CITY OF LONDON LAW SOCIETY LAND LAW COMMITTEE

Minutes of a meeting held on 9 July 2014 at Hogan Lovells, Atlantic House, 50 Holborn Viaduct, London EC1A 2FG

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

1. **WELCOME**

The Committee welcomed Ian Waring of Berwin Leighton Paisner to the Committee.

2. **MINUTES**

The Minutes for the Committee meeting of 21 May 2014 were approved and are on the CLLS website.

3. CERTIFICATE OF TITLE – WRAPPER DOCUMENT

Following the May 2014 Committee meeting, Warren Gordon updated the draft of the wrapper document for the Certificate of title to reflect the comments made and also added a 1-2 page introduction and guidance section. The revised draft was re-circulated to the Committee and discussed at this Committee meeting.

The only comment of note related to where the report on title, to which the certificate wrapper relates, has annexures and the recipient of the wrapper does not wish for all the annexures (or some of them) to be deemed to be disclosed to the recipient. The report may attach, for example, search results, replies to enquiries or other reports which would not form part of a certificate of title. By excluding these from the report for the purposes of the wrapper, it means that any relevant information must be summarised in the body of the report or in the wrapper.

Subject to that comment, the certificate wrapper for a report on title was approved by the Committee and will be added to the Land Law committee website page shortly. The Committee thanked all those involved in the wrapper project and in particular John Nevin and Daniel McKimm.

4. UPDATE ON CIL DRAFTING PROJECT

The CLLS Planning Law committee had no comments on the Committee's drafting for the Community infrastructure levy and this has now been added to the website http://www.citysolicitors.org.uk/attachments/article/114/Community%20infrastructure%20levy%20drafting.pdf

5. PROPOSED CGT CHANGES FOR NON-RESIDENT PROPERTY OWNERS AND IMPACT OF POSSIBLE WITHHOLDING TAX

In relation to the proposals for implementing a capital gains tax (CGT) charge on non-residents disposing of UK residential property, a key concern was the impact of a possible withholding tax (mooted in the consultation document) on the conveyancing process. Would any such withholding tax have to be paid by the seller's conveyancer or buyer's conveyancer directly to HMRC and might this in certain highly geared situations prevent redemption of the seller's mortgage, which would have very serious consequences for transactions of this type?

At a meeting to discuss the proposals, HM Treasury/HMRC stated that, since the consultation, the thinking has moved away from a withholding tax to a payment on account. This payment on account is not intended to interfere with the conveyancing process. There will be no obligation on the seller's conveyancer or buyer's conveyancer to pay any withholding tax to HMRC. The seller itself and the seller only has the CGT

liability, towards which it may need to make a payment possibly within a short period (depending on further consideration by HM Treasury/HMRC), but that is a matter for the seller, not for the seller's conveyancer or the buyer's conveyancer.

There will be no legal duty on either the seller's conveyancer or buyer's conveyancer to file any forms or make any payments or send any money in relation to a withholding tax or other CGT related payment in relation to non-residents disposing of UK residential property.

It is up to solicitors to determine whether they wish to carve out of terms of engagement letters any responsibility for advice on CGT and this may be a matter discussed between the client and solicitor. It was suggested at the meeting with HM Treasury/HMRC that while there will be no specific duty on the seller's conveyancer, the conveyancer may choose to mention generally to their client that there are possible CGT implications when a non-resident disposes of UK residential property. HMRC helpfully agreed to produce some guidance that can be passed to non-residents explaining the process.

The above comments were made at a meeting with HM Treasury/HMRC and are subject to the outcome of the formal consultation on these proposals and any final decisions on design and delivery by HM Treasury/HMRC.

6. OUTCOME OF GOVERNMENT CONSULTATION ON LAND REGISTRY AND LOCAL LAND CHARGES

The Land Registry (LR) in June 2014 published the outcome of its consultation on Land Registry and local land charges https://www.gov.uk/government/consultations/land-registry-wider-powers-and-local-land-charges

LR sought authority to take over the statutory function for holding and maintaining a composite Local Land Charges Register (LLCR) for England and Wales, in place of local authorities. The new model anticipates a central role for LR as sole registering authority for local land charges (LLCs) and for LR to become the sole provider of LLC official search results. Unofficial searches of the LLC register can continue to be provided by personal search companies.

LR's policy goals in relation to LLCs are to remove the national variations in the cost of the service; fee reductions in line with costs; improvement in processing times to maintain quality and integrity of data; and standardising the format of results.

Despite many of the responses to the consultation not being supportive of the proposals, the Government has decided that LR should proceed with the proposals. However, as a result of the responses received, the proposal to limit the period covered by an LLC official search to 15 years will not be implemented.

Concerns about the proposals included whether or not they would improve efficiencies since the CON29 replies would still need to be obtained from the local authorities. There is also uncertainty over the future nature of the Land Registry pending the outcome of the separate BIS consultation.

7. GRAHAM REVIEW INTO PRE-PACK ADMINISTRATION

https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration

Pre-pack administration has been much criticised in some quarters in recent years. Opponents of the process have said that it lacks transparency, with deals negotiated in secret behind closed doors. Allegations have been made that the process does not result in the best value being achieved for businesses. However, it can be an important way of preserving value. The Government commissioned Teresa Graham CBE to undertake an independent review of the process.

The report makes recommendations about how pre-packs can be improved for all concerned. There are six recommendations, of which two are stated to be key.

The first is for a "pre-pack pool". One of the main criticisms of pre-packs is that there is a lack of transparency with pre-pack deals. Perceptions are that connected cases are inherently less fair to creditors. The proposal is that, on a voluntary basis, the connected party has an opportunity to present the deal's outline and why it is necessary to proceed in this way to a member of a pool of experienced business people prior to administration. This will create independent scrutiny of the deal yet retain overall secrecy before the event. A "connected party" includes a director, shadow director or company officer of the insolvent company, and other parties detailed in paragraph 9.5 of the report.

The second key recommendation is that, again on a voluntary basis, the connected party complete a "viability review" on the new company. A criticism of pre-packs is that businesses with fundamentally unviable business models are being allowed back into the marketplace post pre-pack, shorn of old company debts, often to fail again. The proposal is that the connected party draw up a 'viability review' on the new company, stating how the company will survive for at least 12 months from the date of the statement. A short narrative will also be provided, detailing what the new company will do differently from the old company in order that the business does not fail again. The statement/narrative will be drawn up by the connected party prior to administration.

The hope is that the market will come to expect the review's completion in connected party pre-packs, thereby ensuring a meaningful take-up of the proposal. The review may focus the attention of the connected party to the prospects of new company, thereby reducing the higher-than-expected failure rate of connected party new companies. In the event that the new company should fail, the statement will be available to the new company's insolvency office-holder to consider, alongside other records, when ascertaining if recovery action can be taken against the director. It may also assist the office-holder's statutory return to the Secretary of State regarding the director's conduct.

Should the voluntary measures proposed by Teresa Graham measures fail to have the desired impact, then she says that Government should consider legislating and to encourage take up of the proposals, Government may wish to consider taking a reserve legislative power at the earliest opportunity, in order that it can act should the behaviours outlined in the report continue.

The Committee noted the proposals, but considered that they do not appear to impact directly on real estate lawyers.

8. SIGNIFICANT DECISIONS ON RESIDENTIAL SERVICE CHARGE AND DEPOSITS FOR ASSURED SHORTHOLD TENANCIES

8.1 In Windermere Marina Village Ltd v Wild [April 2014], an Upper Tribunal case concerning a residential lease, the relevant service charge provision required the tenant to pay a fair proportion of the landlord's expenditure on communal services. The proportion was to be determined by the landlord's surveyor, whose decision was to be final and binding on the tenant. This case highlights that in a residential lease context such wording, if challenged, is likely to be regarded as void by the courts. This is because of section 27A(6) of *the Landlord and Tenant Act 1985*, which renders void provisions (for example, in leases) that take away the power of the Leasehold Valuation Tribunal to determine whether a service charge is payable and the amount payable, which involves consideration of the proportions of service charge contributions for each tenant.

At risk are residential leases where the parties have not agreed the apportionment of liability at the start of the lease, but have left the apportionment to be determined by a third party at a later date. Also at risk is the situation where more than one method of apportioning charges is identified, but the choice of which method is to be adopted, either generally or in relation to particular categories of expenditure, is left to the landlord or a third party.

Section 27A(6) does not apply in respect of matters that have already been agreed by tenants, for example, the lease provides that the apportionment of service charge expenditure between different parties is in accordance with a fixed proportion or percentage or an agreed formula (such as by reference to floor area, bed spaces or rateable value).

This decision will be of some concern for landlords of existing residential leases where the parties have left the question of apportionment to be determined by the landlord or a third party. Such determination provision may be held to be void if challenged and the tribunal can substitute its own apportionment.

8.2 The other case relates to the requirement to protect a deposit for a statutory periodic assured shorthold tenancy.

Superstrike v Rodrigues [2013] highlighted that a landlord may be required to protect a tenant's deposit for an assured shorthold tenancy (AST) in accordance with statutory requirements, even though the AST for which the deposit was originally provided was entered into before the requirements came into force. That was because when the fixed term of the AST ended, the tenant continued in occupation under a new statutory periodic AST on the same terms as the old tenancy including the obligation to provide the deposit. Since this new tenancy started after the requirements were in force, the deposit had to be protected.

In Gardner v McCusker [May 2014], the County court was faced with the question whether the same rule applied to an AST that had been entered into after the statutory requirements had come into force on 6 April 2007 and where the deposit had already been properly registered when the tenancy first began. The court applied the Superstrike decision and decided that when the original fixed term expired, a new tenancy had come into being which included an obligation on the tenant to pay the deposit. Consequently, the landlord was required to comply with the tenancy deposit registration requirements in relation to the new tenancy, even though it had done so in relation to the fixed term AST.

The decision will potentially cause problems for landlords of AST tenants, both going forward and in relation to existing statutory periodic ASTs where the requirements were not complied with. As a result of the decision, such landlords are required to comply with the deposit registration rules for ASTs (including serving the prescribed information on the tenant within 30 days) when the new periodic tenancy arises on expiry of the original fixed term, even where the deposit has already previously been registered and no new money for the deposit is paid by the tenant.

There are current proposals in a draft Bill to reform the rules governing registration of residential tenancy deposits, which, if enacted, would remove the requirement for a landlord to re-register a deposit when a new statutory periodic tenancy arises. However, there is no guarantee that such proposals will be brought into force and they are unlikely to have retrospective effect.

Landlords need to monitor their portfolios carefully to ensure that registration requirements are complied with both at the start of a fixed term AST and, critically, following its expiry. This is particularly important in view of the potential inability to regain possession of the premises if the statutory requirements have not been complied with. Late compliance with the requirement to serve the prescribed information on the tenant will, it appears, enable a landlord to serve an effective section 21 notice to obtain possession of the let premises (but this would not appear to be the case if the deposit has not been protected at all (as in Superstrike)). The landlord, however, may be fined for such late compliance.

These two decisions are very significant for those involved with leases of residential property.

9. NEW LAND REGISTRY FORM RQ(CO)

The Land Registry has introduced an additional security measure for companies with registered property. Under this free service, a company (or a conveyancer on its behalf) can make a request using a Form RQ(Co) to enter a counter-fraud restriction on up to three registered titles to its property.

The restriction is designed to help safeguard against forgery, particularly the prevention of a fraudster forging a signature. Once registered, it requires a solicitor (or other conveyancer) to certify that they are satisfied that the company transferring or mortgaging the property is the same company as the owner before any new sale, lease or mortgage is registered. The solicitor (or other conveyancer) must also certify that they are satisfied

that reasonable steps have been taken to establish that anyone who executed the deed on behalf of the company held the stated office (i.e. director, secretary or manager) at the time of execution. The form provides an extra hurdle that a fraudster would need to overcome, although it cannot be seen as foolproof since the required certificates themselves could be forged.

The form currently does not apply to limited liability partnerships. There is an equivalent form (Form RQ) providing additional security for individual owners not living at the registered property.

10. STANDARD WAYLEAVE AGREEMENT

The Committee decided to set up a project to create a standard wayleave agreement. While the Committee acknowledges that some operators wish to use their own form of wayleave, there does appear to be some flexibility among operators and it was considered helpful to have a standard that can over time attain market acceptance and reduce the time taken to negotiate wayleaves. Of particular interest is a tripartite wayleave to which a landlord, tenant and operator are party. There would be no compulsion to use the wayleave, but hopefully it will be used because it is regarded as an effective document. The project also provides an opportunity to consider the impact on wayleaves of the Law Commission's recent consultation on the Electronic Communications Code. A sub-group will be appointed to consider the document who will liaise with operators. The project will kick off in Autumn 2014.

11. IDEAS FOR OTHER FUTURE PROJECTS

The Committee considered that a sub-group should be set up to consider production of a development management agreement. There is some demand among firms for a standard form (not all firms have their own precedent) since it is a widely used document. It also provides an opportunity for the Committee to be involved in a development law related project and to liaise with the CLLS Construction Law committee. Once a development management agreement has been produced, the Committee will consider producing an asset management agreement. The development management project will start in 2015.

12. CPD – 1 hour (CPD reference CRI/CLLS).

13. FUTURE COMMITTEE MEETINGS - 17 September and 26 November 2014, all at 12.30pm at Hogan Lovells LLP, Atlantic House, Holborn Viaduct, London EC1A 2FG.