

## **Minutes for CLLS Land Law Committee meeting on 25 November 2020 by audio conference**

**Attendees:** Jackie Newstead (Chair), Warren Gordon (Secretary), Anthea Bamford, Nick Brent, Caroline DeLaney, Martin Elliott, Alison Hardy, David Hawkins, Laurie Heller, Matt Hooton, Stephen Josephides, Daniel McKimm, John Nevin, Brigid North, Franc Pena, Julian Pollock, Jeremy Shields, Sangita Unadkat, Ian Waring and Patrick Williams.

### **1 Apologies and Committee News**

Apologies: Jeremy Brooks, Jamie Chapman, Jayne Elkins, Kevin Hart (from the CLLS), Vikki Hills, Paul Kenny, Tom Pedder.

Anthea Bamford is stepping down from the Committee. The Committee thanked Anthea for her excellent contributions to the Committee's meetings and projects and wished her all the best for the future.

### **2 Approval of Minutes for September Committee meeting**

The Minutes for the September Committee meeting were approved and are on the Committee's webpage.

### **3 Update on use of e-signatures**

It was generally considered that HM Land Registry (HMLR)'s permitted witnessed electronic signature process (which does not have to involve a witness) has encouraged greater use of e-signatures. However, HMLR's requirements set out in their Practice Guide 8 continue to cause some problems and deter some use of e-signatures, for example, their requirement for a one-time password sent by the platform for witnesses. This can cause issues for certain platforms, who do not offer such passwords for witnesses and workarounds may give rise to confidentiality concerns. Alternative modes of execution to e-signatures have been used to overcome pandemic related restrictions such as virtual signing using the Mercury process and powers of attorney.

HMLR's preferred option for e-signatures is Qualified Electronic Signatures (QES) which is a more secure mode of execution. Further details are expected from HMLR by the end of this year and their intention is to run QES in tandem with their permitted "witnessed electronic signature" process for some time to come.

One Committee member raised concerns about where e-signed documents are stored where there are multiple relevant matter numbers (perhaps deal with this by generic deeds folder and sub-matter folders), with associated concerns about people leaving (leading to difficulties in locating the document) and the confidential nature of the documents being stored. Some members are printing copies of the e-signed documents and/or putting them on client extranets.

Mention was made of the view of one or 2 firms (none present on the call) that a printed out e-signed document cannot be an original and is merely a copy. The Committee thought this view did not reflect previous counsel's opinions and Law Society guidance on this topic. Some firms when they send an e-signed document will make it clear whether they are intending to send the original e-signed document or merely a copy.

In view of the rapidly changing practice in this area, this topic will be kept as a standing item on the agenda.

### **4 Certificate of title**

The Committee discussed elements of the proposed new 8<sup>th</sup> edition of the Certificate of title, which a working group of the Committee is currently considering.

The Committee considered possible additional front end provisions. The Committee was minded to include optional limitation on liability and time limit on claim provisions (reflecting that the limitation on liability provision in particular is often sought, but the optional nature reflecting that such provisions will not be acceptable to some recipients of the Certificate) with additional drafting for court jurisdiction and Rights of Third Parties Act.

The Committee is also looking at add-on's for the Certificate, in particular, a form of construction report – the CLLS Construction Law committee has a working group looking at this and they will liaise with the Land Law Committee's working group. Consideration is also being given to including some statements for a residential/mixed use situation for example for rights of first refusal – **Brigid North and Sangita Unadkat kindly agreed to assist on this aspect.** The Committee will look at whether changes are necessary for Welsh law and will consider whether further changes are needed to clause 4 for share sales. Planning reports tend to be more fact driven and therefore a standard add-on seems less appropriate; the Schedule 3 planning statements will be reviewed as part of the preparation of the 8<sup>th</sup> edition.

The Committee does not intend at this time to produce a certificate of title for a development situation, but will look at this again once the 8<sup>th</sup> edition has launched.

Changes are proposed to Schedule 5 (Letting Documents) which look to achieve a greater consistency with the Model Commercial Leases and the Code for Leasing Business Premises. The Committee was provided with the proposed changes **and was asked to provide any comments to Warren Gordon.**

The working group will next meet in January to progress the project. The Committee anticipates that the new Certificate will launch in 2021.

## **5 Impact of decision in Rights Community Action case on judicial review of planning changes including changes to the Use Classes Order.**

The much awaited judgment on the Judicial review of the recent changes to the Use classes Order / permitted development rights has been published. The Judicial review failed so Class E etc is not affected.

The High Court stated that the three statutory instruments at issue did not set a framework for future development consents within the meaning of Article 3(4) of the Directive. The departure from the promise to consult on the proposals on Permitted Development rights to demolish office buildings and erect buildings for residential use was lawful and therefore the claim for judicial review was dismissed.

Rights: Community: Action are seeking permission to appeal. Until any appeal is resolved, there remains uncertainty around the ability to rely on these new permitted development rights and use classes.

So for the moment many firms (and it seems the Model Commercial Lease authors) will not be changing the standards to refer to the recent changes to the Use Classes Order such as Class E. Instead they will continue to refer to the old use classes and to the Use Classes Order as at 31 August 2020. The Committee was broadly in agreement with that approach.

## **6 Pandemic related property documents**

There continue to be numerous discussions between landlords and tenants over waivers/rent concessions outside of leases and small variations to leases. There are many more turnover arrangements for retail, some of which landlords are forced to accept by virtue of a tenant's CVA. Service charge and insurance premium concessions are sometimes sought on a CVA and some CVAs seek no payments at all from the tenant where there is a pandemic related closure mandated by Government requirements. Some landlords will accept tenant-friendly provisions because the tenant is solvent and that will bring overall benefits to the landlord's centre.

In the context of agreements for lease and the pandemic's impact on target or longstop dates for example for carrying out works, the concern was not necessarily access to the property (since that hadn't been obviously impacted since the first lockdown), but was rather problems with the supply of materials.

## **7 Further thoughts on impact of Brexit**

Problems with the supply of materials is also a potentially serious consequence of Brexit (with the interruption of supply chains) and this may be a significant issue for construction projects. The parties should plan for delays but this may put a strain on projects if having to order ahead. Any delays may be catered for by the parties adding in extra time into the programme of works (or it already being built in), but there may be an impact on long-term projects where the governing contract was put in place a number of years ago. While many agreements for lease will allow for extensions of time for matters outside the developer's control, there are potential problems with the drop-dead date and liquidated damages.

**Kevin Hart was asked to update the Committee on what the CLLS is doing in relation to Brexit.**

## **8 Call for evidence on publication of data on contractual controls of land**

The Committee provided a response to the Government's call for evidence on proposals to require the provision and publication of data on contractual controls of land.

## **9 Rent Deposit Deed**

The Committee's form of Rent Deposit Deed has been published. **This will be publicised by the CLLS (please can Kevin discuss with Project Associates)** and any feedback is welcomed.

## **10 Undertakings document**

The Committee's form of undertakings document from borrower's solicitors for the benefit of lender's solicitor and security agent/trustee re post-completion matters, has been published and feedback is also welcomed.

An interesting point has been raised as to why the obligation to make the Land Registry application within the priority period is conditional on the borrower's solicitors having received the DS1 in respect of existing charges to be discharged and evidence of identity for unrepresented parties. The point was that from a lender's perspective the borrower's solicitors should be required to make the application within the priority period even if the DS1 and evidence of identity have not been received, to protect the lender's priority. The point will be considered by the drafting sub-group.

## **11 Committee projects for 2021**

As mentioned earlier, turnover rent is being sought far more often in CVA and other situations (aligning the rent (at least to a degree) to the fortunes of the tenant's business). Turnover clauses have evolved over time to reflect on-line retailing, click and collect etc, but landlords still have concerns that the turnover from the let premises is not being fully captured. It was agreed that the Committee will produce a note on points to watch on turnover rent drafting (including points that have been increasingly sought by tenants during the pandemic and/or as a result of insolvency situations) and what types of provisions are out there and where examples can be found. Transparency is critical with these arrangements which are best served by the landlord's systems being set up to receive the required information from tenants automatically, but this is not always the case. **Many thanks to Laurie Heller, Sangita Unadkat and Jeremy Shields for volunteering to be involved in producing the note and please let Warren know if anyone else from the Committee would like to participate.**

**12 Update on publicity of sub-station lease document and other CLLS projects; Use of disclaimers for documents on Committee's webpages. Is CLLS happy to host 3<sup>rd</sup> party documents?**

Kevin will report back on these issues at the next Committee meeting.

**13 AOB**

**HM Land Registry's Safe Harbour standard for digital identity**

HMLR have published their Safe Harbour standard for using digital identity verification tools: [https://hmlandregistry.blog.gov.uk/2020/11/17/encouraging-digital-identity-checking-in-conveyancing/?utm\\_medium=email&utm\\_source=govdelivery&utm\\_term=.](https://hmlandregistry.blog.gov.uk/2020/11/17/encouraging-digital-identity-checking-in-conveyancing/?utm_medium=email&utm_source=govdelivery&utm_term=)

The current process for manually verifying a client's identity is sometimes inconvenient and inconsistent and HM Land Registry consider that digital identity verification tools may provide a more secure, efficient and convenient means of identifying the parties to a transaction. They have developed a draft set of requirements aimed at encouraging digital identity checks and seek feedback on these by close of play Friday 11 December.

Land Registry believe that such requirements are a strong catalyst for the development of identity checking services aimed at the conveyancing market. Their standard is not compulsory but they believe it is the most secure and the key point is that if the standard is met there will be no question that the conveyancer has done enough to identify their clients and accordingly there is no longer any risk of HMLR seeking recourse for negligence in identity checking. So compliance with the standard means a safe harbour for the conveyancer.

One aspect not as yet covered in the document is how to relate a digitally identified person with a company or other corporate entity that is a party to the transaction, but this is being worked on with [the Industry Forum](#).

**The Committee may raise a few comments on the standard.**

**14 Length of meeting:** 1 hour 30 minutes.

**15 Next meeting: Dates for 2021 will be provided** (5 meetings at similar dates to previous (non-COVID) years) and the January meeting will again be an audio conference. The Committee hopes that there will be in-person meetings later in 2021 and when that can happen the Committee will look to have hybrid meetings with a mix of people in person and joining remotely.