

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

**Minutes of a meeting held on 16 May 2011 at CMS Cameron McKenna, Mitre House, 160 Aldersgate Street, London EC1A 4DD**

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

**1. MINUTES**

The Minutes for the Committee meeting of 23 March 2011 were approved.

**2. CLLS CERTIFICATE OF TITLE**

The latest draft of the new 7<sup>th</sup> edition of the CLLS certificate of title has been widely circulated to the Land Law committee and the two main PSL groups.

There have been structural changes and an update in the certificate's presentation, although there has not been a substantial re-write. Most of the existing Schedule 5 has been relocated to other more appropriate parts of the certificate, thereby making the certificate easier to use. Each statement in Matters affecting the Property, the Lease and the Letting Documents is followed by the disclosure (if any). Specific details of the Lease and the Letting Documents will follow the respective standard statements in the same schedule. In the Letting Documents schedule, there will be a multilet option to make it easier to complete the certificate where there are a number of Letting Documents. All of this should be welcomed by users of the certificate.

A number of issues were raised in relation to the treatment of "Seller" in the certificate. The 7<sup>th</sup> edition refers throughout to information being provided by the Company and has a statement that Company includes Seller (clause 4.2) in an attempt to remove erratic references to Seller encountered in the 6<sup>th</sup> edition. Clause 4.2 is protective of the provider of the certificate. However, sometimes the recipient of the certificate will want to know whether the information actually came from the Seller or the Company. If the recipient would expect the information to come from the Seller (for example, in relation to whether there have been any disputes), there may be a preference for an explicit statement that the Seller was the source, rather than a reliance on clause 4.2. The certificate also will not reveal where the Seller has been unable to confirm the position in replies to CPSEs etc, where the Seller might be expected to do so.

The notes to the 7<sup>th</sup> edition will highlight that, in certain circumstances, it may be reasonable for the recipient of the certificate to ask for additional information or confirmations from the Seller. There is, however, the danger that this could lead to the recipient dissecting the certificate provider's due diligence process. Ultimately, it is a matter of judgment for the provider to decide whether an inadequate reply from the Seller requires a disclosure against a certificate statement, a point that will be reiterated in the notes. In any event, it should be remembered that sometimes the primary source of information will be another party such as a managing agent, but changing the certificate to highlight all sources of information may over-complicate.

The expression, the "Seller", is not only relevant for a certificate being provided to a lender to fund an acquisition by the Company of a property from the Seller, but also to a sale by the Seller of the shares in the company that owns the property. It goes without saying that in the latter situation warranties from the Company are pointless and warranties need to be obtained from the Seller. The form of the certificate will likely need to be amended to accommodate a share acquisition and, more generally, the certificate needs to be aligned to who is giving the warranties in the sale and purchase agreement (i.e. the normal warranty that the information provided to the solicitors giving the certificate is correct).

There will be no wording in the certificate itself for limiting the provider's liability, although the notes to users will touch on the issue and emphasise that it is a matter for negotiation on each occasion.

The *Good Harvest* decision and competition law's recently commenced application to land agreements have highlighted that there are a number of provisions in leases or covenants in documents that may or may not be enforceable. It was noted that formal legal opinions provided by solicitors on legal documents contain qualifications and it was suggested that it would be helpful to include a general statement in the certificate to re-enforce the fact that the provider is advising on the terms of the documents rather than on their enforceability, which may be affected by other legal matters.

However, the provision of the certificate is more similar to reporting to a client where, generally, no such qualifications would be included. The consensus at the meeting was not to include such a statement- there was concern, for example, about whether such a statement could sit with the provider certifying that the Company has good and marketable title to the property.

It was agreed that the provider should give sufficient information to enable the recipient's solicitors to then provide to the recipient the legal analysis including on questions of enforceability. The issue of commenting on enforceability will be highlighted in the notes.

The notes themselves will be re-ordered from the current set, so that they will commence with the key interpretation points and the more general issues (such as changes from the 6<sup>th</sup> edition) will be dealt with later on. As with the 6<sup>th</sup> edition, at the beginning of the certificate there will be a clear reminder to read the notes before using the certificate.

**The current form of notes will be circulated to the Committee for further comment and Warren Gordon agreed to produce a first draft of the revised notes to users.**

On the form of the certificate, it was mentioned that there will be a deletion of the reference to land charges searches against estate owners for the root of title in Schedule 6. Instead, there will be a new statement in Schedule 3 to the effect that there are such clear land charges searches with the title deeds (for unregistered land) and a disclosure will be made if that is not the case.

The Committee decided that the certificate cannot contain a statement that the Lease/Letting Document includes uninsured damage provisions in a particular form, because there is no one approach and many leases (particularly, older ones) do not contain uninsured damage provisions.

**The draft of the new Certificate will be updated to reflect the above discussions. The redraft will be circulated to the main PSL groups (who will be asked to provide comments before the end of June 2011) and also to the CLLS planning law committee (for comments on the planning and environmental statements) and to tax experts (for comments on the VAT and SDLT statements).**

### 3. BPF DISCUSSIONS ON STANDARD FORM OF LEASE

The BPF is considering the production of an indicative standard form of lease from a retail perspective. The project involves a number of large law firms, institutions and property companies, but is at a very preliminary stage. The BPF is aware of the CLLS's interest in a project of this type.

The BPF is interested in how regularly leases require subleases to be let at the higher of the market rent and passing rent under the lease. There have been some suggestions that such a provision is still being used, despite the property industry declaration of a few years ago against such a practice. Such a provision would generally be regarded as onerous with potential rent review implications.

**A sub-group of the Committee may look again at its insurance provisions which have not been looked at in a few years and which appear on the Committee's page of the CLLS website.**

### 4. IMPLICATIONS OF THE NEW SRA CODE OF CONDUCT

It appears from the conflicts of interests section (Chapter 3) of the new Code of Conduct that the new edition of the CLLS Certificate of title will not require the recognition of the Law Society/Solicitors Regulation Authority. That is because such requirement only appears to arise in the context of "standard" mortgages of private residences. **The point will be confirmed with the Law Society/Solicitors Regulation Authority.**

It was noted that the final form of Chapter 3 is very different from the version consulted on. However, the changes were broadly welcomed (conveyancing is now not excluded from the exceptions where a solicitor may act, with appropriate safeguards, where there is a client conflict). More detail is provided in the "indicative behaviours", although some of the helpful detail from the current Code remains absent.

The "contract race" rule is now in outcome 11(3)- the trigger point to inform the buyers has been brought forward to when the seller intends to deal with more than one buyer.

### 5. OFT GUIDANCE ON APPLICATION OF COMPETITION LAW TO LAND AGREEMENTS

The final form of the Office of Fair Trading's guidance on the application of competition law following the revocation of the Land Agreements Exclusion Order has been published. There are a few further examples of the application of competition law to land agreements.

**6. RIGHTS OF LIGHT DEED**

**Laurie Heller, Nicholas Vergette, Jon Pike and Warren Gordon have agreed to constitute a sub-group of the Committee to consider and draft a rights of light deed/crane oversailing licence.** Interest has also been shown by other professionals outside the Committee in being involved in this project. Concerns arising from uncertainties caused by the *Heaney* decision on rights of light provide added importance to the project.

**7. AOB**

It was noted that David Hobart, the CLLS's new Chief Executive, is likely to attend the next Land Law committee meeting to meet the members.

The Law Society's Conveyancing Quality Scheme was briefly mentioned. The CQS (which is like a kitemark) applies to the conveyance of residential properties and the Council of Mortgage Lenders is likely to require solicitors who act for CML lenders in such transactions to be CQS members.

**The CLLS will be asked whether the CPD hours available for attending Committee meetings are "accredited".**

**8. CPD- 1.75 hours (CPD reference CRI/CLLS).**

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