

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

**Minutes of a meeting held on 23 September 2010 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>Nick Brent</b> <b>John Butler</b> <b>Jayne Elkins</b> <b>Martin Elliott</b> <b>Alison Gowman</b> <b>Laurie Heller</b> <b>Simon Hillson</b> <b>Daniel McKimm</b> <b>Jackie Newstead</b> <b>Jon Pike</b> <b>Mark Rees-Jones</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>Nick Jones</b> <b>Anthony Judge</b> <b>Lewis Myers</b> <b>David Waterfield</b> <b>Mark Wheelhouse</b> <b>Martin Wright</b>

**1. WELCOME**

The committee welcomed Jayne Elkins of Field Fisher Waterhouse LLP as a new member.

**2. MINUTES**

The Minutes for the Committee meeting of 14 July 2010 were approved.

### 3. PERPETUITY-TYPE TRAPS

The Law Society may make representations suggesting abolition of 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***

as part of its response to publication of a future Bill to repeal unnecessary laws.

**Post-meeting note: Warren Gordon discussed this with a Law Society representative and it cannot be guaranteed that such representations will be made.**

Consequently, the Land Law committee may wish to consider making representations in that regard, either alone or together with PSL groups. Warren Gordon happy to liaise with PSLs on this.

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

The CLLS Construction Law committee produced a note in May 2010 on the use of the the Contracts (Rights of Third Parties) Act 1999 as an alternative to collateral warranties. A sub-group of the Land Law committee is liaising with the Construction Law committee with a view to publishing a joint article highlighting the benefits of using (and encouraging the use of) the Act in that regard. Lehman's can be used to help publicise the article.

### 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.

As Bill says in his article, the landlord insuring party may be willing to obtain a waiver of the insurer's recovery rights against the offending party, usually subject to the maintenance of a stated amount of public liability insurance by the contractor, which will need to be extended to include damage to the building. If it is not possible to obtain the waiver, the JCT contract will need amending.

While approaches may be made to the JCT drafting committee in relation to possible changes to the standard contracts on this issue, 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.

**Query whether the sub-group of the land law committee looking at this issue considers it would be useful to provide information to the profession about the problem.**

## **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, but little consensus. Should CRC be treated as part of the service charge regime, or separately because of the probable mismatch between service charge accounting periods and the relevant periods under CRC? Should landlords charge a fixed additional CRC payment, or even not seek contributions from tenants at all?

As and when the cost of CRC allowances materially increases (or even when landlords actually have to start buying allowances), then there may be more of a consensus among landlords to have express lease drafting enabling recovery of CRC allowances and perhaps the related administrative costs from tenants. It was reiterated that most existing leases will not enable landlords to recover CRC costs.

The probable differences of approach to CRC among landlords was a concern for the committee- for example, impact on tenants of successive landlords having different approaches leading to tenants paying twice for CRC for the same period.

One suggestion was adopting a more informal memorandum of understanding/personal arrangement between landlord and tenant to cater for CRC, but this obviously creates uncertainty for successor landlords and tenants.

At a previous meeting, Jeremy Brooks agreed to talk to Peter Williams of Eversheds (who sits on the BPF working party on CRC) about possible drafting and the committee awaits with interest any further developments.

The committee considered that the CLLS certificate of title did not need amending to take account of CRC. If a lease contains a CRC related provision, the provider of the certificate may decide that this is a material matter that ought to be highlighted.

## **7. GOOD HARVEST AND CERTIFICATE OF TITLE**

The committee decided not to change the form of the CLLS certificate of title, at this stage, to take account of the implications of the High Court decision in the *Good Harvest* case. However, an additional note will be added to the land law committee page of the CLLS website to the effect that- the committee has decided not to suggest a standard qualification to take account of the Good Harvest decision and that the provider of the certificate should qualify the sections of the certificate potentially affected by Good Harvest (as with any other qualification to the certificate) when considered appropriate in the context of the particular transaction, property and documentation.

There was a wide-ranging general discussion on whether the provider of the certificate of title should give opinions as to enforceability (for example, of lease provisions). Some members thought not, regarding the certificate as purely factual. Others considered there was already an element of opining on enforceability, for example, in relation to title matters.

In the light of this discussion, it was considered sensible to review the 6<sup>th</sup> edition of the certificate in relation to the issue of the certifier opining on enforceability, and more generally. A sub-group comprising Nick Brown, Warren Gordon, Daniel McKimm, Peter Taylor, Jackie Newstead, Mark Rees-Jones and Jayne Elkins will undertake this project with a view to releasing the new edition in the course of 2011 (having received any requisite regulatory recognition).

## **8. CLLS SERVICE CHARGE PROVISIONS**

A meeting occurred on 8 September to discuss the CLLS service charge provisions involving the Committee sub-group who drafted the provisions and Peter Forrester and Chris Edwards, who are working on the proposed new edition of the RICS Service Charge Code. The proposal is for the new Code to refer to the CLLS provisions (perhaps along with another separately produced set of service charge provisions) as examples of Code compliant provisions.

Jackie Newstead has kindly adapted the CLLS provisions for an office situation with additional provisions for a shopping centre and this drafting is currently being considered by the sub-group. Once the sub-group and the land law committee are both happy with the provisions, they will be added to the CLLS website.

## **9. NEW PROJECTS FOR THE COMMITTEE**

As mentioned, the committee will consider producing a new edition of the certificate of title.

Peter Taylor will produce a note explaining why the committee should consider producing a standard form of lease guarantee.

## **10. MEMBERSHIP ISSUES**

The committee agreed that substitutes should only be allowed to attend committee meetings in exceptional circumstances, where members could not attend. This is to ensure continuity on the committee.

## **11. AOB**

The CLLS is generally seeking to publicise its activities (using Lehmans) and any ideas in that regard will be welcome.

## **12. CPD- 1 hour 15 minutes.**

## **13. Remaining meeting for 2010 at 12.30pm: 17 November at CMS Cameron McKenna, Mitre House, 160 Aldersgate Street, London EC1A 4DD.**