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Dear Katherine

RICS Consultation on the new Code for Leasing Business Premises

The City of London Law Society ("CLLS") represents approximately 17,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

A full list of the CLLS corporate members may be found on the CLLS website at http://www.citysolicitors.org.uk/attachments/category/81/Corporate%20Membership%202017%201.pdf

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response, prepared by the CLLS Land Law Committee, is in respect of the Royal Institute of Chartered Surveyors' Consultation on the new Code for Leasing Business Premises

Response

1. In the Committee's view, the terms of the proposed new Code represent fairly where the state of the market has now moved in terms of good and acceptable commercial practice. As such, it should provide a spur to landowners and tenants as to what negotiations for lettings should seek to achieve. While there is a mild emphasis towards the investment

interests of landowners, counterbalancing this is further clarity on the "prohibition" of unfair dealing and terms. The new Code should prove influential in shaping what may be considered to be good and bad practice, which the Courts may refer to in considering issues of what is and is not reasonable where there is discretion in determining litigated issues.

2. The new Code should be commended on clarity and laying down good practice. Observance of the new Code should leave potential tenants with a clear framework of where the terms of the resulting tenancy should lead.

3. Importantly, there does, however, appear to be a conflictual aspect as to the mandatory and best practice provisions of the new Code. The regulations apply to members of the RICS; they do not directly affect landowners who are not regulated by the RICS. Where landowners instructing RICS members require negotiations or lease provisions contrary to the mandatory and best practice regulation operating on members, what is the position then? The new Code does not specify. Would such a situation give rise to "special circumstances" relieving RICS members from observance of the relevant Code provisions and, if so, how would that work? Or would the RICS member in question have to decline to act, or leave their job if an employee? Is there any other position that can be adopted in the circumstances? The terms of the new Code must surely exercise an influence on landowners to act in compliance, but they are not binding on them. Should not the new Code at least comment on such a situation and make recommendations?

4. It may be useful to have a section on telecommunications and data availability. This reflects their importance for tenants (it is almost as important a utility service as electricity, gas or water) and the delays that may be caused to the grant of a new lease by the requirements for installation of new services.

5. The draft proposes that it should be mandatory for the terms of a lease to be recorded in written heads of terms and include the required contents specified in paragraph 1.2. This is understandable for a "typical" rack-rented lease of a single unit to an occupier. However, there are numerous varieties of "lease" where this requirement would seem to be either inappropriate or possibly burdensome. For example:

a. very short leases such as the "Clearlet" lease, where the heads of terms might end up being longer than the lease itself.

b. sub-station leases;

c. reversionary leases on the same terms as the existing lease;

d. long leases at a premium (which are, in effect, a sale of the property).

It might be therefore helpful for the new Code to make clear the sorts of leases where formal written heads of terms containing the mandatory contents set out in paragraph 1.2 may not always be required.

6. Paragraph 3.3 – this provision is mandatory so it would be helpful if it made clear that it does not apply to break rights in relation to damage to or destruction of the property. Otherwise, landlords will be obliged to include such details in the heads of terms, which is presumably not the intention of this requirement and would be burdensome.

7. Paragraph 3.5 – it is somewhat controversial for the new code to state that leases "should" be within the Landlord and Tenant Act 1954, unless there is a "good reason" to exclude them. This goes beyond the 2007 Landlord Code, which was effectively neutral on the subject of 1954 Act protection. In the terminology of a professional statement, "should"

connotes “best practice”. We have received expressions of concern from landlord clients that this change will unduly restrict their estate management. If the RICS does decide to adopt this position following the consultation, then:

a. it would be helpful if paragraph 3.5 referred specifically to the requirements of a superior lease being an example of a “good reason” for a sublease to be excluded; and

b. should it be the landlord’s responsibility to tell the tenant to seek advice about the implications of contracting out? While the current Landlord Code contains similar wording, the regulatory implications of the new code mean that if a landlord fails to do so, it would no longer be complying with best practice and could, therefore, be criticised. In any event, informing the tenant of its rights is the purpose behind the existing statutory notice procedure for contracting out.

8. Paragraph 4.3 – Most guarantees are not limited to rent. The default position should rather be that a guarantee always relates to the totality of the tenant’s obligations and if the tenant wishes for something less, that is a matter for commercial negotiation.

9. Paragraph 8.2 – This states that tenants should not normally be obliged to give the premises back at the end of the lease in any better condition than they were in at their grant. While this is similar to the current Lease Code, it is not a reflection of the repair provision of many leases and under the new Code it will have best practice professional conduct implications.

10. Paragraph 8.5 – The suggestion that a lease should include a landlord’s obligation to enforce remedies for defects is perhaps difficult to reconcile with achieving a “clean” investment for sale purposes.

11. In paragraph 3.3 of the template heads of terms, there should be a new “(f) Details of any other pre-conditions”. This reflects paragraph 3.6 of the new Code and its mention of other pre-conditions.

12. Is it intended that paragraph 11.1 of the new Code should not be a mandatory content of the heads of terms?

Yours faithfully

Jackie Newstead
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City of London Law Society

A full list of the Land Law Committee members is herewith:-

http://www.citysolicitors.org.uk/index.php?option=com_content&view=category&id=142&Itemid=469