CITY OF LONDON LAW SOCIETY LAND LAW COMMITTEE

Minutes of a meeting held on 21 May 2014 at Hogan Lovells, Atlantic House, 50 Holborn Viaduct, London EC1A 2FG

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

1. **WELCOME**

The Committee welcomed David Hawkins of Norton Rose Fulbright to the Committee.

2. **MINUTES**

The Minutes for the Committee meeting of 19 March 2014 were approved and are on the CLLS website.

3. CERTIFICATE OF TITLE – WRAPPER DOCUMENT

Following the March 2014 Committee meeting, Warren Gordon updated the draft of the wrapper document for the Certificate of title to reflect the comments made and the revised draft was re-circulated to the Committee and discussed at this Committee meeting.

The Committee has noticed the increasing use on transactions of what are colloquially known as "wrapper" documents. A common context for the wrapper is that a property has been purchased and the solicitors acting for the purchaser produced a report on title in relation to the acquisition for the purchaser's benefit. Within a short period after the production of the report, the new owner of the property wishes to re-finance the property and the party providing the finance requires a certificate of title for its benefit in the form of the Committee's Certificate of Title (Seventh Edition 2012).

Since the report was produced recently, there is considerable sense from an efficiency perspective for the solicitors, who provided the report, to re-issue it for the funder's benefit. However, since the funder requires the CLLS certificate of title, its front end must wrap around the report and certain additional confirmations have to be given by the certifying solicitors so that the funder ends up with the benefit of a document equivalent to what it would have received if the certificate itself had been provided. The Committee has produced a document to fulfil that purpose, which is called a "Certificate Wrapper".

The key provision of the Certificate Wrapper is clause 12. By this provision, the certifying solicitors, in effect, confirm that they have undertaken the process that they would have carried out to produce the certificate and that matters affecting or relating to the property, the headlease and/or occupational leases that would have been revealed or disclosed by the certificate are set out in the Certificate Wrapper, the original report or in a disclosure (contained in the Additional Disclosures Schedule in the Certificate Wrapper).

Since the Certificate Wrapper creates the equivalent of the CLLS certificate of title, the confirmation in clause 12 is subject to the same caveats, assumptions and qualifications as are contained in the certificate. Likewise, in order to produce the Certificate Wrapper, the certifying solicitors must undertake the same due diligence process and obtain the same confirmations as they would have had to do to provide the certificate.

The Certificate Wrapper is only suitable for use if the relevant report on title covers the matters dealt with by the certificate in relation to the property, benefits and incumbrances, matters affecting the property, the lease (for a leasehold title) and occupational leases. If the report does not cover such matters or the report is sufficiently old so that substantial disclosure would have to be made in the Certificate Wrapper, its efficiency benefits are undermined and a CLLS certificate should be used instead.

If the intention is for the Certificate Wrapper to be the equivalent of the CLLS certificate, there should be no watering down of clause 12 or other parts of the Certificate Wrapper. While the Committee acknowledges and accepts that a wrapper for the certificate can be in a different form if that is what the parties agree, the parties should understand that any

such watering down or other difference has the consequence that the funder or other recipient is not receiving the equivalent of the certificate.

If there are certain parts of the report on title that are not required for the certificate, the parties can agree to carve them out of the Certificate Wrapper.

Warren agreed to update the draft to reflect the discussions at this meeting and will also add a 1-2 page introduction and guidance section. This will then be re-circulated to the Committee for final approval.

4. UPDATING CERTIFICATE OF TITLE

The Committee agreed that each edition of the Committee's Certificate of title will last 5 years. So the 8th edition will be launched in 2017. Mid-way through this 5 year cycle, an "erratum" document will be produced highlighting points picked up since the current edition went live. This document can be published on the CLLS website and the points highlighted can possibly be incorporated in a 2015 version of the 7th edition. Alternatively, the Committee may choose to defer incorporating the changes until 2017 and the 8th edition. Clearly, if a serious defect is discovered in the Certificate or a change in the law requires a change in the Certificate, such changes can be made there and then without waiting for the next scheduled review or edition.

5. CERTIFICATE OF TITLE AND DISCLOSURE OF TITLE INSURANCE POLICIES

Reference should not be made to specific defective title insurance policies as a disclosure in the Certificate before a specific purchaser has been identified. References to such policies in Certificates held on extranets or referred to in auction particulars (where no purchaser(s) has been identified) can invalidate the insurance and, if in doubt, the insurers should be consulted.

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

The Committee's response to the BIS consultation on the Land Registry's future was sent to BIS and can be found here

http://www.citysolicitors.org.uk/attachments/article/114/20140320%20CLLS%20response%20to%20BIS%20consultation%20'Land%20Registry%20-%20new%20service%20delivery%20company'%20(final).pdf .

7. LAND REGISTRY'S DESTRUCTION OF ORIGINAL DOCUMENTS IF SUBMITTED ON POSTAL APPLICATIONS

From Monday 30 June 2014, the Land Registry will no longer require original documents to be sent when application is made to change the register of a registered property by post or through an electronic channel. Instead, the Land Registry only needs certified copies of deeds or documents to be sent with applications.

Critically, if an original document is sent to the Land Registry on or after 30 June, the Land Registry will accept it, but it will be scanned and then destroyed.

Prior to 30 June, the Land Registry returns original documents that are submitted with certified copies. On or after 30 June, this will no longer happen; the Land Registry will destroy both the original document and certified copies after scanning. Therefore, careful consideration should be given before sending in original documents.

This change does not apply to first registrations - applications for first registration will still need original documents.

Land Registry has made this change to align the registration processes for paper applications and applications made through e-DRS (e-DRS only accepts certified copies).

A consequence of this change is that solicitors may have original documents that they may not previously have held. Check lender's requirements for the retention of originals such as mortgages. Firms should review their rules for handling deeds in the light of this change.

In relation to e-DRS (which enables documents to be electronically submitted to the Land Registry), be aware of the risk management implications of providing the requisite certificate in relation to the scanned documentation, for example, ensure that secretaries seek fee earner approval before selecting the relevant certificate. E-DRS is an attractive option as a result of the half price Land Registry fee for applications through e-DRS.

8. CONCERNS ABOUT "FARNDALE" DECISION ON COMMERCIAL ASSETS SUCH AS STUDENT ACCOMMODATION

The legislation governing residential property has, in certain instances, gone beyond the scope of what was originally intended by the draftsmen. This is particularly so in relation to the right under Part II of the Leasehold Reform, Housing and Urban Development Act 1993 for qualifying tenants to take extended leases at a peppercorn rent in return for payment of a premium: a right created to "protect individual homeowners from being thrown out of their home at the end of their long lease".

The definition of residential could potentially be extended, following decisions such as Farndale Court Freehold Ltd v G&O Rents Ltd (2011), unreported, Central London County Court, which suggest that commercial assets such as student accommodation could be included within the scope of residential.

For investors, this is an emerging practical problem. Potentially, if a block of student accommodation is acquired as a long–term investment and it is leased back to someone to manage it, if they have a lease for more than 21 years, they could pay the investor some money and extend the term for an extra 90 years. In so doing, they buy out the rental income, which defeats the object for the investor of putting the arrangement in place, as the investor wants regular income.

There will be those who argue that the legislation should not apply in such situations because the leases in question are business tenancies under the Landlord and Tenant Act 1954. However, particularly since the amendments introduced by the Commonhold and Leasehold Reform Act 2002 came into force (removing the requirement for the tenant to be in occupation), the legislation is "open to being interpreted" in such a way that it might apply to premises that do not fit with a traditional perception of residential.

As to the question whether investors have been put off by it, thus far, the answer appears to be no, although the suspicion is that some of the smaller investors will be a bit wary of it. The way around this issue requires additional work – either by putting layers of leases in place or splitting up the term granted, both of which have a bearing on cost. It is also questionable whether it is likely in practice that the manager would seek to buy out the rental income.

This note on the implications of *Farndale* is mostly based on an Estates Gazette article dated 1 February 2014 featuring comments of the Chair on this issue among others.

9. REPORTING TO CLIENT ON SIGNIFICANT DISCREPANCY IN PRICE STATED AT LAND REGISTRY

Be alert to significant discrepancies between a recent Land Registry price and the valuation on a re-financing and advise a lender client accordingly. While the issue was highlighted by the E-Surv case (link below), the point was already relevant in an undervalue context.

E. SURV LIMITED V GOLDSMITH WILLIAMS SOLICITORS

10. CAPITAL ALLOWANCES CHANGES FROM APRIL 2014

On the capital allowances changes from April 2014, buyers in particular should ensure sale contracts have wording protecting their capital allowances position, because if they do not, they are likely to lose the right to claim potentially valuable capital allowances.

11. UPDATE ON CIL DRAFTING PROJECT

As to the CIL drafting project, the CIL wording and guidance notes are with the CLLS Planning committee whose response is expected shortly.

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

Members were encouraged to respond to the Government consultation on the introduction of capital gains tax for non-resident owners disposing of UK residential properties and the possibility of a withholding tax which could cause problems on real estate transactions –

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/298759/CGT_non-residents_condoc.pdf .

13. UPDATE ON LEASE PROJECT

Whilst the lease project (to create industry standard leases and management documentation) no longer has the BPF imprimatur, many regard it as comprising an excellent set of documentation. Some clients will require its use and some firms may use it of their own accord, subject to client needs.

14. MARKS & SPENCER DECISION ON BREAK RIGHTS AND TENANT REFUND FOR ADVANCE RENTAL PAYMENT

In the light of the Marks & Spencer v BNP Court of Appeal decision, for tenants or those acting for them, to address the concern for refunds, the break date should be the final day of a quarter (and certainly not the first day of the following quarter). If the break date has to be mid-quarter, include a landlord's obligation to refund the proportion of the rent and other sums previously paid by the tenant for the period from and including the day after the break date to the end of the quarter, provided that the tenant successfully terminated the lease.

15. CO-OPERATION BETWEEN THE COMMITTEE AND THE LAW SOCIETY'S CONVEYANCING AND LAND LAW COMMITTEE

Warren Gordon will be Chair of the Law Society's Conveyancing and Land Law committee from September 2014 for 3 years. The CLLS Land Law committee should look to work more closely with the Law Society committee on topics of mutual interest.

16. CPD – 1.5 hours (CPD reference CRI/CLLS).

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