CITY OF LONDON LAW SOCIETY LAND LAW COMMITTEE

Minutes of a meeting held on 8 July 2015 at Hogan Lovells, Atlantic House, 50 Holborn Viaduct, London EC1A 2FG

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

1. **MINUTES**

The minutes of the May 2015 Committee meeting were approved and are on the Land Law committee webpage.

2. **DISCUSSION ON SUB-GROUP'S DEVELOPMENT MANAGEMENT AGREEMENT**

There was a very helpful discussion on the close to final form of the Asset and development management agreement. Laurie Heller has kindly drafted some introductory explanatory notes that will be added to the agreement. While the agreement will be a useful exemplar, the explanatory notes will make it clear that the approach taken by the agreement is not the only one and the particular circumstances will dictate the contents on each occasion.

Particular comments made –

- Add footnote that there may be sensitivity around attaching the appraisal or business plan to the agreement.
- Clause 3.4.2.4 will be square bracketed to reflect that the duty of care deed is not always provided to tenants.
- The Manager is likely to raise concerns about not receiving the Performance Fee under clause 6 if the End Date is not reached – a footnote will be added.
- Clause 10.1.2 and 10.1.3 – lack of clarity over is meant by "at a time when"- perhaps link into following notification.
- Clause 10.1.7 – reference to clause 24 should be clause 26.
- Clause 11 – provisions to apply even where uncertainty over termination.
- Clause 12.1 – should there be an exclusion for consequential losses? Deal with in footnote.
- Clause 15.2 – this should be subject to clause 9.4.

The agreement will be updated to reflect these changes and, once signed off by the sub-group, will be circulated for a final time to the whole committee. Assuming no further comments, it will then be added to the CLLS website.

Kevin Hart of CLLS agreed to obtain stats for how often the documents on the Land Law committee page of the website are looked at. This would be done twice a year. The stats will not be a reflection of general use of the documents because many now reside on firms' databases. It was also suggested that the CLLS includes reminders about documents in their emails. There was some concern about the under-use of the Protocol for discharging mortgages and, while acknowledging that changing some lenders' practices may be difficult, the committee should persevere and any further publicity from the CLLS will be welcome.

3. **UPDATE ON WAYLEAVE PROJECT AND INDUSTRY INTEREST**

Warren Gordon summarised the wayleave drafting project that a sub-group of the committee has undertaken. This is a high profile project being led by Central London

Forward. Central London Forward was established in 2007 as a sub-regional strategic organization representing the eight central London local authorities including City of London, Kensington and Chelsea and Westminster.

Central London Forward is using the British Standards Institution ("BSI") to run the project. BSI is a publisher of standards and uses technical authors (such as in this case the City of London Law Society Land Law committee) for their technical (such as legal) input and impartial experts on steering groups and public consultations to build up a consensus on a particular outcome. In this case, the outcome is to standardise and improve the efficiency of the process of the installation of fixed line and mobile phone apparatus (Broadband connectivity) and this will include standard documentation, the majority of which will, hopefully, be adopted by the industry.

The proposal is for the sub-group of the Land Law committee to produce a first draft of a wayleave agreement. The sub-group has been provided with a number of drafts provided by mainly operators and the sub-group will within an 8 week period (ending at the start of September) produce a first draft. The starting point will be a Nabarro's wayleave agreement dealing with fixed line services to tenants, which document has broadly been accepted by a major operator and, therefore, seems a sensible, balanced starting point.

The process is that once the sub-group has produced the first draft, following consideration by the BSI, the draft will be considered by a steering group made up of at least 15 stakeholders including representative bodies of operators, property owners and developers, property managers and other interested parties. Further drafts may be produced following the steering group meeting. There will also be a public consultation with a larger group of interested parties on any documents produced. There is a tight deadline with a proposed publication date in November 2015.

There will be a scoping discussion with the steering group on 15 July which will inform the drafting and the group will consider a very early and incomplete draft produced by the sub-group. Warren will attend that meeting.

The wayleave will reflect the proposed Code subject to current Government consultation and will aim to be relatively straightforward and provide a sensible starting point so that the majority of it such as the boilerplate and other standard provisions will be uncontroversial and there will be a minority of provisions which will be the subject of discussion when the document is actually used (such as indemnity, redevelopment provisions). A third party will produce separate guidance to inform and supplement the sub-group's document.

The sub-group's draft will focus on fixed line situations which the project considers the biggest priority. A document for a mobile phone apparatus situation may follow.

A critical factor highlighted was the extent to which stakeholders abided by the process and documentation formulated by this project once launched. If the majority of the document(s) is used the majority of the time then the project can be counted a success.

In view of the tight timeframes for production of the document, drafts will be circulated to the entire committee by email for comments/information during July and August.

4. **IMPORTANCE OF REPORTING ON THE RESULTS OF A SEARCH**

Warren highlighted the recent worrying case of Orientfield Holdings Ltd v Bird & Bird LLP [26 June 2015] High Court. A link to the judgment follows http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Ch/2015/1963.html&query=title+(+orientfield+)&method=boolean

A law firm's failure to disclose the results of a planning search in its report on title led to a successful claim against it (for part of the deposit that the buyer lost following rescission of the contract). What is disturbing is that the omission was one that many firms could have made. A redevelopment of a school site within 100 metres of the relevant property revealed by a Plansearch (residential) report. It is not the case that there is always consideration of the planning position for properties adjoining the property to be purchased.

The Court considered that, having carried out the Plansearch Plus report, the law firm was under a duty to explain the results of the search to the buyer. It had been a breach of duty to say that the information that the report provided did not reveal anything that adversely affected the property. The firm had been obliged to include the Plansearch report in the report on title. A reasonably competent solicitor with the Plansearch report to hand would have adopted the position that any development within 100 metres of the property would be of significance. The firm had skim read the report in a few minutes: any qualitative analysis would have revealed developments of potential importance.

The problem is that searches like this often produce voluminous results that would take time and cost to plough through, often out of all proportion to the transaction. Some at the meeting suggested attaching the whole search result to the report on title, but clients would expect points of concern to be highlighted in the report.

The committee wondered about the impact of the decision on the Certificate of title wording for searches and this will be given further consideration.

One option suggested by some would be to include, where appropriate, in reports on title an exclusion that "we have not investigated the planning position for land or buildings surrounding the Property – please let us know if you wish us to do so". Consideration should be given to having greater clarity in reports as to what the solicitor has and has not done in relation to searches.

Or should solicitors be careful about carrying out certain perhaps less "usual" searches for fear of what may be disclosed? A major concern for solicitors is that with the vast array of free information out there, what should they be searching? If they do not disclose information out there that may be adverse to a client, is the solicitor in breach of its duty?

With that in mind, it was suggested that the Law Society should consider some guidance on the identity of "prudent searches" (which will of course depend to a degree on the

nature of the transaction). Warren will mention this to the Law Society. Establishing guidance among practitioners may be helpful in terms of the factors that a court takes into account in determining what is a reasonable practice when considering the liability of law firms for failing to carry out less usual searches.

5. CHANGES TO RICS CODE OF MEASURING PRACTICE FOR OFFICES FROM 1 JANUARY 2016

The 6th edition of the RICS's Code of Measuring Practice has been around since 2007. It is often referred to in documentation in the context of a definition of "Gross External Area" or "Gross Internal Area" or "Net Internal Area". The Code applies to office, residential, industrial, retail and mixed use. Commencing on 1 January 2016, the Code of Measuring Practice will no longer apply to offices and will be replaced by "Professional statement: office measurement, being Part 1 of RICS property measurement 1st edition May 2015". The existing 6th edition of the RICS's Code of Measuring Practice will continue to apply to residential, industrial, retail and mixed use.

Between now and 1 January 2016, the 6th edition of the RICS's Code of Measuring Practice continues to be used for the measurement of offices. However, commencing on 1 January 2016 "Professional statement: office measurement" is mandatory for offices.

Bear this in mind in relation to references to the Code of Measuring Practice in documentation. The terminology under "Professional statement: office measurement" will be different. "IPMS 1" compares closely to gross external area ("GEA") with some differences (e.g. balconies and accessible rooftop terraces are included in IPMS 1 but excluded in GEA). IPMS 1 is particularly used in a planning context.

"IPMS 2-Office" compares closely but not exactly to gross internal area ("GIA"). In addition to the differences mentioned between IPMS 1 and GEA, areas occupied by the reveals of windows when measured and assessed as the internal dominant face are included in IPMS 2 but excluded for GIA. IPMS 2 is particularly used in a costings context. "IPMS 3-Office"compares to net internal area ("NIA"), but has the largest number of differences between the old and new measure. IPMS 3 is particularly used in the context of agency and valuation; taxation; and property and facilities management.

So from 1 January 2016, GEA, GIA and NIA will effectively disappear for the measurement of offices and the industry will need to get used to IPMS 1, IPMS 2-Office and IPMS 3-Office. GEA, GIA and NIA will, however, remain the measurement tools for residential, industrial, retail and mixed use. The new RICS document states how to make a direct comparison/conversion between the old and new measurement tools for offices. Some transactional documents will provide for both bases.

6. NEW STANDARD COMMERCIAL PROPERTY CONDITIONS

Warren gave a brief run through the new 3rd edition of the Standard Commercial Conditions which are very close to being finalised and will be published hopefully in the next few months.

7. **TENANTS RUNNING BUSINESSES FROM THEIR HOME – PROTECTING LANDLORDS FROM TENANTS ACQUIRING 1954 ACT SECURITY OF TENURE RIGHTS**

Keen to encourage home businesses, legislation has been enacted in the Small Business, Enterprise and Employment Act 2015 (which has yet to come into force) which seeks to deal with landlords' concerns that allowing a residential tenant to run a business from home may enable the tenant to obtain business security of tenure rights. It will do this by establishing a new concept of the "home business", which may be carried on in the home without the home as a result falling within the Landlord and Tenant Act 1954.

8. **AOB**

The impact of the Consumer Protection from Unfair Trading Regulations 2008 as amended since 1 October 2014 will be considered at the September meeting.

9. **CPD - 1 HOUR 15 MINUTES - NB: CPD REFERENCE IS CRI/CLLS**

10. **REMAINING 2015 COMMITTEE MEETING DATES - 30 SEPTEMBER AND 25 NOVEMBER - BOTH AT 12.30PM AT HOGAN LOVELLS LLP, ATLANTIC HOUSE, HOLBORN VIADUCT, LONDON EC1A 2FG**