease in traditional form. For other leases with value such as a rent sharing lease, Schedule 3 will require substantial qualification and it may even be appropriate to supply the lease or relevant sections. The short form Report on Title should normally be used for reporting on a "rack rent" lease, for example, in

connection with a corporate transaction. The Notes to Users will further clarify the circumstances in which Schedule 3 should be used.

2.6 Liability capping

Providers of the Certificate are seeking to cap their liability for the Certificate in certain circumstances, for example, where the Certificate is part of a corporate transaction, liability will sometimes be limited to the same level as other liability limits on the transaction. Some Certificate providers argue that if they limit their liability to their own clients under terms of engagement letters, why should they not do so for third parties in respect of the Certificate? The more realistic the level of the cap in the context of the value of the transaction, the more likely it is to be acceptable. However, the banks are, generally, strongly against capping liability and, in reality, it will, consequently, be an uphill struggle to introduce capping wording into the Certificate.

The current guidance on the issue in the Notes to Users (paragraph 6 of General Points) was considered to be broadly acceptable.

2.7 Updating of Certificate

The Certificate may need some minor updating for changes in the law, although the current view is that there does not need to be an explicit reference to the CRC Energy Efficiency Scheme in the context of the Letting Documents, since, if not covered elsewhere, it will likely be a material matter requiring a qualification to paragraph 27 of Schedule 4.

Clause 2.9 on the Contracts (Rights of Third Parties) Act 1999 needs a slight minor amendment.

3 The Report on Title will be reviewed, in particular, considering the amount of disclosure required to the checklists in the Report.

4 LPSLG's comments on the Certificate

The Committee would like to thank the London Property Support Lawyers Group for its helpful comments on the Certificate, which the Committee will bear in mind for the new edition.

At the Committee meeting, it was suggested that including in the Certificate a provision for capping liability (akin to the liability capping agreed between solicitors and their clients) would move the market forward, at least, for the providers of the Certificate and recognise that capping liability does happen. The banks remain very much against capping liability. The relevant reference in the notes to users in the Certificate may be expanded to provide further comment on this issue.

When the drafting process is further progressed, it will be useful to seek the views of a valuer on the new form of Certificate and how valuers use the Certificate.

There was a discussion about the extent to which the provider of the Certificate should advise on the enforceability of provisions, for example, in leases, or instead provide the information in the knowledge that the recipient of the Certificate will take its own professional advice on the Certificate's contents. The almost unanimous view was that the latter approach should be adopted. Of course, the provider should not deliberately mislead, but should give sufficient information to enable the recipient's solicitors to then provide to the recipient the legal analysis including on questions of enforceability.

There was a consensus that the form of statements for the Letting Documents in Schedule 4 to the Certificate should remain. Much of the concern about the nature of the statements emanates from a misunderstanding of the purpose of the Certificate. It is not meant to be a management tool (valuers often want to look at the leases themselves rather than the Certificate) and its purpose lies in lending, corporate and other large transactions (as further detailed in paragraph 1 of the summary of the sub-group meeting above).

It was considered by most that having space for a qualification immediately below the relevant statement (rather than, separately, in Schedule 5) would improve the useability of the Certificate. A similar approach could also be used for other parts of the Certificate (such as Schedules 2 and 3). There was a minority view that having all the qualifications (exceptions from the norm) in one place would enable the recipient to more readily assimilate the key concerns. However, often, the qualifications made little sense without referring to the statement to which they referred.

The next step is for the Chair to produce a first draft of the new Certificate for the sub-group to consider.

4. CLLS SERVICE CHARGE PROVISIONS

The sub-group of the committee (plus RICS Service Charge Code draftsmen, Peter Forrester and Chris Edwards) met on 8 December to discuss the service charge provisions (for a shopping centre and separate provisions for an office building). The proposed new Code, which is substantially the same as the previous Code and has just been re-ordered to make it more useable, requires little change to the provisions. The sub-group will now finalise the provisions with a view to circulating to the Land Law committee. Once the committee has approved the provisions, they will be added to the CLLS website and can be publicised by Lehmann Communications. Warren Gordon will discuss with Peter Forrester the possibility of a joint article for a property journal on the new Code and the CLLS provisions.

The Committee is not sending a formal response on the new Code. Peter Forrester and Chris Edwards are aware of the Committee's views through the work on the provisions. Warren Gordon sent a response highlighting a few points, some representing the views of members of the sub-group, including the Code should perhaps address the issue of whether to put CRC Energy Efficiency Scheme costs through the service charge.

5. CHANGES TO CONFLICTS RULES IN NEW SRA CODE OF CONDUCT

The CLLS has sent a response to the SRA's consultation on the draft Code of Conduct. In general, the CLLS does not understand the SRA's approach to conveyancing conflicts. The Code adopts a more restrictive approach to conflicts for conveyancing than it does for other commercial areas. The removal of all the current conveyancing-specific rules and guidance is likely to create uncertainty and problems for conveyancers over whether they can act for a seller and buyer, landlord and tenant or lender and borrower. In particular, the inability for a solicitor to act for both a borrower and a lender will cause very serious problems for residential conveyancing. Problems may also be caused for firms who want to act for both sides of an intra-group transaction.

The CLLS response concluded that the specific provisions in the current Code, which expressly authorise solicitors to act for more than one party in conveyancing transactions, should be retained. We await the SRA's response. The committee would like to thank Peter Williams of Eversheds for his assistance with the response.

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

A response has now been submitted by a joint working party of the CLLS (which included members of the CLLS Competition Law committee and Anthony Judge and Mark Rees-Jones of the Land Law committee) to the consultation by the Office of Fair Trading on its draft guidance on the application of competition law following the revocation of the Land Agreements Exclusion Order. We await the OFT's response.

7. CRC

There was a brief discussion on the CRC Energy Efficiency Scheme concerning whether, following the abolition of recycling payments (which makes the cost of allowances more akin to a tax), firms are now including lease provisions enabling landlords to recharge CRC costs to tenants, for example, via the service charge. Some are beginning to do so. The use of green or light green leases was also discussed. Mention was made of the form of "memorandum of understanding" contained in Appendix 5 of the Better Buildings Partnership's "Green Building Management Toolkit"-

http://www.betterbuildingspartnership.co.uk/download/bbp-green-building-managment-toolkit-1.pdf

It was considered that the committee should undertake a project to produce some "light green" lease provisions. Volunteers would be requested by email.

8. AOB

- The proposed abolition of the **Property Misdescriptions Act 1991** ("PMA")- A justification for the abolition is the overlap between the PMA and the Consumer Protection from Unfair Trading Regulations 2008 in the protection given to housebuyers. One concern about the abolition is the removal of protection for non-consumers, particularly in the context of auctions where there is little ability to check

representations/information. Peter Taylor is looking into this with the RICS and will keep the Committee informed of his progress.

- **Code of Banking Practice**- many major banks are signatories to this Code which encourages banks to be transparent in their tax affairs, to liaise with HMRC and not to act outside the spirit of tax legislation. Consequently, banks may be reluctant to participate in own account transactions or funding transactions, which involve an SDLT scheme. Jeanette Shellard will provide further information on this issue.

9. **CPD-** 1 hour 15 minutes (CPD reference CRI/CLLS).

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