CITY OF LONDON LAW SOCIETY LAND LAW COMMITTEE

Minutes of a meeting held on 23 November 2011 at CMS Cameron McKenna, Mitre House, 160 Aldersgate Street, London EC1A 4DD

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

1. MINUTES

The Minutes for the Committee meeting of 21 September 2011 were approved. Elizabeth Cooke of the Law Commission has agreed to talk, at a Committee meeting early in 2012, about the Law Commission's report on easements and covenants.

2. CLLS CERTIFICATE OF TITLE

A revised draft of the certificate was provided to the Committee in advance of the meeting. The two key areas remaining to be finalised continue to be:

- where the Company does not own the property when its solicitor provides the certificate, how best to deal with "Seller" references- an expanded clause 4.2 has been included bringing together the "Seller" references;

- how to deal with a large number of Letting Documents, particularly, where a disclosure follows each standard statement. The suggested approach in the draft provided is for Schedule 5 to include for each standard Letting Document details of the Letting Document and Licences and the statements (with disclosures). The Schedule then contains a Supplement for the other Letting Documents indicating on which standard each one is based. The idea is there should be some flexibility here on the amount of detail required, whether licences are covered etc and this should be agreed between the provider and recipient of the certificate. A tabular example is provided to be used if desired.

The SRA has been approached over whether they wish to "recognise" the certificate for conflicts of interest purposes under the Code of Conduct. They have yet to respond, but it appears unlikely that they will wish to recognise the certificate, in view of the outcomes focussed approach of the new Code.

This supports greater flexibility in the certificate's treatment of the Letting Documents, which could, perhaps, include changes to the standard statements or Letting Documents' details. The approach adopted for the Letting Documents should be agreed up front between the provider and recipient of the certificate and a comparison document should be provided to the recipient highlighting changes from the original Schedule 5. It is, however, important that the rest of the certificate remains consistent and the original form is not changed. The notes to users will reiterate these points.

The Committee is asked to provide any further comments on the certificate by the end of this year.

The notes to users, a first draft of which has already been circulated to the committee, will be updated to reflect the latest changes to the draft.

Mention was made of a recent article in Estates Gazette suggesting the Committee should lead on supporting certifying firms' attempts to limit their liability for the certificate. The Committee's view remains that any limitation or cap must be a matter to be agreed by the solicitors and the addressees on a case by case basis.

3. "HOUSE OF FRASER" DECISION

There was a brief discussion of outstanding points from the Court of Appeal's decision in "House of Fraser". There remain certain issues on which opinions remain divided including whether-

- the original tenant's guarantor can directly guarantee T3 if they have previously provided a sub-guarantee for T1's AGA obligations in relation to T2;

- a tenant can assign to its guarantor or to the guarantor and itself.

These issues are dealt with in depth in the minutes for the September 2011 Committee meeting.

The House of Fraser decision highlights the importance of guarantees. **Peter Taylor has agreed to look at key issues in that regard and potentially lead a sub-group project on this- this could cover such matters as different forms of guarantee, whether contracting out notices need to be served on guarantors, section 17 notices under the Landlord and Tenant (Covenants) Act 1995 etc.**

4. CHARGES OF PART- LAND REGISTRY CHANGE OF POLICY

Prior to 19 September 2011, the Land Registry's policy was not to routinely register charges of part under a new title (instead, it referenced the part charged on the borrower's existing title). From that date, the Registry changed the policy so that, where expressly applied for by a customer, on a charge of part, the Registry will create a new registered title for the charged part, removing it from the borrower's existing title, subject to certain exceptions. If the customer does not apply for a new title, the Registry will, usually, reference the charged part on the borrower's existing title. Part of the reason behind the change is that some lenders required owners to sub-divide their titles before granting the charge, which rendered redundant the Registry's policy.

The Land Registry's change of policy begs a question. If a new title is created for the charged part, the issue arises of whether any easements and covenants need to be created between the two titles. It is important to remember that the owner of the new title, if it also remains the owner of the residue of the original title, cannot, for example, grant an easement to itself, even though different property benefits from and is burdened by the easement. It is an essential characteristic of an easement that the owner and occupier of the dominant tenement and the owner and occupier of the servient tenement must be different.

The Land Registry has not provided any specific guidance in that regard. Options, however, include sub-division of titles before charging, but there may be adverse tax consequences. Another alternative is for the charge to contain an agreement by the borrower (as owner of the non-charged part) to create easements etc at the point (if any) that the lender enforces its security over the charged part. Apparently, the Land Registry will register/note such agreement.

5. SWIFT V COLIN

The recent decision in *Swift 1st Ltd* v *Colin* has generated some interest. The judge sitting as a High Court judge held that a lender had a full power of sale over a freehold property, notwithstanding that its charge was not substantively registered on the title to that property at the Land Registry (it was merely noted on the registered title). The Land Registry's position has been that a noted charge cannot give rise to a power of sale as the charge is merely equitable. The judge, however, stated that the Law of Property Act 1925 gave a lender a power of sale where the charge, by way of legal mortgage, was a deed, regardless of "Land registration niceties".

While some commentators are not unduly perturbed by the decision arguing that Land registration priority will govern the position, others are concerned by the impact of a decision that will cause many practitioners and the Land Registry to re-evaluate their approach to fixed charges that are either not on or merely noted on the registered title. Existing registered lenders without (or perhaps even with) the benefit of a restriction on the title may feel more exposed in the light of the decision, as may prospective lenders. Perhaps due diligence should be broadened so that focus is paid to fixed charges registered at Companies House, even though they do not appear on the registered title. However, due diligence is more difficult in the case of individuals or overseas companies.

It may be that the mischief lies in the Land Registration Act 2002 not fully addressing the power of sale rights under the Law of Property Act 1925, but legislative change in that regard appears unlikely.

6. LEGAL OPINIONS

It was noted that the CLLS Financial Law Committee had issued a guide to the questions to be addressed when providing opinion letters on English law in financial transactions. Although of general interest, this had no direct application to real estate.

The Overseas Companies (Execution of Documents and Registration of Charges)(Amendment) Regulations 2011, which came into force on **1 October 2011**, removes the requirement for registered overseas companies to register with Companies House any charges created over their UK property. Transitional provisions provide that the existing requirements will apply to any charge created before 1 October 2011. Consideration will be given to whether any consequential change needs to be made to the CLLS Land Law Committee form of opinion on overseas companies entering into documentation for English/Welsh real estate transactions. **Martin Elliott and Mark Rees-Jones kindly agreed to generally review the CLLS opinion.**

7. RIGHTS OF LIGHT PROJECT

There follows a summary of the main points from the meeting of the rights of light sub-group which immediately preceded the Committee meeting.

Although the focus of the sub-group is on the deed of release of right to light, usually, the difficult part of the process will be the negotiation of the substance of the deal, potentially, involving numerous parties.

It was, therefore, considered helpful to have some further information to accompany the deed. This could take the form of a simple, practical one page note on the basics of rights to light, or, alternatively, a checklist or heads of terms covering the key issues in a rights to light release negotiation/deed.

Examples of relevant issues include whether the release is to be mutual; there is to be crane oversailing or scaffolding; the release is to be general or limited to an agreed profile for a development; the consequences of varying the profile of the development; dealing with tenants' rights to light; does release cover claims for nuisance?

It was noted that it was crucial to engage insurers at an early stage in considering rights to light issues so that the insurer is aware of and can consent to any approaches to third parties. If not, there is a danger that insurance will not be obtainable if an approach has already been made to a third party.

It was also considered helpful to have an appendix to the documentation the sub-group produces which will relate to how to obtain insurance cover for potential rights to light concerns. It will be sensible for the appendix to be looked at by underwriters, who would be asked to confirm that they had no objection in principle to the appendix's contents.

There were some initial discussions on the deed of release kindly provided by Nicholas Vergette. Some written comments were provided on the deed and any further comments on the deed should be provided to Nicholas. It was noted that it will be useful to have some accompanying drafting notes.

The deed should perhaps have a confidentiality provision- there may, for example, be some sensitivity in the consideration paid under the deed. Query whether a Land Registry exempt information application can be made in respect of the consideration figure.

It would be useful to have the involvement of the City Corporation in this project and Alison Gowman has agreed to approach them.

It was noted that the Law Commission has a forthcoming project on specific issues in relation to rights to light (as part of its eleventh programme of law reform). The Law Commission states that, in particular, the project "will investigate whether the current law by which rights to light are acquired and enforced provides an appropriate balance between those benefiting from the rights and those wishing to develop land in the vicinity. It will examine the interrelationship between the planning system and rights to light and it will examine whether the remedies available to the courts are reasonable, sufficient and proportionate."

The Law Commission intends to commence this project in early 2012, publishing a consultation paper in early 2013. It will, in discussion with the Department for Communities and Local Government, review how the project should be taken forward at the time of publishing its preliminary proposals and after analysing the responses to its consultation. If both the Commission and Government agree that further work is appropriate, the Commission will aim to produce a final report, with draft bill, in late 2014 or early 2015. If either party decides at an earlier stage that the project should not continue, the Commission will produce a narrative report of its conclusions.

Therefore, any changes in the law on rights to light are some way off and the CLLS project should not wait for this.

The next meeting of the sub-group is planned for January 2012.

8. CLLS LAND LAW COMMITTEE'S INSURANCE PROVISIONS

A sub-group of the Committee met on 12 October 2011 to look again at the Committee's insurance provisions, which have not been looked at in a few years and which appear on the Committee's page of the CLLS website. The following is a summary of the key points-

CLLS precedents should be better publicised, both in journals and on websites of legal/property industry bodies.

"terrorism" should be included as an Insured Risk in the lease, but without specific definition to avoid conflict with insurance policy definitions. "terrorism" is frequently included as an Insured Risk in policies.

the provisions should be fairly balanced leaning slightly in favour of the landlord, since leases are usually drafted in a landlord-friendly fashion, but should seek to comply with the insurance section in the Landlord's Code part of the Code for Leasing Business premises (an example being a landlord's obligation to disclose commission received by the landlord). The provisions should make that clear.

the provisions should state the date when they were published.

consideration should be given to whether the provisions should have a sustainability flavour, for example, in relation to reinstatement following damage or destruction. In view of possible landlord resistance, this is probably better dealt with in the footnotes.

before the next meeting (which will take place on 8 December 2011), the sub-group will, generally, review the CLLS provisions with reference to an insurance clause provided by Laurie Heller. The purpose is to decide whether the starting point for the new provisions is the existing set, or whether the sub-group should start afresh perhaps with Laurie's provisions as the starting point.

the sub-group should go back to basics and do some "blue sky" thinking to understand whether commonly used insurance provisions in leases are fit for purpose and reflect insurance realities.

the sub-group agreed to ask Ray Robinson to join the sub-group and subsequently he has kindly agreed to join.

9. AOB

A query was raised concerning whether a "tenant's covenant" under the Landlord and Tenant (Covenants) Act 1995 can benefit a non-landlord such as other tenants (in a residential situation).

Peter Taylor also considered that the issue of assignment of rents may be worthy of consideration by the Committee.

10. **CPD- 1 hour** (CPD reference CRI/CLLS).

11. **Dates for the next couple of meetings to follow.** At one of those meetings, Professor Elizabeth Cooke of the Law Commission will talk about the Law Commission's report "Making Land Work: Easements, Covenants and Profits a Prendre".