Minutes for CLLS Land Law Committee meeting on 23 March 2022 hybrid in-person/by Teams

Attendees: Jackie Newstead (Chair), Warren Gordon (Secretary), Nick Brent, Jayne Elkins, Martin Elliott, Alison Hardy, David Hawkins, Laurie Heller, Matt Hooton, Stephen Josephides, Paul Kenny, Daniel McKimm, John Nevin, Tom Pedder, Julian Pollock, Jeremy Shields, Sangita Unadkat, Ian Waring and Patrick Williams.

1 **Apologies**: Jeremy Brooks, Jamie Chapman, Caroline DeLaney, Vikki Hills, Brigid North, Franc Pena, Kevin Hart (from the CLLS).

2 **Approval of Minutes for January 2022 Committee meeting** Land-Law-Committee-Minutes-January-2022.pdf (citysolicitors.org.uk)

3 **Certificate of title**

The drafting group met on Monday 21 March to consider the current form of the new edition of the Certificate. The drafting group agreed various changes to the form and the revised draft was circulated to the whole Committee for its consideration and comment at this Committee meeting.

There are a few specific points on the new edition of the Certificate where views were sought of the Committee -

- Schedule 3, para 1 (VAT) - Query whether certifying firm needs to say they have been provided with a copy of the option and HMRC's acknowledgment, that are consistent with what is stated in paragraph 1.4. The Committee considered that the drafting should state that the certifying firm has seen a copy of the option.

- Should the Certificate comment on outstanding obligations under an agreement for lease where the lease has been granted? The Committee considered that the drafting should state that there are no material matters in relation to the agreement for lease which bind the Company that the certifying firm considers ought to be brought to the recipient's attention.

- Should the Certificate include confirmations about the registration of the Company on the Companies House register of overseas entities where the Company is an overseas entity? The Committee considered that the Land Registry restriction aspect of this could be treated as other restrictions on the title.

- Should environmental/flood searches be included in Schedule 6, since they are very common? The Committee decided no - practice differs as to who obtains the search.

- Should the Certificate include comment on allocation of environmental liability/contamination between landlord and tenant? The Committee decided no – specific allocations of responsibility do not arise regularly enough to justify a particular Certificate statement.

- In relation to the statement carving out comment on the National Security and Investment Act 2021, it was agreed that there should at least be a footnote to consider whether that statement should be extended to certain recent transactions rather than just the "Transaction" itself (and it may be preferable to

amend the statement itself) – e.g. the grant of the Lease or any Letting Document on which value is key, as NSIA could apply to those situations but not be within the definition of Transaction. The difficulty for the certifying firm potentially applies to all those circumstances.

There will be no proforma construction report for the new Certificate, as much depends on the particular circumstances; instead it is proposed that there will be guidance from the Construction Law Committee covering construction reporting generally, not just limited to the Certificate, highlighting the need for the reporting to be appropriate in the light of the relevant transaction and the Certificate's usual use for investment/portfolio situations. The Committee awaits news of any possible additional statements for the Construction section of the Certificate from the Construction Law Committee.

For completeness, there are also the following connected matters:

- Possible Planning statements – Jackie Newstead has been reaching out to the CLLS Planning Law Committee.
- Brigid North and Sangita Unadkat are looking at the residential law side, although there will not be a Schedule 4 equivalent for a residential long lease.
- Once the Certificate is finalised, there will be a consultation among the PSL community lasting a couple of months seeking comments.

Action: The drafting of the Certificate will continue and hopefully a close to final form should be available for May's Committee meeting.

4 **Commercial Rent (Coronavirus) Bill for COVID rent arrears**:

The draft Bill passed its third reading in the House of Lords on Tuesday, with the House of Commons considering the final amendments on 23 March 2022. The Act and arbitration scheme are likely to be in force at the end of this week and a Code of Practice was also published in November 2021. The moratorium under the Coronavirus Act 2020 preventing forfeiture of commercial leases on grounds of arrears comes to an end on 25 March 2022 as does restrictions on commercial rent arrears recovery (CRAR), and the restriction on winding up petitions on grounds of arrears ends on 31 March 2022.

The purpose of the Commercial Rent (Coronavirus) Act is to ringfence and resolve certain pandemic arrears, the key point being that if a tenant was mandated to close during the pandemic (so not, for example, offices), any arrears accrued during that period are protected by the Act. The tenant's protection is a six months window from 25 March within which to ask an arbitrator to consider the tenant's business and decide upon questions of tenant viability, affordability and landlord solvency and to make an award as to whether the arrears should be paid, deferred or wholly or partly written-off. One of the concerns is that there is no objective test for tenant viability; it is down to the arbitrator's discretion.

It is possible that 1,000s of cases will go to arbitration and that over 1,000 arbitrators will be needed to deal with this. There must be questions over whether there will be enough arbitrators to make this work.

A number of uncertainties and questions remain about the statutory arbitration process.

The arbitration decisions will be published so could create binding precedents and there may be concerns about confidentiality.

The Act cannot deal with tenants with multiple premises, without the agreement of the relevant landlords (to consolidate the arbitration proceedings).

5 **Thoughts on the Economic Crime (Transparency and Enforcement) Act 2022**

The Economic Crime (Transparency and Enforcement) Act received Royal Assent on 15 March 2022. The Act provides for the setting up of the Companies House register for beneficial owners of overseas entities that own UK property (adopting a similar approach to the person with significant control PSC register for UK-registered entities).

While the legislation captures the beneficial owner of the overseas entity registered proprietor, it may not necessarily capture the beneficiary behind the entity. The Act forms part of the UK Government's strategy to crack down on overseas criminals using UK property to launder money. Once the register has gone live, there will be implications for overseas entities that are, or are entitled to be, the proprietor of land registered at the Land Registries for England/Wales, Scotland or Northern Ireland, or for parties dealing with them. This register will not only apply prospectively, but also apply retrospectively to property bought by overseas owners up to over 20 years ago in England and Wales (the legislation refers to overseas entities that became a registered proprietor pursuant to an application made to HM Land Registry (HMLR) on or after 1 January 1999, which apparently is the date from which HMLR has readily accessible data for which proprietors are overseas entities). Overseas entities include for example Jersey and Guernsey entities.

The method by which the Government will enforce Companies House registration is through introducing controls over the ability of overseas entities or certain parties transacting with them to register themselves at HM Land Registry. The transfer (or other disposition) of land by the overseas entity remains valid, but the disposition may not be registered at HMLR if there has been no Companies House registration.

So to be registered at HMLR, the overseas entity must be either a "registered overseas entity" (having complied with the registration and updating duties at Companies House) or an "exempt overseas entity" (details of who is exempt is to be included in future regulations). Concern was expressed about how mortgagees can protect themselves.

HMLR will be required to enter a restriction on a title owned by an overseas entity (registered pursuant to an application made on or after 1 January 1999) and this must be done as soon as reasonably practicable and before the end of a transitional period. The transitional period is 6 months from the date that the section of the Act relating to Companies House's register of overseas entities comes fully into force. Although the restriction will appear on the title, it does not take effect until the end of the transitional period. The restriction will prohibit the registration of a transfer, grant of a lease for more than 7 years or grant of a legal charge, subject to certain exceptions, in particular the entity is a "registered overseas entity" or an "exempt overseas entity" at the time of the disposition; the disposition was made pursuant to a contract dated before the restriction was entered in the register; the disposition was made in the exercise of a power of sale or leasing conferred on the owner of a registered charge or a receiver appointed by such an owner; and the disposition is made by a specified insolvency practitioner in specified circumstances. There are similar restrictions where an overseas entity disposing is entitled to be, but is not registered at HMLR.

There are also transitional provisions requiring an overseas entity, which became registered proprietor pursuant to an application to HMLR made on or after 1 January 1999 but before the new legislation commences, to become a "registered overseas entity" by the end of the transitional period mentioned above, unless they are exempt.

If the overseas entity became the registered proprietor pursuant to an application made on or after 1 January 1999 but it is neither a "registered overseas entity" nor exempt,

the Secretary of State can by notice require them to apply for registration in the register of overseas entities within 6 months from the date of the notice.

And there are provisions which seek to capture an overseas entity which disposes of its UK land during the transitional period and would otherwise avoid disclosure of relevant information to Companies House.

Failure to comply with the legislation is a criminal offence for the entity and its officers at fault with fines and/or imprisonment.

The timings relate to a period starting from the date that the section of the Act relating to Companies House's register of overseas entities comes fully into force. It remains to be seen how long that will take and perhaps in that regard how well-progressed Companies House is with the new register.

Overseas entities and UK entities that hold assets through overseas entities should consider their UK land ownerships or proposed acquisitions to understand the implications of the legislation for their organisations.

A group of PSLs from various firms are working on drafting for the Act to ensure that a party dealing with an overseas entity can be registered at HMLR. The drafting is likely to be included as condition precedents in agreements for lease and sale contracts, since the Companies House requirements will need to be satisfied before completion of the relevant disposition.

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

A correspondent had kindly provided comments on the CLLS form of overseas legal opinion. Martin Elliott is leading a sub-group of the Committee considering those comments and the sub-group has done some preliminary work updating the opinion and incorporating some comments. Views were sought of the Committee on how far law firms which receive an overseas opinion should go on checking a) an overseas' lawyer's right to practise b) their level of PI cover and proof of this. The Committee considered that it should not be normal practice to check the overseas' lawyer's right to practise – the overseas lawyer would usually cover this in the opinion and recipient firms will generally satisfy themselves on this as a matter of common sense. Information as to the level of PI cover wouldn't generally be sought as the overseas firm is unlikely to divulge this information and what test should be applied to gauge the level of cover required? **Action: A draft of the revised opinion will be circulated to the Committee for comments.**

7 **Further thoughts on ESG drafting**

The Committee is working with the Law Society to consider production of a possible note looking at green lease drafting including the clauses of the Chancery Lane Project. **Action: Please let Warren know if you would like to be involved with this initiative.**

8 **Use of Client Account on Financings**

Is it reasonable for a law firm to refuse to accept funds directly from their own client on the basis that they don't want to receive the funds into their client account? A concern was mentioned by one member that they had encountered this in a financing and they asked that, if a firm is instructed and the funds directly relate to their instruction, how can it be a breach of the solicitor accounts rules by passing the funds through the firm's account? The Committee noted that in financings the money may not need to pass through the law firm's client account, although it was acknowledged that the funds for

closings more generally would often need to sit with a solicitor and that passing from one solicitor's account to another greatly speeds up the process. Most members had not encountered this as a problem.

9 **Law Society's planned work on Professional ethics**

A paper was shared with the Committee on the Law Society's planned work on professional ethics. This paper outlines the problems facing the legal profession in relation to the label 'professional enablers', the work that the Law Society has been undertaking to address the issue, initial analysis of the issue and some early views about initial potential options that the Law Society could take forward to help support the profession. Members were encouraged to share the paper with interested colleagues.

10 **Committee's undertakings documents – are they "Harcus Sinclair compliant"?** (Borrower's solicitor's undertakings for benefit of lender's solicitor and security agent/trustee re post-completion matters – The City of London Law Society ~ CLLS (citysolicitors.org.uk) and Protocol for discharging mortgages of commercial property – The City of London Law Society ~ CLLS (citysolicitors.org.uk)

The undertakings were not specifically drafted to take account of the Harcus Sinclair decision e.g. they do not specifically include consideration wording, although such consideration wording is not necessarily required in the light of the decision.

11 **Further thoughts on the impact of the National Security and Investment Act 2021**

Action: This will be carried over to the agenda for future meetings so that the Committee can track and discuss approach to this legislation.

12 **Update on progress of the Product Security and Telecommunications Infrastructure Bill** with changes to the Electronic Communications Code

This is at Committee stage in the House of Commons. The Bill will make changes to the Code including:

- To deal with the problem of who grants Code rights when the operator is already in occupation (the "Compton Beauchamp" issue).
- All Code agreements including those made before the 2017 Code came into force and those under the Landlord and Tenant Act 1954 (where the primary purpose is to grant Code rights), when renewed by a court order will be renewed on valuation terms consistent with the 2017 Code.
- New provisions to actively encourage alternative dispute resolution.
- Introducing a faster procedure to allow operators to get temporary rights to install infrastructure on relevant land (i.e. not covered by buildings or used as a garden, park or other recreational area) when an occupier is unresponsive.
- Giving operators rights to automatically upgrade and share equipment that was installed before 2017.
- Changes to what can be sought as temporary, interim orders while a telecoms infrastructure agreement is being renewed.

13 **Update on publicity of CLLS projects; Use of disclaimers for documents on Committee's webpages**

Action: This will be carried over to the next Committee meeting.

14 **AOB** including

- Vice Chair of the Committee – **Action: Jackie will discuss this further with the CLLS.**

- Today's hybrid meeting worked well with people in person and those attending virtually able to hear each other clearly. There needs to be at least 5 people in person (from for example a catering perspective) and the number of in-person attendees can be ascertained when papers are circulated in advance of the meeting. Members are encouraged to attend in person if they are able to do so.

15 **Length of meeting – 1.5 hours**

16 **Dates for remaining 2022 meetings**, all at 12.30pm and hybrid in person/virtual: 25 May, 20 July (possibly to be cancelled due to holidays), 21 September and 23 November.

Warren Gordon
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