CITY OF LONDON LAW SOCIETY LAND LAW COMMITTEE

Minutes of a meeting held on 25 January 2012 at CMS Cameron McKenna, Mitre House, 160 Aldersgate Street, London EC1A 4DD

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

1. WELCOME

Emma Kendall from Freshfields Bruckhaus Deringer LLP was welcomed as a new Committee member.

There are some other changes to the Committee membership. James Crookes will now represent Pinsent Masons LLP and Jamie Chapman will represent Ashurst LLP.

The Committee expressed its thanks to the departing members, Mark Wheelhouse, Nic Berry and Martin Wright, for their work for the Committee.

The Chair will circulate the up to date list of Committee members after the meeting.

2. MINUTES

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

3. CLLS CERTIFICATE OF TITLE

A revised draft of the certificate was provided to the Committee in advance of the meeting. This is, essentially, the final draft and thanks to the drafting committee of Nick Brown, Mark Rees-Jones, Anthony Judge and Warren Gordon.

Certain key areas of the Certificate were highlighted to the Committee.

Seller references/when the Company does not own the Property

An expanded clause 4.3, dealing with the situation where the Company does not own the property when its solicitor provides the certificate (i.e. the Company is buying from a Seller) and including details of the basis of the Company's knowledge and bringing together the "Seller" references. The clause is largely based on a draft presented at an earlier Committee meeting, which has been slightly improved. Clause 4.3.1(f) and the Disclosures provide scope to specify all providers of information through which the Company has acquired knowledge of the Property. For example, in an outsourcing context, the Seller may know little about the Property and it will be useful to know who manages and is the information source about the Property.

Clause 4.3.5 states that when the replies of the Seller's solicitors to the certifying solicitors' enquiries etc are inadequate (in the certifier's opinion), this is disclosed by the certifier in the relevant part of the Certificate. The point of this clause is that there will be certain issues in relation to which the recipient of the Certificate will want to know when the Seller (as opposed to the Company) has given an inadequate reply. Without 4.3.5, this would not necessarily be apparent. Concern was expressed at the meeting that this clause could lead to disclosures by the certifier merely because the Seller's solicitors had given the standard caveat as to awareness in replies to enquiries ("not so far as the Seller is aware"), which the certifier may consider inadequate.

To address that concern, the notes to users will state: "Normal caveats relating to the Seller's awareness given by the Seller's solicitors in providing replies to enquiries (such as "not so far as the Seller is aware") should, usually, not be treated as an "inadequate" reply. An inadequate reply will, usually, be a lack of reply by the Seller's solicitors".

Letting Documents

Schedule 5 accommodates multiple lettings. There is a "Supplement" (having some resemblance to a format previously produced by the London Property Support Lawyers group), which gives the option to certify the Letting Documents by reference to one or

more standard forms of Letting Documents at the Property. The certifier and recipient of the Certificate can agree the extent of the details to be included and the extent of recording of variations and licences. A non-mandatory table is provided in which certain key information for each Letting Document is inserted and below the details for each Letting Document there is a box in which material variations from the standard are disclosed.

Guarantee

It was considered useful to introduce into the Letting Documents Schedule to the Certificate statements reflecting a modern form of guarantee for the tenant's obligations in a lease.

There was a discussion over whether there should be a statement concerning whether a warning notice was served on a guarantor in respect of the lease (where it is to be contracted out of sections 24-28 of the Landlord and Tenant Act 1954) that the landlord can require the guarantor to take following tenant disclaimer etc. The 6th edition stated that no warning notices were served and, therefore, a qualification was required if they had been served. Some PSLs have suggested that the 7th edition should state the opposite, namely, that warning notices were served and, therefore, a disclosure would be needed if they had not been served.

Practice among firms varies over whether notices are served on guarantors. It was considered that a failure to serve a warning notice was unlikely to have an effect on value- what was at issue was whether a lease that a landlord had a discretion to grant under the guarantee provisions (and which discretion was, generally, rarely exercised) was contracted out or not. Many landlords prefer to rely on the guarantor's guarantee that the tenant performs its obligations rather than to require the guarantor to take a lease.

Despite those considerations, the Committee decided that it would be clearer to include a statement that warning notices were served. Recipients of the Certificate would probably want to know the position on whether warning notices were served on guarantors and it is considered that they would find it more useful and it is more logical if expressed as a positive rather than a negative. The notes to users will make it clear that the change in the Certificate wording does not reflect any change in the Committee's view as to the rights or wrongs of serving notices on guarantors.

The Committee is asked to provide any final comments on the Certificate and notes to users by close of business on Friday 3 February 2012.

4. CODE OF CONDUCT

The Committee was reminded that there will be a conference call for interested firms to discuss the Code of Conduct on 26 January 2012.

5. GREEN DEAL AND IMPORTANT POINT ON LOW EPC RATING

The voluntary Green Deal is likely to be available from Autumn 2012. Its impact on property transactions will include the fact that the liability for payments for works pursuant to the Green Deal (through the electricity bill) will run with the land and the buyer of a property subject to the Green Deal will take on the liability. If a tenant or licensee pays the energy bills, they will take on the liability. This may have an impact on the property's valuation.

The seller, landlord etc will have to disclose details of any Green Deal plan to a prospective buyer or relevant tenant, who must then acknowledge in the relevant documentation (contract, lease etc) that they will be liable for the Green Deal charges payable through the electricity bill. The Green Deal will be disclosed using the energy performance certificate. Occupiers of domestic and non-domestic premises and private sector landlords can benefit from the Green Deal.

The Energy Act 2011 requires the Secretary of State to make regulations to ensure that a landlord achieves a certain level of energy efficiency for a property in England and Wales, before the landlord can let the property. This applies to non-domestic and domestic private rented property (excluding social housing). As currently proposed, it appears that the property must achieve at least an "E" rating on the relevant energy performance certificate and it is proposed that this will come in no later than 1 April 2018. It could come in sooner without much prior notice. Landlords with or prospective buyers of energy inefficient properties (with "F" or "G" ratings) need to be aware that at some point they will have to carry out works in order to be able to let their properties. Certain properties (to be specified in future regulations) will be exempt from this requirement.

6. LEGAL OPINIONS

Mark Rees-Jones and Martin Elliott are in the course of reviewing the CLLS Land Law Committee form of opinion on overseas companies entering into documentation for English/Welsh real estate transactions.

7. RIGHTS OF LIGHT PROJECT

Minutes of meeting of CLLS Land Law committee sub-group on rights to light on 23 November 2011

Attendees: Warren Gordon, Nicholas Vergette, Bill Gloyn, Laurie Heller, Jon Pike, Jeanette Shellard. Other members of sub-group- Gordon Ingram, Jayne Elkins

1. 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.

2. 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.

3. 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?

4. 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.

5. 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.

6. 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.

7. 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.

8. It would be useful to have the involvement of the City Corporation in this project and Alison Gowman has agreed to approach them. **Note: Subsequently, Deborah Cluett of the City Corporation agreed to attend the next meeting of the sub-group.**

9. 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.

Note: Subsequent to the meeting, Tony Curnow and Claire Fallows from the CLLS Planning and Environmental Law Committee agreed to join the sub-group.

8. CLLS LAND LAW COMMITTEE'S INSURANCE PROVISIONS

There follows a summary of the main points made at the sub-group meeting on the CLLS Land Law committee's insurance provisions, which took place on 8 December 2011.

1. The sub-group engaged in some "blue sky" thinking on whether insurance provisions in leases match insurance reality. The conclusion was that, broadly, the tried and tested drafting generally found in insurance provisions in rack rent commercial leases does reflect what happens in practice.

2. Leases will usually provide that landlords are obliged to insure landlord's fixtures and fittings but not tenant's fixtures and fittings. There is sometimes uncertainty as to whether a tenant's fit out constitutes landlord's or tenant's fixtures, but leases often effectively leave it to the law to clarify the position, rather than being specific in the drafting. That may be a more sensible approach rather than specifically detailing which parts of the fit-out are landlord's and which are tenant's fixtures. However, potential issues remain.

Where tenants choose to insure their fit out and the landlord has also included aspects of the fit out in its building insurance, there may be double insurance issues with possible consequential averaging. Tenants may object to paying for its own insurance of its fit out and also paying towards the cost of the landlord's insurance of the tenant's fit out to the extent it comprises landlord's fixtures. A significant issue is where the landlord has contributed to the cost of the tenant's fit out, but the fit out does not constitute a landlord's fixture- even though the landlord has a financial stake in the fit out, there is no guarantee it will be insured. Query whether drafting should be included in the lease to deal with this issue e.g. should the fit out paid for by the landlord be deemed to be a landlord's fixture for insurance purposes and, therefore, insured by the landlord with the tenant paying towards the cost? The landlord then in practice has to remember to cover this under its insurance policy.

3. While almost all rack rent leases oblige landlords to use the insurance proceeds for reinstatement, there will be occasions when the landlord's funding agreement requires the proceeds to be paid to the funder as loss payee and not laid out for reinstatement. In that case, the proceeds will usually be paid out on an indemnity basis and be a lesser amount than if paid out for reinstatement. This issue needs to be tackled in the negotiation of the funding agreement to ensure that, even if the funder is loss payee, proceeds can be used for reinstatement to enable landlords to fulfil their lease obligations.

4. Query whether service charge costs should include insurance items or whether this should all be included in the insurance provisions.

5. The insurance costs should include the amount spent in effecting and maintaining insurance of plant and machinery against sudden and unforeseen breakdown and provision of statutory inspection. This is not necessarily an Insured Risk.

6. In terms of uninsured damage/risks, one draft set of provisions considered at the meeting brings within the ambit of 'Uninsured Risks' any peril or event that is not identified specifically in the definition of 'Insured Risks' but is such other risk against which the landlord may consider it prudent to insure. The consequence appears to be that uninsured risks covers a risk that the landlord may in fact insure (although not specifically mentioned in the definition) but then the risk becomes uninsurable. The CLLS draft applies uninsured damage treatment just to those expressly specified risks in the insured risks definition, so if there is a non-specified risk which the landlord actually insures which then becomes uninsurable, this does not appear to be covered by the Uninsured Damage definition (and would not be an insured risk). This distinction may have implications for suspension of rent, reinstatement etc.

7. The CLLS insurance provisions are generally aimed at a rack rent lease and there will be other considerations if it is a long valuable lease e.g. composite policies for benefit of landlord, tenant etc.

8. Should latent defects insurance be mentioned more frequently in lease drafting e.g. landlord obliged to procure latent defects insurance for tenant's benefit towards which tenant pays; rent suspension applies in latent defect situation etc?

Comments were requested on Laurie Heller's draft provisions as part of the consideration of the CLLS provisions http://www.citysolicitors.org.uk/FileServer.aspx?oID=290&IID=0 .

A further meeting of the sub-group will be arranged for February/March 2012.

The British Banking Association has been notified by the Association of British Insurers that it intends to withdraw from the Agreement Regarding Notification of Interest on Mortgaged Properties. Banks have relied on this Agreement for many years as additional protection when banks take security over the proceeds of insurance policies, particularly in relation to property. This could lead to the ending of the market practice of noting the banks' interest on insurance policies with banks, to the extent they were not already doing so, looking for further protections such as being a composite insured.

9. AOB

The Office of Fair Trading has issued guidance on the Consumer Protection from Unfair Trading Regulations 2008. The guidance on what is acceptable behaviour under the Regulations is of interest in view of the possible repeal of the Property Misdescriptions Act 1991 on the basis that the 2008 Regulations provide similar protections for consumers.

There is to be a new version of the RICS Common Auction Conditions in 2012/13.

A British Property Federation committee continues to discuss the creation of a user-friendly lease of commercial property (using plain English). Apparently, it is influenced by Land Securities' "Clearlet" lease, but it is more generic.

10. CPD- 1.5 hours (CPD reference CRI/CLLS).

11. **Date for next meeting- 21 March 2012** Professor Elizabeth Cooke of the Law Commission will talk about the Law Commission's report "Making Land Work: Easements, Covenants and Profits a Prendre".