CITY OF LONDON LAW SOCIETY LAND LAW COMMITTEE

Minutes of a meeting held on 17 September 2014 at Hogan Lovells, Atlantic House, 50 Holborn Viaduct, London EC1A 2FG

In attendance	**Jackie Newstead (Chair)** **Warren Gordon (Secretary)** **James Barnes** **Jamie Chapman** **Mike Edwards** **Martin Elliott** **Alison Hardy** **Laurie Heller** **Pranai Karia** **John Nevin** **Peter Taylor** **Ian Waring** **Peter Williams (external visitor for item 3 on Model Commercial Leases)**
Apologies	**William Boss** **Nick Brent** **Jeremy Brooks** **James Crookes** **Jayne Elkins** **Alison Gowman** **David Hawkins** **Charles Horsfield** **Anthony Judge** **Emma Kendall** **Daniel McKimm** **Nick Jones** **Jon Pike** **Nicholas Vergette**

1. **WELCOME**

The Committee welcomed Peter Williams who will present on the item on the Model Commercial Leases.

2. **MINUTES**

The minutes of the July 2014 Committee meeting were approved and are on the Land Law committee webpage.

3. **MODEL COMMERCIAL LEASES**

Peter Williams provided a very helpful presentation on the Model Commercial Leases project. The website link is http://modelcommerciallease.co.uk/ The purpose behind the project is to achieve a more balanced first draft of a commercial lease including tenant's amendments that are generally accepted by landlords. This will save time in negotiations. Increased and wider use of the leases will lead to greater familiarity and increased efficiency in their use. Ideally, if the leases are used, a comparison document should be sent out showing differences between the draft produced and the original. There was a discussion about whether the leases can be used for trophy lettings and differing views. There were some objections to the length of the leases, although they are shorter than some.

Some tenants are asking in heads of terms for the leases to be used. One obstacle to their use is existing leases at shopping centres, office buildings etc. Also the people behind the leases do not endorse them, which will limit the ability to promote the leases. Ultimately, the proof of the leases will be in their take-up by law firms (perhaps encouraged by their clients) who may choose to introduce leases into their precedent bank where they do not have an equivalent. The leases can be amended and the Model Commercial Leases logo on the front can be removed.

Certain member firms will be using the leases as their precedent leases subject to exceptions such as existing leases for a property or client preference.

Peter asked for any comments on the leases and other asset management documentation to be fed back to him at peter@falcolegaltraining.co.uk

Dion Panambalana of Hogan Lovells or Ed Benzecry of CMS Cameron McKenna will be invited to the next committee meeting for further discussions on this project once the Committee has had a chance to digest the leases.

4. **CERTIFICATE OF TITLE – FINALISED WRAPPER DOCUMENT**

http://www.citysolicitors.org.uk/attachments/article/114/16892910_3_Certificate%20wrapper%20%20-%20version%203%20%2021%20May%202014_CLEANED.pdf

The wrapper document for the Certificate of title (7th edition) has been added to the CLLS website and Committee members said that it had been used on a few occasions with little objection or amendment.

5. **UPDATE ON PROPOSED CGT CHANGES FOR NON-RESIDENT OWNERS OF UK RESIDENTIAL PROPERTY**

The Government has briefly reported back on the consultation process with a full response to follow in the Autumn. The Government is clear that widely held non-resident collective investment schemes should not be affected by the capital gains tax (CGT) charge. It intends to introduce a form of "close company" test to limit the scope of the extension of CGT to non-residents, to seek to ensure that the extension of CGT will not apply where a disposal of UK property is made by a diversely held institutional investor that holds UK residential property directly, or by one which invests indirectly through an arrangement that is not controlled by a few private investors. No mention was made of there being no withholding tax, a point specifically referred to verbally at consultation meetings. The meetings indicated that the payment of CGT would not impact on the conveyancing process.

Solicitors should consider their terms of engagement letters in terms of whether to carve out responsibility for advice on CGT or other taxes. The Government has suggested that it may produce some general guidance that can be handed to non-residents to provide further information on CGT implications. Some thought that there may be some dangers of solicitors handing their client this general guidance, because it may suggest the solicitor is taking on the responsibility for advising on the CGT implications when that may not be the case.

6. **OUTCOME OF GOVERNMENT CONSULTATION ON LAND REGISTRY SERVICE DELIVERY COMPANY**

The Government's proposal was to create a new company, to which responsibility for the performance of service delivery functions would be transferred (the service delivery company), and to have a separate Office of the Chief Land Registrar (OCLR) that would be retained in Government. The Land Registry service delivery company would be responsible for the processes relating to land registration, while the OCLR would primarily perform regulatory and fee-setting functions to ensure that customers' interests are protected. The consultation envisaged the possibility of private ownership or involvement. A number of concerns were expressed about the proposals including data protection and the impact of the profit motive on the priorities of the service delivery company if privately owned.

Given the importance of the Land Registry to the effective operation of the UK property market, the Government has now concluded that further consideration would be valuable. Therefore, at this time, no decision has been taken to change Land Registry's model. However, Government continues to believe that there could be benefits in creating an arm's length service delivery company and it will continue to develop policy and engage with stakeholders. There will be a further consultation if there were to be proposals to change Land Registry's commercial model. Watch this space.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/328872/bis_14_949_Introduction_of_a_Land_Registry_Service_Delivery_Company.pdf

7. **GOVERNMENT CONSULTATION ON ANNUAL TAX ON ENVELOPED DWELLINGS – REDUCING THE ADMINISTRATIVE BURDEN**

Brief mention was made of the Government's consultation on the Annual tax on enveloped dwellings – reducing the administrative burden. The consultation proposed amendments to the current filing requirements to reduce the number of returns genuine businesses have to submit to claim a relief from ATED. ATED filing is more likely to be dealt with by our tax colleagues or clients.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/335710/hmrc_consultation_ATED.PDF

8. **GOVERNMENT CONSULTATION ON ENERGY EFFICIENCY REGULATIONS**

The Government has recently consulted on energy efficiency regulations for domestic and non-domestic properties.

Domestic - https://www.gov.uk/government/consultations/private-rented-sector-energy-efficiency-regulations-domestic

Non-domestic –

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/338398/Non-Domestic_PRS_Regulations_Consultation__v1_51__No_Tracks_Final_Version_30_07_14.pdf

Domestic and non-domestic private rented sector Minimum Energy Efficiency Standard Regulations must be in force by 1 April 2018, and will require all eligible properties in the sector to be improved to a specified minimum standard, before they can be let. Also domestic private rented sector Tenant's Energy Efficiency Improvement Regulations must be in force by 1 April 2016 and will allow tenants to request consent for energy efficiency measures that may not unreasonably be refused by the landlord. Both sets of Regulations will apply only to those buildings within scope of the Energy Performance of Buildings (England and Wales) Regulations 2012: buildings not required to obtain an EPC such as those awaiting demolition will not be within scope of the Minimum Standard Regulations or Tenant's Improvement Regulations.

These Regulations are key regulations for the property industry and there follows a summary of some key points for the Committee's benefit.

Domestic - The Tenant's Improvement Regulations will apply to any property regardless of the EPC rating and whether the property has an EPC in place. The Minimum Standard Regulations only will apply to properties with an F or G EPC rating. Under the Tenant's Improvement Regulations, landlords will be able to refuse a tenant's request for consent where the funding route proposed by the tenant to pay for requested improvements entails net or upfront costs to the landlord for the energy efficiency improvements.

Funding options that may be available for tenants to ensure that there are no net or upfront costs to landlords include Green Deal finance, ECO, local or national grants, the tenant's own sources or a combination of these. Similarly, under the Minimum Standard Regulations where a property falls below an E EPC rating, the landlord would only be required to undertake improvements (in order to be able to let) that could be funded without net or upfront cost for the measures, for example, through using the Green Deal finance, ECO or other incentives. Improvements will not be required (to let), which need consent from a third party, such as a freeholder, where that consent is not given.

For the Minimum Standard Regulations, landlords of buildings within scope who let to new tenants from 1 April 2018 onwards will be required to comply with the Regulations. From 1 April 2020 a regulatory "backstop" will apply by which all landlords of properties within scope (i.e. all leases, existing or new) would be required to meet the standard, or demonstrate an exemption of the type mentioned in the previous paragraph. Local authorities will be the enforcement bodies with a maximum fine of £5,000 and there may be further penalties if the breach is not resolved. The tenant, however, will not have to be evicted. The Government plans to issue its response and lay the regulations by the start of 2015.

Non-Domestic – There are some similarities with the Domestic Regulations, but some important differences. To ensure that any regulations do not impose disproportionate burdens on business, the Government has committed to ensuring that landlords do not face upfront costs for required improvement measures. The Regulations will not affect over 80% of non-domestic properties that are rated A - E on their EPC, and will not apply to owner occupied non-domestic property.

Cost safeguard provisions will mean that where a property falls below an E EPC rating, the landlord would only be required to make those improvements (in order to let) which could be made at no upfront cost, for example, through a Green Deal finance arrangement. Whilst the Green Deal Finance Company is currently not offering Green Deal finance on non-domestic properties, it continues to keep this under review. The Regulations would not require landlords to carry out improvements (to let) where necessary third party consent is denied. Therefore, where a landlord is denied consent to such improvements, or Green Deal finance chosen to pay for them, such works would not be required.

Where a property has not reached an E EPC rating due to any of the above reasons, such exemptions from meeting the standard would not last in perpetuity, but would expire after a reasonable period of time. The Government proposes that this would be five years, or earlier where a tenant vacates the property and the reason for the exemption was the tenant's refusal to consent. When the exemption expires, the landlord would need to seek to comply with the standard or again demonstrate an exemption in order to let the property. A similar position is proposed for domestic property.

Those non-domestic buildings within scope of the EPC regulations newly let to new tenants from 1 April 2018 onwards will be required to comply with the Regulations. From 1 April 2023 a regulatory "backstop" will apply whereby all properties within scope would

be required to meet the standard, including all leases (existing or new), or demonstrate an exemption. As the Regulations are to be designed to respect any valid third party consent obligations that a landlord might have, where the backstop applies to existing leases, a sitting tenant's refusal to consent to improvements or Green Deal finance means that an exemption would be provided.

The Government's preferred formula for calculating penalties for the non-domestic sector is to use a percentage of the rateable value of the property. A fixed penalty would need to apply where the formula could not be applied (for example, where the property falls within a minority of buildings exempt from business rates), and the Government considers that there may be merit in establishing a minimum and a maximum penalty level (without specifying what they are).

A question was raised at the Committee meeting whether lease renewals would be caught. Currently, lease renewals and extensions do not trigger an EPC requirement. However, extending the application point for Minimum Standard Regulations to lease renewals and extensions would in the Government's view arguably make sense, even though it could only apply to properties that had an EPC, as it is at those points in a lease cycle that both landlord and tenant are in negotiations, providing an opportune time to raise matters regarding energy efficiency improvements. Should the Government opt for a soft start, more lettings would be brought within scope.

For buildings that do not satisfy the Minimum Standard Regulations from the relevant date (because they are "F" or "G" rating) and there is no exemption, there was concern about the implications on rent review of leases in the building. Should an assumption be included in rent review provisions that the premises/building have at least an "E" EPC rating. It was considered that this was unnecessary, because of the existing fairly typical assumption that the premises may lawfully be let to and used for the permitted use (as defined in the lease) by any person throughout the term of the hypothetical lease.

There was also the issue of whether the cost of works to meet the Minimum Standard Regulations would fall within the statutory requirements compliance head in a typical service charge provision. Since this does not appear to be an obligation to carry out the works, rather the landlord may not be able to let if the works are not carried out, such cost may not be seen as complying with statutory requirements. However, the cost may fall within sustainability heads of charge. The Government is consulting on whether landlords could be permitted to demonstrate compliance by undertaking all improvements that pay for themselves in energy bill savings within a prescribed period. It is not entirely clear how the landlord's ability to recover the costs of making the improvement from its tenants fits into this ("Golden Rule") equation.

There are no Tenant's Energy Efficiency Improvement Regulations for the non-domestic private rented sector.

9. STANDARD WAYLEAVE AGREEMENT

A sub-group will be established to produce a CLLS Land Law committee form of wayleave agreement. The starting point will be a draft kindly offered by Nabarro. The

parties to the agreement are the property owner and the operator although the apparatus, subject of the agreement, will be for the tenant's benefit. Query whether a licence to alter would also be required or whether the agreement augments provisions in the lease. The question was also raised as to whether it is correct for a wayleave agreement to define the owner/grantor to include successors – while the successor will normally be bound by the Electronic Communications Code, can a successor enforce the benefit of the operator's obligations in the agreement? The sub-group will comprise Warren Gordon, Laurie Heller, Peter Taylor, Alison Hardy and Nicholas Vergette (subject to his agreement). Other volunteers are welcome.

10. **IMPACT OF LAND REGISTRY'S CHANGE OF PRACTICE ON ORIGINAL DOCUMENTATION**

There has been some discussion about the creation of a protocol for the retention of original documents in view of Land Registry's new policy of destroying any originals that they receive. The Committee struggled to see the need for this. Even before the new policy, solicitors were in possession of originals following the Land Registry's then policy on originals and no protocol was deemed necessary then. Many firms will have their own existing policies for the safe retention of deeds in any event. The Committee considered that there was no need to change the Protocol for the discharge of mortgages of commercial property in the light of the Land Registry's change of practice.

11. **AOB - MINES AND MINERALS**

Take the following situation. On the disposal of a site, the usual title investigations had been carried out, clear search of the index map (SIM), good and marketable title, etc. Just before completion the usual Land Registry searches were carried out (whether with or without priority). The search was clear and revealed no pending applications against the title.

Purely by chance, as a title indemnity policy was required, a new SIM search was carried out. This disclosed another, previously unknown, title number. It turned out that the Land Registry had received an application to register title to the mines and minerals under the property (as opposed to someone claiming rights to work the minerals that would have resulted in a UN1 on the title to the land). The Land Registry was asked why an application to register title to mines and minerals under the property was not noted on the title to the surface land and was told that it was not Land Registry policy to do so. The only way that the application would be discoverable would be by renewing the SIM search.

The action taken by Land Registry will differ depending on whether it is proposed to grant an absolute title to the mines and minerals or a qualified title. If it is proposed to grant an absolute title, the surface title is investigated to see whether it includes an entry that the mines and minerals are excepted from the title. If the mines and minerals are excepted from the title, as there will then be no overlap between the respective titles, the registration of the mines and minerals can proceed. No notice is served on the proprietor of the surface title and no additional entry is made on the surface title.

If the surface title does not exclude the mines and minerals, notice of the application to register the mines and minerals is then served on the registered proprietor of the surface title who is given an opportunity to object to the application. If no objection is received, an entry is then put on the surface title. If an objection is received, this will result in a dispute, which will have to be resolved in the same way as any other Land Registry dispute.

A different course of action is taken if it is proposed to grant a qualified title to the mines and minerals. This is where the problems may arise in particular. The Land Registry does not serve a notice in relation to a qualified corporeal mineral title. They say that this difference in approach is appropriate, because while mines and minerals are rebuttably presumed to be included in the registered title of surface land if there is no entry excluding them, it is merely a presumption that can be rebutted by any contrary evidence.

In addition, the registration of any title where the boundaries have not been determined in accordance with section 60 of the Land Registration Act 2002 is a general boundary situation, since the Land Registry has decided that this applies horizontally as well as laterally. The question of whether or not the relevant mines and mines are included in the surface title is thereby left undetermined when the surface title is first registered. It could, therefore, be argued that unless there is a specific entry on the surface title stating that the mines and minerals are included within the registration, an application to register a corporeal mines and mineral title does not conflict with a registered surface title. If the surface title includes the mines and minerals, the qualification entered on the qualified mineral title results in such minerals not being included in the mineral title.

An official search against a particular title number, e.g. of the surface title, is only going to reveal applications that have been received from the date searched against **that** title number. It may be that the only way to find out whether applications have been lodged to register mines and minerals is to undertake repeat SIMs, which would reveal pending applications received in respect of the whole of the **area** searched against, not just the surface title number.

One major real estate practice is advising people to renew a SIM search immediately before completion in appropriate circumstances such as development land, wind farms, etc.

This mines issue can cause major problems and the PSL groups are having further discussions with the Land Registry.

In the meantime, consideration could be given to including a paragraph in reports on title along the lines of: “As at the date of our SIM search, there were no registrations in relation to mines and minerals and they have not been excepted from the registered title to the Property. However, their inclusion in the title is a rebuttable presumption and third party applications to register separate title to the mines and minerals may be successfully made without the owner of the title to the Property being notified. [We will, therefore, renew the SIM search shortly before completion in an attempt to reveal any such third party applications]”.

12. **CPD - 1 HOUR 45 MINUTES. CPD REFERENCE IS CRI/CLLS.**

13. **FUTURE COMMITTEE MEETING DATE - 26 NOVEMBER 2014 AT 12.30PM AT HOGAN LOVELLS LLP, ATLANTIC HOUSE, HOLBORN VIADUCT, LONDON EC1A 2FG.**