

CITY OF LONDON LAW SOCIETY LAND LAW COMMITTEE

Minutes for CLLS Land Law Committee meeting on 24th March 2021 by audio conference

In attendance	Jackie Newstead (Chair), Warren Gordon (Secretary), Kevin Hart (from the CLLS), Nick Brent, Jeremy Brooks, Jamie Chapman, Caroline DeLaney, Martin Elliott, David Hawkins, Laurie Heller, Vikki Hills, Matt Hooton, Stephen Josephides, John Nevin, Brigid North, Tom Pedder, Franc Pena, Julian Pollock, Jeremy Shields, Sangita Unadkat, Ian Waring and Paul Kenny (guest attendee).
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2 Approval of Minutes for January 2021 Committee meeting

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

3 Update on initial meeting of working group on turnover rent drafting

The Committee's working group on turnover rent drafting had its first meeting on 11 March. The group comprises Laurie Heller, Warren Gordon, Jeremy Shields, Sangita Unadkat and two non-members were co-opted – Katherine Lang of Baker Mackenzie and Olivia Vice of Hogan Lovells, both of whom have had much "front-line" experience of handling turnover rents in the current conditions and whose help was most informative.

Laurie provided the Committee with a very helpful report summarising the discussions at the meeting.

The group's purpose is to produce a reference note to assist solicitors in the use of turnover rent provisions. Such provisions were often encountered before the pandemic as a way of linking the rental payment to the fortunes of the tenant's business. They are sometimes proposed as part of CVAs and are being increasingly requested by tenants in view of the enforced closures and general impact on business caused by the pandemic.

The group acknowledges that there are already a number of very good standards for turnover rent provisions so producing another standard is not the purpose of the project. Instead the group considers that a note highlighting the various turnover rent arrangements and key points of concern and interest in relation to turnover drafting reflecting the group's experience gained through both negotiations and use in practice, will be of particular benefit to the legal community.

Topics covered in the discussions included attitudes to turnover rent; what is "turnover"; the rates of basic fixed rents, turnover rent and provision for reversion to fixed rents; forms of turnover rent

arrangements and other relevant factors such as SDLT, confidentiality, assignment and sub-letting; keep open covenants and void trading periods; and CVAs.

The group intends to meet again to progress the note with a view to publishing this mid-2021. **Committee member responses to the note are requested by 16 April.**

4 Update on Certificate of title project

The Certificate of title working group had its latest meeting on 17 March to progress consideration of a new 8th edition.

The group focused on the suggested additional front-end provisions previously circulated to this Committee and ended up with a draft that was circulated with the papers for the Committee meeting. These limited numbers of provisions are intended to supplement the existing front end of the Certificate covering such matters as liability caps, time limits for claims, Rights of Third Parties Act and exclusive jurisdiction.

The Committee supported the inclusion of a provision for a liability cap – solicitors have caps in terms of engagement for their own clients, so there should be a cap for a certificate to third parties. The cap is a matter of negotiation linked to the value of the deal, property and loan but there are no absolutes here and the particular circumstances will dictate what is agreed. Consideration will need to be given to whether the cap extends to other reports provided on the transaction.

It is proposed that the Construction Law Committee will produce a form of Construction report, which can be included as a schedule to the Certificate. **Tom Pedder kindly agreed to follow up with the Construction Law Committee to ascertain their progress with this.**

Warren also circulated his previous mark-up of parts of the Certificate focusing particularly on Schedule 5 (Letting Documents). Thanks to Committee members who have already provided comments, which Warren will work through making changes where appropriate. **If Committee members have not already commented on the proposed changes to Schedule 5 in particular, please send through any comments to Warren.**

The working group agreed that while the Schedule 5 statements do not need to and should not mirror the Model Commercial Lease provisions, there is some sense in seeking to bring the statements closer to the MCL. While not everyone uses the MCL or encounters it on a regular basis, it is as good as any industry standard lease out there at the moment and seeks to achieve a relatively balanced position but still broadly institutionally acceptable, which is what most leases are doing in today's market.

The group propose to meet next in a month's time when they can make further inroads into Schedule 5.

The group also agreed that when they have finalised the Certificate and associated documents, there should be a mini consultation among the PSL community (say lasting a month or so) which will provide an opportunity to capture and deal with any remaining major points before the new

edition is launched. 2021 remains the target for launch but if it needs to go beyond then, it can do so since there are no major issues with the current Certificate documentation.

5 Response to consultation on changes to the Electronic Communications Code

The consultation on changes to the Electronic Communications Code (click [here](#) for the consultation document) was mentioned at the January Committee meeting. Since the deadline for responding is the date of this March Committee meeting, the proposed response had to be circulated for comments to Committee members in between meetings. There had been little feedback on the proposed response, which was circulated again with the papers for this meeting. The response, which was produced by Laurie, Alison Hardy and Warren, has been drafted for both the Law Society and the CLLS with a few small differences between each law society's response.

The consultation follows from regular feedback from various stakeholders that the 2017 Code is not having its intended effect. The Government considers that changes are required to realise fully the aim and ambition behind the 2017 Code and speed up commercial and public investment in gigabit-capable networks. The changes also address problems with the Code highlighted by tribunal and court decisions.

The Committee's response states that new Code agreements in the sphere of commercial property would be completed more quickly if there was a common impetus among site providers/occupiers and operators to have the apparatus installed. The Code pays insufficient attention to the motivations (or lack of them) of site providers for entering into Code agreements in certain situations; why would they enter into a Code agreement if there is little incentive for them (financially or otherwise which the consultation does not consider) and instead potential detriment for example in the form of restrictions on development?

A distinction also needs to be made between fixed line (broadband) agreements which generally proceed more smoothly because the property itself benefits, as compared to negotiations in respect of mobile installations, on rooftops, elsewhere on the property or in greenfield sites, which are often more contentious because the property itself may not benefit.

The response highlights that standard form Code wayleaves and other agreements on a balanced basis might well help negotiations to reach fruition thereby speeding up installations, and suggests that the Government might consider endorsing such forms as those produced by the Corporation of the City of London and the Greater London Authority.

The final form of the response submitted (which has a couple of minor clerical changes) will be circulated to the Committee in due course. Many thanks to the authors of the response for their work on this.

6 Telecommunications Infrastructure (Leasehold Property) Act 2021

The **Telecommunications Infrastructure (Leasehold Property) Act 2021** received Royal Assent on 15 March, although the keys parts of the Act have not yet come into force and it appears unclear when this will be.

The legislation inserts a new Part 4A into the Electronic Communications Code and it is aimed at let premises that form part of a multiple dwelling building (multiple dwelling building is a building containing two or more sets of premises which are used as, or intended to be used as, a separate dwelling). The mischief that the legislation seeks to tackle is that operators are unable to connect up residential tenants (to gigabit-capable broadband/fibre networks) because of a lack of response from their landlords (to facilitate the necessary access etc.). The legislation provides that if a specified process is gone through and the landlord still fails to respond, a court can make an order imposing an agreement that code rights are exercisable by the operator to provide the electronic communications service to the let premises.

7 HM Land Registry's Practice Guide 81 on encouraging the use of digital technology in identity verification

On 2 March, Land Registry issued Practice guide 81 on encouraging the use of digital technology in identity verification. They believe that there is scope for an alternative higher standard of identity check – using biometric and cryptographic technology- that gives greater certainty to the conveyancer that they have discharged their duty on identity verification in connection with land registration applications.

The guide sets out that alternative standard for checking identity, which can be applied immediately. Use of that alternative standard is voluntary and this is separate to Land Registry's requirements as to how confirmation or evidence of identity is to be provided as part of an application for registration (for which see Land Registry's practice guide 67 on evidence of identity).

The benefit of a conveyancer using the alternative standard is that they will have fulfilled their obligation to take reasonable steps in relation to the requirement to verify their client's identity and will reach what is called the "Safe Harbour". This means that Land Registry will not pursue any recourse claim against the conveyancer resulting from the registration of a fraudulent transaction on the grounds that identity checks were inadequate. Compliance with the standard involves the carrying out of various steps and if they cannot all be carried out or if there remains reasonable doubt over the client's identity and it is not positively resolved, the standard will not be achieved.

Of some comfort to conveyancers is Land Registry's statement that it must satisfy itself that there has indeed been fraud or negligence before seeking recourse against a conveyancer.

It remains to be seen whether the technology to satisfy the standard is readily available in the market.

8 Government consultations on energy efficiency

On 17 March 2021 the Government published two consultations on national performance-based policy framework for rating the energy and carbon performance of large commercial and industrial buildings in England and Wales; and on a framework to improve the implementation and enforcement of the energy performance certificate (EPC) B target by 2030 for privately rented non-domestic buildings in England and Wales.

They are important consultations. The first one sets out the Government's plans to introduce a national performance-based policy framework for assessing energy use and carbon emissions in commercial and industrial buildings above 1,000m² in England and Wales, with annual ratings and mandatory disclosure as the first step. The rating will be performance-based and reward a building with a higher score if the building actually reduces their measured energy use and carbon emissions. The Government proposes that owners and single tenants of buildings above 1,000m² will be required to obtain a rating for their building on an annual basis and have that rating disclosed publicly online. Prospective tenants and buyers must be made aware of the rating before the building is let or sold and the consultation considers how this will interact with the commissioning of EPCs. The consultation proposes that instead of needing to obtain EPCs alongside performance-based ratings to prove compliance, landlords will be able to agree the set of cost-effective measures that they need to install under the Minimum Energy Efficiency Standards (MEES) with the scheme administrator when they are first required to obtain annual ratings. The Government plans to introduce the ratings in three phases over the 2020s with a phase one soft launch in April 2022 for an estimated 10,000 offices in England and Wales. The consultation's proposals complement the future target for the Non-Domestic Private Rented Sector MEES of EPC B by 2030.

The second consultation focuses on improving the implementation and enforcement of the Non-Domestic Private Rented Sector MEES regulations. Among points of interest are:

- The requirement for listed buildings, and those in a conservation area, which are to be rented out, to have an EPC subject to exemptions (there has been some confusion over whether listed buildings need an EPC).
- A phased implementation of the EPC B by 2030 requirement, with EPC C by 2027 set as an interim milestone. The interim milestone does not mean that landlords must improve their properties to an EPC C before then improving the property to achieve an EPC B - instead landlords should invest in the improvement of their building in a way that is most cost-effective and minimises disruption to themselves and their tenants.
- The introduction of two-year 'compliance windows'. The 'compliance window' will begin with the requirement for landlords to present a valid EPC. For EPC C, the Government proposes the compliance window should be 2025-2027, and for EPC B 2028-2030. (From 1 April 2023, as per the current position, all non-domestic rental properties in scope of the MEES Regulations will need to be compliant with EPC E, or have a valid exemption.)
- A move away from enforcement at the point of let. This has especially caused problems with properties let in a shell and core state. Landlords will still be required to hold a valid EPC when looking to rent out their property, but for the purposes of meeting MEES, all non-domestic rented buildings will need to achieve an EPC C by 2027 and EPC B by 2030, regardless of when they are let.
- The continual requirement to have an EPC if letting - this will ensure that lease renewals are captured, by ensuring that properties always have an up-to-date EPC during the whole time that they are being rented out.
- The possibility of giving tenants of non-domestic properties some duties regarding compliance with MEES.
- The consultation's illustrative timeline shows that the amendments to the PRS Regulations would come into force on 1 April 2025.

9 June 2021 is the deadline for responding to the consultations. The Committee does not propose to provide its own response to the consultations. **However, the Committee requested that Kevin Hart ask if any other CLLS Committee is looking at and responding to these consultations and if so, the Committee can add their own comments.**

The consultations more generally highlight the importance of landlords and tenants sharing energy data and there are often provisions in that regard in sustainability clauses in leases.

9 Working with the Law Society's Conveyancing and Land Law Committee

Jackie and Warren represented the Committee in a meeting with representatives of the Law Society and its Conveyancing and Land Law Committee to discuss opportunities for the two Committees to work together for example in responding to consultations. The joint response on the Electronic Communications Code consultation is the first example. The Law Society already receives the minutes of the Committee's meetings and the Law Society's Conveyancing and Land Law Committee will share with the Committee topics that it is considering so that we can determine projects of mutual interest. This collaboration between the Committees is a very positive step which should strengthen the messaging from the legal profession for the benefit of real estate lawyers generally, whether specialising in commercial or residential property.

10 Next stage of the standard sub-station lease project

Jeremy Brooks mentioned the possibility of the project extending to a lease of part of a building (and addressing a possible superior landlord and forfeiture concerns) together with a due diligence note. That could extend to a bespoke certificate of title. **Committee members are requested to ask at their firms whether the CLLS sub-station lease is being used on transactions and to report back to Warren.**

11 Update on CLLS meeting with the Law Commission

Warren attended a meeting with the Law Commission together with David Hobart, Edward Sparrow and Dorothy Livingstone. It was a productive meeting intended to discuss possible topics for the Law Commission's consideration. Warren suggested looking at issues with the Landlord and Tenant Act 1954 and Landlord and Tenant (Covenants) Act 1995; a follow-up on e-signatures in the light of the experiences during the pandemic; and getting rid of some of the remaining perpetuity style traps such as the 21 years for reversionary leases. It is hoped this will be the start of continuing dialogue with the CLLS over the Law Commission's programme of reform.

12 Small change to CLLS standard rent deposit deed

A minor update was made on 19 February to the CLLS Land Law Committee's Form of Rent Deposit Deed. This relates to the period for repayment of a deposit balance where there is an ascertained but unquantified claim for liabilities at the relevant date for repayment. The document previously had a square bracketed period of six months after the relevant date for repayment unless quantified in the meantime. The change is to extend the period (again square bracketed) to 12 months after the relevant date for repayment unless quantified in the meantime, with a footnote to consider whether that period is realistic for quantifying all claims for liabilities in the context of the particular lease. The drafting seeks to achieve a balance between the tenant's wish to have the deposit balance repaid as soon as possible and the landlord's need to have a sufficient period in which to quantify claims.

13 FCA Business Interruption Insurance Supreme Court decision

In the light of the Supreme Court's decision on business interruption insurance in relation to the pandemic, the Committee considered whether landlords might start to compel tenants to obtain business interruption cover with "disease extension coverage" and tenants will ask if landlords have such coverage to cover off unpaid rents. This may factor in rent suspension for COVID/pandemic arrangements. Some insurance policies extend "damage" to non-physical damage so a lease rent suspension for damage may be triggered. **The Committee may have a mini project looking at a guidance note considering rent suspension provisions in a pandemic context – this project may follow completion of the Turnover rent project.**

14 COVID19 and enforcement update

On 10 March 2021, the Government announced that the moratorium on the forfeiture of business leases for non-payment of rent will be further extended for England to 30 June 2021. (Wales is also 30 June). Evictions in England in relation to residential premises will not be enforced until at least 31 May 2021 subject to exceptions. The restrictions on the use of commercial rent arrears recovery will also be extended to 30 June 2021 - the minimum amount of net unpaid rent before an enforcement action can take place is 457 days' rent where it takes place between 25 March and 23 June 2021 (both dates inclusive); and 554 days' rent where it takes place between 24 and 30 June 2021 (both dates inclusive).

15 Any further points on 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 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 and Vikki Hills will report back at the next Committee meeting.**

16 Update on publicity of sub-station lease document, rent deposit deed and other CLLS projects; Use of disclaimers for documents on Committee's webpages. Is CLLS happy to host 3rd party documents?

Kevin Hart will provide an update at the next Committee meeting.

17 Report on meeting of Chairs of the CLLS Specialist committees

Jackie had previously updated the Committee on the matters discussed at this meeting that took place on 28 January. The points of interest included concerns about the National Security and

Investment Bill; consideration being given to ways that members might be polled to ensure that the right topics are being considered by the CLLS committees; how the CLLS can better engage with the younger members of the profession (there is concern that the work that the Committees do is generally not well enough known). **This will be discussed further at the next Committee meeting.**

18 What the CLLS is doing on Brexit

Kevin Hart provided an update by email. The International Law Committee has met twice this year and is due to meet again shortly. The Ministers, Alex Chalk and Lord Wolfson, have attended with their civil servants. The topics for discussion have been:

- The TCA with the EU and its consequences for the legal profession in the UK and their clients. The MOJ is interested in the practical effects of the TCA on practitioners and business.
- The MOJ briefed the ILC on progress in negotiating trade agreements with other countries.
- Civil Justice Cooperation: the challenges with adhering to Lugano and the dispute with the EU about the effective date of the UK's adherence to Hague 2005 and the comparative benefits of each.
- Rights of practice, although the MOJ regard this as largely a bi-lateral matter for agreement by Bars in the UK and the EU members.
- Stakeholder engagement: how to organise lobbying in the EU on important points such as adherence to Lugano. Currently the view is that trade and consumer associations' etc. rather than lawyers are the best source of lobbying because they cannot be discounted as speaking in their own self-interest.

19 Suggested changes to the CLLS Opinion

A PSL has kindly suggested some changes to the Committee's overseas legal opinion (circulated to the Committee). The Committee offered its thanks for the suggested amendments and will consider whether they justify updating the standard at this stage. **Please can members send any comments to Warren?** A working group may be set up to consider this further.

20 Residential leasehold reforms – placeholder

There was no discussion on this at the meeting.

21 AOB

An issue was raised of how best to deal with the retention of deeds in the case of Mercury and DocuSign originals. With regards to the latter, do people create PDF copies or do the originals just exist in the ether somewhere? How does this impact on undertakings to banks/lenders to

hold/store original deeds to the bank's order? **This item will be deferred to the next Committee meeting.**

22 Length of meeting

1 hour 30 minutes.

23 Remaining 2021 meetings: 26 May, 28 July, 29 September and 24 November.