Minutes for CLLS Land Law Committee meeting on 24 November 2021 in person and by audio conference

Attendees: Jackie Newstead (Chair), Warren Gordon (Secretary), Nick Brent, Jeremy Brooks, Jamie Chapman, Caroline DeLaney, Jayne Elkins, Martin Elliott, David Hawkins, Laurie Heller, Matt Hooton, Stephen Josephides, Paul Kenny, Daniel McKimm, John Nevin, Brigid North, Franc Pena, Jeremy Shields, Sangita Unadkat, Ian Waring and Patrick Williams.

1 **Apologies**: Alison Hardy, Kevin Hart (from the CLLS), Vikki Hills, Tom Pedder, Julian Pollock.

2 **Approval of Minutes for September 2021 Committee meeting**

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

3 **Certificate of title**

The Certificate of title sub-group met on 8 November and particular thanks to Angus Dawson from Macfarlanes (and member of the CLLS Construction Law Committee) for joining. Below is a summary of the key points from the sub-group's discussions.

There was broad acceptance among the sub-group that the current Certificate remained fit for purpose although with the passage of time it needed a little refreshing (it is 5 years since the last update which didn't take a deeper look at the Certificate).

Construction and Planning

One area where it was considered improvements can be made for the new 8th edition is the Certificate's treatment of properties where there are more complex planning and construction issues.

Jackie has reached out to the CLLS Planning Law Committee. One of the issues encountered with planning is where there is a long and detailed planning history, so as to avoid unnecessary and irrelevant disclosures in the Certificate. The approach to disclosure of planning history can be clarified in the guidance notes for the Certificate and it will be helpful to have the input of the Planning Law Committee on this.

Angus Dawson joined the first part of the sub-group meeting to discuss what the Construction Law Committee had been doing re a possible Construction law add-on for the Certificate.

Angus mentioned that the Construction Law Committee had come up with some extra statements for the Certificate and a guidance note on the level of reporting on construction documents. This note was not Certificate specific, but was more general in the context of construction reporting in development and investment finance transactions – so, what ought to be included in the ordinary course of reporting? This guidance was in an advanced state and was out for comments from the entire Construction Law Committee.

The meeting discussed the proposed extra statements (3 of them) for Schedule 3 on Construction work and warranties. The statements deal with Construction specific claims and proceedings and the determination of disputes. There is a Company confirmation that there are no material defects in any works.

Paragraph 24.1 of Schedule 3 currently refers to a Company confirmation that no buildings or other structures on the Property have been erected or been subject to extension or major alteration within the 6 years prior to the date of the Certificate. The proposal of the Construction Law Committee was to increase the 6 years to 12 years, reflecting what construction lawyers normally expect to see when doing due diligence. They also propose removing the word "major" and the accompanying guidance would explain how to approach which alterations should be reported on and the degree of reporting.

The sub-group will look at the construction committee's note before changing anything, but a solution being considered is to:

(i) extend to 12 years as that's consistent with the existing requirement to disclose any warranties/TPR (which will usually be for 12 years) and is generally what people do;
(ii) replace the word "major" with "material" (while the word "major" may sometimes be inappropriate (for example, there can be an alteration that is minor but still material), the sub-group considered that the word alteration needed qualification with "material", otherwise all alterations would have to be disclosed however immaterial); and
(iii) expand the guidance as to what might be considered appropriate levels of reporting in different situations and how to interpret "material" i.e. in terms of proportionality taking account of time (since the alteration was made) and value (possibly by reference to a quantum sum) thresholds and the nature of the transaction. Significant construction work may merit a separate construction report.

Actions:

Angus kindly agreed to circulate the guidance and statements to the sub-group.

Jackie to follow up with the Planning Law Committee.

Schedule 5

There was a further discussion at the sub-group meeting about whether the Schedule 5 statements should be significantly streamlined (as had been suggested by at least one correspondent) to make it easier and more cost-effective to produce the Certificate.

While the Committee should be mindful of the pricing of Certificates, to make a significant reduction in the nature of the statements would undermine the confidence that recipients of the Certificate have in its contents. Schedule 5 is intended to reflect the key attributes of the institutionally acceptable lease (hence the move to make them better reflect the Model Commercial Leases) and to materially shorten them removes a key raison d'etre of the Certificate. And in some ways if the statements were made much more basic, they may be equally excessively disclosed against because much of the detail is missing and then the concern returns about the cutting and pasting of lease provisions into the Certificate (which was the whole reason that the standard statements were introduced).

If there are opportunities to reduce the length of the statements, then the Committee will look to do this, but the point of the statements was not just about those points going to the value of the Property, but also practical issues related to the Property (while acknowledging at the same time that the Certificate is not an ideal management tool).

The guidance should continue to emphasise the usefulness of the CLLS (short-form) report on title for lower value properties/ those with less importance in the context of the overall transaction. The guidance for the new edition should also allow for the possibility of including the Letting Documents schedule from the short-form report in the

Certificate in place of Schedule 5 where appropriate in view of the properties and transaction and agreed between the parties.

Residential/Mixed use statements

Brigid North and Sangita Unadkat were thanked for their suggested statements for the Certificate for residential/mixed use property.

It was felt by the sub-group that some of the statements were quite subjective and it would be difficult for the Company or the certifying solicitors to confirm for example that Part 1 (Tenants' Rights of First Refusal) of the Landlord and Tenant Act 1987 does not apply to the Property. Instead, it was suggested that the statement could be broken down into more easily provided factual information or Company confirmations such as less than half the internal floor area of the building (disregarding common parts) is occupied for residential purposes; or the number of flats held by qualifying tenants do not exceed 50% of the total number of flats in the building. If there is no disclosure against such statements, the recipient knows that the section 5 right cannot apply. If there is a disclosure, the Act needs to be considered further. The sub-group also considered that there should perhaps be a Company confirmation that it has not received a s5 notice; nor the relevant notices for collective enfranchisement and right to manage.

It was considered that a preamble would be helpful to make it clear that these statements are there to assist with ascertaining whether the relevant statutory rights apply, and the Certificate guidance can also address this.

Actions:

Brigid and Sangita will kindly consider what if any changes need to be made to the residential/mixed use statements.

Earlier discussions had mentioned the possibility of a new Schedule to cover a long term residential lease at a premium, based on Schedule 4 with changes – while this topic was not discussed at the meeting, thoughts on this are welcomed.

Other Points on the Certificate front-end

Clause 1.6: the provision currently states that where there are multiple Addressees, the aggregate liability of the certifying firm is no greater than the liability if the Addressee had been a single person. A correspondent had raised an issue about how this provision operates if the Addressees had different claims, for example, because one had senior debt and another mezzanine. The sub-group's view was that this provision was to do with protecting the certifying firm, not working out the quantum of particular Addressees' claims and that in practice the Addressees' interests would likely be amalgamated into a single number to determine the loss and then the liability cap would be applied.

1.8 The provision excluding liability for individual partners etc. A correspondent had highlighted that this provision could be clearer if the Certificate was being given by a law firm partnership. The sub-group agreed and said that 1.8 in the new edition will likely have a qualification that this exclusion is not intended to relieve any firm that is a partnership from liability in relation to the giving of the Certificate.

4.3 The sub-group agreed that this provision did not adequately cater for a transaction that involved the sale of shares in the Company. There will, therefore, be an alternative clause 4.3 for a share sale and, as a consequence, the confirmation letters and other

supplemental Certificate documents may need to be tweaked (or alternatives produced for a share sale).

General Actions and Next steps

The next meeting of the Certificate sub-group will take place in the 2nd/3rd week of January 2022. David Hawkins has kindly provided some comments on the Certificate and Warren Gordon will go through those and circulate a revised version for the sub-group to consider.

4 **Pandemic related drafting**

In the light of the recent London Trocadero v Picture House Cinemas case (which seems to be following the general approach of the courts) and, in particular, the court holding that no rent suspension clause should be implied into the lease in that instance, it seems likely that there will be some requests for pandemic related drafting in leases.

However, the experience of Committee members is that while pandemic related drafting is sometimes encountered for retail/hospitality lettings, overall for all lettings requests for pandemic related drafting are only encountered in a minority of cases. The Committee does not intend to produce any suggested drafting.

5 **Impact of Supreme Court judgment in Harcus Sinclair LLP and another v Your Lawyers Ltd [2021] UKSC 32 on the giving of undertakings by LLPs**

There has been no further publicity from the Law Society/SRA on the implications of the Harcus Sinclair case and the Committee hopes to work with the Law Society further on this.

6 **Commercial Rent (Coronavirus) Bill and new Code of Practice for COVID rent arrears**

The Government has announced (the following contains public sector information licensed under the Open Government Licence v3.0) that a new Code of Practice will be introduced (applying across the UK and replacing the previous 'Code of Practice for commercial property relationships'), providing landlords and tenants with a process for settling outstanding COVID rent arrears for commercial property. The Code sets out that, in the first instance, tenants unable to pay in full should negotiate with their landlord in the expectation that the landlord waives some or all of those rent arrears where they are able to do so. The Code signposts tenants and landlords to forms of alternative dispute resolution, such as mediation, if they wish to pursue this. It is not clear what penalties if any there will be for non-compliance with the Code.

The intention is that from **25 March 2022** (commercial tenants are protected from eviction until 25 March 2022), new laws introduced in the Commercial Rent (Coronavirus) Bill (applying to England and Wales) will establish a legally-binding arbitration process for commercial landlords and tenants who have not already reached an agreement following the principles in the Code. Subject to Parliamentary passage, this will come into force next year. The Bill will apply to commercial rent debts related to the mandated closure of certain businesses (such as pubs, gyms, restaurants and non-essential retail), in full or in part, from March 2020 until the date restrictions ended for their sector. Debts accrued at other times will not be in scope. The result of the arbitration process will be a legally-binding agreement that the landlord and tenant must adhere to, resolving rent arrears disputes. The arbitrator could postpone, reduce or write off the arrears. A key test will be the viability of the tenant's business versus the

landlord's solvency. The window to apply for arbitration will be 6 months from the date that the legislation comes into force, with a maximum time frame to repay of 24 months. The legal arbitration process will be delivered by private arbitrators in accordance with guidelines set out in the legislation.

The Government is also protecting commercial tenants from debt claims, including County Court Judgements (CCJs), High Court Judgements (HCJs) and bankruptcy petitions, issued against them in relation to rent arrears accrued during the pandemic. This measure will provide further protection to businesses which had to close and accumulated debts during the pandemic, while protections from forfeiture for business tenancies are in place under the Coronavirus Act 2020.

7 **APSL/LPSLG sub-group's papers on deeds in the light of e-signing / Mercury**

Warren provided some comments on the paper to the APSL/LPSLG group.

The Committee had a more detailed discussion about the paper and expressed some concern that if the proposed deeds schedule in the paper was widely used, it could create a precedent or expectation among firms that if such a schedule was not used, this may be regarded as an issue. The Committee was concerned about the potential extra work involved in creating the schedule and it was considered that this could be dealt with in a more straightforward way. Asking firms to retain emails in relation to the signing process (for example for the Mercury process) is not practical and again a precedent should not be set that there needs to be this audit trail otherwise there is an issue.

The Committee will consider the paper's suggested changes for the Certificate of title and Borrower's solicitor's undertakings document and thanked the group for suggesting them.

8 **Residential Property Developers Tax**

The tax will be levied on companies which are within the scope of corporation tax; and undertake "residential property development activities".

The Finance Bill includes the Residential Property Developers Tax legislation. A key announcement was the announcement of the RPDT rate (4%) and the annual RPDT-free allowance (£25 million).

Build-to-rent investors are removed from the scope of the tax – the broad requirement is that the developer holds land as trading stock.

Student accommodation is carved out from the definition of "residential"; and non-profit housing companies, and their wholly owned subsidiaries are also excluded.

9 **Queries raised on Borrower's solicitor's undertakings document**

This is deferred to the next meeting.

10 **Residential leasehold reform – implications of Leasehold Reform (Ground Rent) Bill**

The Bill continues to make its way through Parliament. No precise date is as yet known as to when the legislation will come into force.

The legislation will restrict ground rents on newly created long residential leases (with certain exceptions) to a token one peppercorn per annum, effectively restricting ground rents to zero financial value and thereby making leasehold ownership more affordable to

tenants. A breach of this restriction will be a civil offence with a possible penalty of between £500 and £30,000 and a possible requirement to repay unlawfully charged ground rent plus interest to the tenants.

For retirement home leases, the Act's provisions will not commence before 1 April 2023.

The Government tabled an amendment to clarify that service charges, council tax, insurance and similar payments that are reserved as 'rent' in the lease, should not be prohibited by the Bill (a concern previously raised).

The Bill will only apply to new leases and will not help existing tenants.

It was also suggested that structuring leases (not granted to residential occupiers) should be carved out of the Bill and this point will be fed back to The Law Society.

11 **Update on Register of Beneficial Owners of Overseas Entities**

The Parliamentary Under Secretary of State for Business, Energy and Corporate Responsibility (Lord Callanan) provided an update early November on the creation of the Register of Beneficial Owners of Overseas Entities owning land in the UK. The Government committed to report to Parliament annually on the progress that has been made towards putting in place this register. The Government intends to introduce legislation to Parliament as soon as Parliamentary time allows.

12 **Update on publicity of new rent deposit deed, turnover rent report and other CLLS projects; Use of disclaimers for documents on Committee's webpages**

This item will be deferred to the next meeting. Mention was made of the IPF's helpful survey of current practice on Turnover-based Leases from November 2021.

13 **Suggested changes to the CLLS Overseas legal opinion**

A correspondent had provided some suggested comments on the form of Opinion and the Committee thanked the correspondent for providing them. The Committee will consider these as part of its next review of the Opinion which will take place in 2022. Volunteers for that project among Committee members are requested.

14 **AOB**

Many thanks to those who put themselves forward for the position of Vice Chair of the Committee and Jackie will be discussing this with the CLLS.

Future meetings will be hybrid in-person/virtual (trying Teams for the virtual element), but where possible members should try to attend in person.

15 **Length of meeting – 1.5 hours**

16 **Dates for 2022 meetings** – proposed dates will be circulated shortly.

Warren Gordon
Senior Professional Support Lawyer