CITY OF LONDON LAW SOCIETY LAND LAW COMMITTEE

Minutes of a meeting held on 19 March 2014 at Hogan Lovells, Atlantic House, 50 Holborn Viaduct, London EC1A 2FG

In attendance	**Jackie Newstead (Chair)** **Warren Gordon (Secretary)** **Nick Brent** **James Barnes** **Alison Hardy** **Laurie Heller** **Anthony Judge** **Pranai Karia** **Emma Kendall** **Daniel McKimm** **John Nevin** **Jon Pike**
Apologies	**Jeremy Brooks** **William Boss** **Jamie Chapman** **James Crookes** **Mike Edwards** **Jayne Elkins** **Martin Elliott** **Alison Gowman** **Charles Horsfield** **Nick Jones** **Jeanette Shellard** **Peter Taylor** **Nicholas Vergette**

1. **MINUTES**

The Minutes for the Committee meeting of 23 January 2014 were approved and are on the CLLS website. On point 7 relating to the Consultation on the extension of Land Registry powers to cover local land charges, Warren Gordon highlighted that a possible issue with the proposals is that the information which would be covered by the search with the Land Registry would only go back 15 years. A search would need to be made at the relevant local authority for information that is more than 15 years old. Clearly, there

may be very important entries that are more than 15 years old and limiting the search results in the way proposed undermines their accuracy and completeness.

2. **CERTIFICATE OF TITLE – WRAPPER DOCUMENT**

The majority of the meeting was spent discussing a possible City of London Law Society Land Law committee "wrapper document" to accompany the Seventh edition of the CLLS Land Law committee Certificate of title.

Prior to the meeting a sub-group of the Committee had considered a number of possible drafts for a wrapper (and thanks in that regard are given to Nabarro, Clifford Chance and Slaughter & May for supplying examples) and produced a form of wrapper that was discussed at the meeting. Many thanks also to James Barnes of Herbert Smith Freehills for his very helpful comments.

The sub-group considered that the primary purpose of the wrapper is to supplement a report on title, previously produced and no more than 6-12 months old, so that it becomes the equivalent of a Certificate of title for the recipient. If the report is say 2 years old, consideration should be given to a new certificate being provided.

For the concept of a wrapper to work, the original report on title essentially needs to cover the same ground as the Certificate of title in terms of the statements on matters affecting the property, the lease and letting documents and the searches and enquiries. If that is the case, the most straightforward approach is for the wrapper to include most of the front end of, plus a few other provisions from, the Certificate.

At the Committee meeting, the general approach of the sub-group was supported, although in places it was noted that the draft wrapper produced to the meeting did not replicate the Certificate's front end wording and should do so.

Since the wrapper's purpose is in effect to create a Certificate of title around an existing report without having to actually produce a new Certificate, the provider of the wrapper will need to obtain the "Company confirmations", which is an integral part of the Certificate itself. It was acknowledged that often at the time the wrapper is provided the Company may have owned the property for only a short time and will wonder why they are being asked to provide the confirmations. Despite that reservation, it was considered important that the wrapper requires the Company confirmations, so that it is not regarded as inferior to a Certificate of title.

Following the meeting Warren Gordon will update the draft to reflect the comments made and the revised draft will be re-circulated to the Committee and discussed at the May 2014 Committee meeting.

As a separate point, it was noted that a word may be missing from clause 1.1 of the Seventh Edition of the Certificate of title itself. On the 4th line of clause 1.1, it was suggested that the word "you" should be added before "[the Chargee]". The Committee will discuss making this change the next time that it considers amendments to the Certificate or introducing a new edition.

3. **CLLS LAND LAW COMMITTEE RESPONSE TO BIS CONSULTATION ON FUTURE OF LAND REGISTRY**

The Committee approved a form of response produced on the Committee's behalf to the BIS consultation on the Land Registry's future. It was agreed that the conclusions in the Committee's response would be extended to cover the following.

"The proposals in this consultation are of fundamental importance. They impact on the Land Registry and the way it delivers its services in relation to a most critical asset of this country - its property. The integrity, independence, efficiency, established systems and processes and "one-stop shop" nature of the Land Registry, supported, critically, by the state guarantee of title provided by the Land Registry on the Crown's behalf, are major reasons why the public and investors (from this country and overseas) choose and feel confident to invest their money in this country. The proposals in the consultation raise questions over whether the Land Registry will still be able to deliver some or all of those attributes. If it cannot, this could deter investors and, potentially, have an adverse economic impact.

If there is to be both the OCLR and a service delivery company, this will lead to the splitting of functions, which are all currently performed by the Land Registry. This risks adverse consequences of overlap, greater administration, delay and cost, none of which will be in the public interest. This will also not assist this country as regards surveys like the World Bank's Report on 'Ease of Doing Business'.

These are all significant concerns, but the key one is that, in view of the fundamental nature of the proposals, we consider that inadequate information has been provided in the consultation. Many statements have been made, but insufficient evidence has been provided to support the statements. The consultation is critical enough to warrant informed responses from stakeholders and other interested parties and a general outline of the proposals does not provide enough content to fully elucidate their implications. Therefore, the responses, received by BIS, will not be as helpful to BIS as they might have been, because so much important information is missing. This could result in critical issues not being addressed in any proposed new structure for the Land Registry.

It would also be really helpful for BIS to publish, generally, the analysis and detail that underpinned the consultation, which may help to alleviate some of the concerns of respondents."

4. **IMPACT OF AND THOUGHTS ON THE *GAME* DECISION**

The Court of Appeal in *Pillar Denton v Jervis* ("Game") [24 February 2014] addressed the highly topical and significant issue of the liability of administrators of a corporate tenant for rent as an administration expense when retaining possession of premises for the purposes of the administration.

The previous decisions of *Goldacre* and *Luminar* resulted in unfair outcomes in that administrators could end up paying an entire quarter's rent in advance as an

administration expense, even though they were not in possession of the premises for most of that period. Conversely and perhaps more frequently, they could end up being in possession for almost an entire quarter without having to pay rent as an expense for that period. The rent would simply be provable as a debt in the administration, reducing the chances of recovery.

The Court of Appeal in Game has dealt with those concerns in a decision that emphasises fairness. The Court overruled the Goldacre and Luminar decisions. Lord Justice Lewison, providing the judgment of the Court, stated that the administrator must pay rent (at the rate reserved by the lease) for the duration of the period that he retains possession of the property for the benefit of the administration. The rent is treated as being paid on a daily basis and such payments are payable as expenses of the administration. The key point in the judgment is that the duration of the period for which rent must be paid as an expense is a question of fact and is not determined merely by reference to which rent payment dates occur before, during or after that period. The Court confirmed that a liquidation should be treated in that regard in the same way as an administration.

While this is a fair outcome (and probably means that lease changes in relation to rental payment periods discussed prior to the Court of Appeal decision are now not necessary), there are some concerns with and areas left uncovered by the Court of Appeal decision. For example, there may be difficulties for a landlord in empirically proving the duration of the period that an administrator or liquidator is retaining possession of the property for the benefit of the administration/liquidation.

Another concern emanates from the fact that now the Court has changed the law, the new law is treated as if it always was the law. This retrospective impact may provide opportunities for landlords or office holders to seek extra rent as an expense or refunds of rent already paid.

The case did not specifically address the situation where an administrator retains possession of part only of a property and claims that he is only liable for rent as an expense (on a daily basis) for that part of the property. There is perhaps uncertainty over the legitimacy of such a claim. Also Game specifically focused on rent and did not address the treatment of service charge, dilapidations and other payments.

5. IMPLICATIONS OF THE *COVENTRY V LAWRENCE* DECISION, PARTICULARLY IN RELATION TO DAMAGES IN LIEU OF INJUNCTIONS

The Supreme Court decision in *Coventry v Lawrence* [26 February 2014] could prove a watershed moment for when an injured party will be entitled to an injunction in preference to a pure damages remedy. The case has multifarious other noteworthy implications. Publicity around this case has focused on its impact on rights to light situations.

As to whether to award damages instead of an injunction, there were differences in the views of the Supreme Court justices. In the leading judgment, Lord Neuberger stated that the prima facie position is that an injunction should be granted, so the legal burden is on the defendant to show why it should not. Subject to that burden, when a judge is called on to decide whether to award damages in lieu of an injunction, there should not be any inclination either way: the outcome should depend on all the evidence and arguments.

The application of the four tests in *Shelfer* must not be such as "to be a fetter on the exercise of the court's discretion"; it would, in the absence of additional relevant circumstances pointing the other way, normally be right to refuse an injunction if those four tests were satisfied; and the fact that those tests are not all satisfied does not mean that an injunction should be granted. The grant of planning permission for a particular activity may provide strong support for the contention that the activity is of benefit to the public, which would be relevant to the question of whether or not to grant an injunction.

There were differing views among the Committee as to the relevance of the decision for rights to light cases. Clearly, the Supreme Court advocated a more flexible application of the *Shelfer* tests, but how the decision impacts on the issue of whether to award damages in lieu of an injunction in rights to light situations is more complex, as highlighted by the nuanced and subtly different comments of the Supreme Court justices.

6. THOUGHTS ON COMMERCIAL RENT ARREARS RECOVERY

Distress was an invaluable and frequently used remedy for the recovery of arrears. Its replacement by commercial rent arrears recovery ("CRAR") from 6 April 2014 causes a significant problem for landlords. The requirement with CRAR to serve prior notice gives tenants an opportunity to put goods out of landlords' reach and undermines the remedy. Whilst seeking to protect tenants' human rights and create a more level playing field between landlord and tenant, many landlords will perceive that CRAR has gone too far in helping tenants.

7. LEASE INSURANCE CLAUSES PROJECT

The Committee's new insurance provisions for a rack rent commercial lease were added to the CLLS website on 18 March 2014 -

http://www.citysolicitors.org.uk/attachments/category/172/CLLS%20Land%20Law%20committee%20Insurance%20Provisions_CLEANED.pdf

8. **AOB**

Various vacant positions on the Committee have been advertised. David Hawkins of Norton Rose and Ian Waring of BLP will join the Committee. Laurie Heller and Peter Taylor will remain on the Committee as honorary members.

Jeanette Shellard has stepped down from the Committee and the Committee expressed its thanks to Jeanette for her contributions to the Committee's work over the years.

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

10. **FUTURE COMMITTEE MEETINGS** - 21 May, 9 July, 17 September and 26 November 2014, all at 12.30pm at Hogan Lovells LLP, Atlantic House, Holborn Viaduct, London EC1A 2FG.