

Consultation on a new 8th edition of the CLLS Land Law Committee's Certificate of title

Key points

The Land Law Committee of the City of London Law Society is consulting on a new 8th edition of its Certificate of title. The current 7th edition was launched in 2012 with an update of that edition in 2016.

It is, therefore, 10 years since the Committee has undertaken a thorough review of the Certificate.

It is proposed that the structure of the Certificate will remain the same with the front end provisions on reliance, certification and confirmations, and the Schedules covering interpretation, assumptions and qualifications; Property details; matters affecting the Property; the Lease; Letting Documents; and Searches and enquiries.

This is the first time that we have undertaken a wider consultation process on the form of a new edition of the Certificate. The Committee considers that the Certificate will benefit from the input of a wider group of stakeholders, helping to ensure that all key issues have been addressed and that the proposed changes are generally accepted.

The accompanying documentation including the confirmation letters; questionnaire; and wrapper, as well as the Notes to users at the back of the Certificate will follow once the form of Certificate is settled. The Committee's short form report on title does not form part of the consultation.

We have made available on the website a comparison document showing the changes from the 7th edition, together with a clean copy of the proposed new 8th edition. Set out below are further details on and explanation of some of the proposed changes for the 8th edition. The numbers refer to the relevant clause or paragraph number in the Certificate.

What we would like from respondents to this consultation -

- **Please provide your comments on the proposed changes in the new edition.**
- **Is there anything else that you would like included?**
- **We are interested in your views as to whether the Certificate should seek further information on environmental performance and climate change issues.**
- **Please let us have any other observations on your experiences of using the Certificate and associated documents and how you consider this can be improved.**

You can respond by emailing [] and we would be grateful if your responses are provided by close of business on 31 October 2022.

Detail of the proposed changes

Front end of the Certificate

Clause 1

1.6 This provision on multiple Addressees remains unchanged - 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. An issue was raised with the Committee about how this provision operates if the Addressees had different claims, for example, because one had senior debt and another mezzanine. The Committee's view is that this provision is 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. has been amended to be clearer for where the Certificate is being given by a law firm partnership. There is now a qualification that this exclusion is not intended to relieve any firm that is a partnership or otherwise from liability in relation to the giving of the Certificate.

1.9 There is inclusion of a provision capping the Certificate provider's liability. Solicitors have caps in terms of engagement for their own clients, so there should be a cap for a certificate to third parties. No figure is given for the cap although some explanation is given in relation to how the cap may be determined. The guidance will remind certifying firms to check internal procedures as to the policy on and level of caps on liability.

1.10 There is a deadline for commencement of proceedings in connection with the Certificate.

Clause 2

The quality of the registered title is now dealt with in Schedule 2.

Valuers provision

The Valuers provision in the current edition has been removed as it does not reflect what usually happens in practice, and this will be covered in the Notes to users.

Clause 3

The provisions for a Seller situation also now cater for the sale of shares in the Company.

Disclosures

There are optional disclosures referring to a Planning and a Construction Report, which may be produced by the provider of the Certificate or a third party. It is not proposed that the Committee will produce a pro-forma Construction or Planning Report, as much depends on the particular circumstances; instead it is proposed that there will be guidance from the CLLS 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.

Schedule 1

"Letting Documents" – this has been expanded to make it clear that the relevant arrangement may be personal to the Company.

Qualifications

3.7 There is a new qualification that the provider of the Certificate has not investigated and expresses no opinion on whether the National Security and Investment Act 2021 applies to any transaction. This reflects the difficulties for the certifying firm of confirming whether the Act applies in all the circumstances of

the transaction and also avoids a certifying firm unwittingly taking on any liability if the Act does apply and this is not highlighted in the Certificate.

3.11 There is a new qualification that the provider has not checked whether benefits have been properly protected. This is a reflection of what happens in practice and the difficulties of establishing this.

Third Party Rights and Jurisdiction

4 There is a new provision excluding the Contracts (Rights of Third Parties) Act 1999.

5 The jurisdiction clause refers to Wales as well as England, and disputes are to be submitted to the exclusive jurisdiction of the English and Welsh courts.

Schedule 2

The quality of title (absolute etc) is now covered in Schedule 2.

Details of restrictions in the Proprietorship register must be specifically identified.

The wording for the Economic Crime (Transparency and Enforcement) Act 2022 follows that from the recently amended 7th edition. We are interested in whether you consider further information should be provided. The current wording is intended to be a signposting exercise for users of the Certificate, alerting the parties to steps that may need to be taken to comply with the Act, rather than a detailed analysis.

Schedule 3

1 The statement about documents of title being held by the provider to the order of the Company has been removed as not reflecting what usually happens in practice.

Welsh land transaction tax is now referred to as well as stamp duty land tax.

In relation to value added tax, there are new statements that the Company confirms that notice of the option to tax was given to HM Revenue & Customs, and that the Certificate provider has been provided with a copy of the option.

3 The access statement has an additional confirmation from the Company that so far as it is aware there has been no challenge or objection to accessing the Property at the relevant points.

7 The “Agreements” statement also includes obligations in relation to overage etc binding on the Company as opposed to the Property.

8 The “Adverse Rights” statement recognises that the inspection may be undertaken by the Company’s agent or representative, as opposed to the Company itself.

18 The “Listed buildings” statements have been expanded.

23 The statement on Energy performance certificates has been expanded to require inclusion in the Disclosures of the rating and the “valid until” date of the EPC.

24 Disclosure will be required if buildings or other structures on the Property have been erected or been subject to extension or material (replacing the word “major”) alteration within 12 years prior to the date of the Certificate (as opposed to 6 years). This reflects what construction lawyers normally expect to see when doing due diligence, it is consistent with the existing requirement to disclose any warranties/Third Party Rights (which will usually be for 12 years) and is generally what is done. As mentioned, the word “major” has been replaced with “material” - the word “major” may sometimes be inappropriate (for example, there can be an alteration that is minor but still material) and it was considered that the word

alteration needed qualification with “material”, otherwise all alterations would have to be disclosed, however, immaterial. Reference is also made to Third Party rights.

27 There is a new section for Residential and mixed use buildings. In terms of the approach adopted to the drafting of the statements for residential issues, there are perhaps too many technicalities/ specific defined terms (all of which differ slightly amongst the various relevant legislation) to include all of this in detail in the Certificate. The suggested approach instead seeks to enable the provider of the Certificate to establish through the flowchart of statements whether there is a risk of the relevant Acts applying. If there is, further investigations would be required. So the proposed statements are not intended to cover every situation, nor whether the relevant Transaction which is the subject of the Certificate triggers the relevant Act, but rather to flag where there may be an issue.

It was considered that the statements should come from the Company as they include issues that the certifying firm would not be able to ascertain from the deeds. The statements in relation to tenant’s rights to a lease extension/freehold acquisition refer to a Company confirmation that no claim has been made for such an extension/acquisition. There will be no Schedule 4 equivalent for a long term residential lease.

There is no statement for TUPE, which is considered by the Committee to be an inappropriate topic for the Certificate.

Schedule 4

Part 2

9 One of the key changes is that the statements now provide that the tenant (rather than the landlord) is obliged to insure the Property. This better reflects the typical position in a valuable long-term lease. There is provision at 9.2 for the landlord to be a composite insured and 9.3 provides for what happens if the tenant fails to insure.

11 The Certificate is now explicit in stating that the landlord cannot exercise a right of re-entry in the case of insolvency.

20 The Welsh land transaction tax is covered as well as stamp duty land tax.

Schedule 5

There have been suggestions that the Schedule 5 statements (on the provisions in Letting Documents) should be significantly streamlined to make it easier and more cost-effective to produce the Certificate. The Committee is mindful of the pricing of Certificates, but 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 and now better reflect the Model Commercial Leases and to shorten the statements materially removes a key *raison d’être* of the Certificate. In some ways if the statements were made 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 main reason that the standard lease statements were introduced).

The Committee did look for opportunities to reduce the length of the statements and did so where appropriate. The purpose of the statements is not just about those points going to the value of the Property, but also practical issues related to the Property (while acknowledging that the Certificate is not an ideal

management tool). The Notes to users for the Certificate will 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 Notes will 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 where agreed between the parties.

The Schedule 5 statements do not mirror the Model Commercial Lease provisions, but the statements have been amended to be brought closer to the MCL. While not everyone uses the MCL or encounters it on a regular basis, it is a well-known industry standard lease which seeks to achieve a relatively balanced position but is still broadly institutionally acceptable, which is what most leases are doing in today's market.

Here are some of the main changes to the statements in Part 2 of Schedule 5.

Part 2

3.1 “Without deduction or set-off” is caveated with “unless required by law”, a common tenant's amendment.

4.1 The rent review statement now includes the “lawfully let” assumption, usually now included in leases for the Minimum Energy Efficiency Standards. The assumption on compliance with landlord's obligations reflects the common tenant amendment of save for material or persistent breach. The disregards statement better reflects drafting commonly encountered today.

5 In the repair statement, damage by uninsured risks is now excluded. Paragraph 9.6 defines “insured risks” and “uninsured risks” and the latter carves out damage by the tenant's act or default.

8 The alienation statement now separately refers to charging of whole. The authorised guarantee agreement requirement is “where reasonable” reflecting the Code for Leasing Business Premises and what is commonly agreed. There are statements for an underletting of part (in addition to whole) and references to some additional controls on underleases commonly encountered. There is a statement as to no restriction on change of control of the tenant.

9 Further detail has been included in the statement of the insurance provisions to better reflect current lease drafting. The statements refer to rent suspension and the position on reinstatement and lease termination if there is damage by an uninsured risk – the 7th edition did not deal with uninsured risks.

11 The forfeiture statement also covers insolvency of a guarantor.

13 The contracting out requirements are now limited to the tenant and do not include guarantors.

18 There is a Company confirmation for consents other than those required under the Lease for the grant of the Letting Document, with the certifying firm confirming the position for Lease consents.

26 There is a statement that the landlord and the tenant will share data relating to the environmental performance of the property, subject to keeping the data confidential. This is regarded as perhaps the most important green lease provision (see **Climate change provisions** below).

31 This new statement confirms that there are no outstanding material obligations under an agreement for lease binding on the Company following the grant of the Letting Document, which the certifying firm considers ought to be brought to the Addressees' attention.

32 There are statements for Letting Documents at a residential or mixed use building. A Company confirmation of no tenant claims to acquire a new lease or the freehold under the relevant legislation for

residential property. There is also a Company confirmation, for residential property, that any deposit has been dealt with in accordance with an authorised statutory deposit scheme.

The Committee decided not to include a statement on allocation of environmental liability/contamination between the landlord and the tenant – specific allocations of responsibility do not arise regularly enough to justify a particular Certificate statement.

Schedule 6

Environmental/flood searches have not been included, since practice differs as to who obtains the search.

The coal search has been removed as it is location dependent.

The chancel repair search has been removed since it is questionable whether this search still needs to be done as a matter of course following the expiry in 2013 of the transitional provisions of the Land Registration Act 2002.

Climate change provisions

Should the Certificate include climate change statements/disclosures? For particular transactions it may be appropriate to include statements/disclosures for example of the type produced by the Chancery Lane Project [Climate Clauses | The Chancery Lane Project](#) (CLP). However, the Committee considers that this is not the right time to make extensive changes to the Certificate to reflect such statements/disclosures. This view is influenced by the fact that the majority of current leases do not reflect the statements in CLP's drafting and will lead to extensive disclosures in the Certificate. However, as time passes if the majority of leases reflect CLP's drafting and it is generally considered that the Certificate needs to address climate change issues in a more extensive way, then at that point the Committee will consider introducing further changes to address those issues, as an update to the 8th edition.

It is generally accepted that data sharing provisions in leases are important and the Certificate includes a statement that there are data sharing provisions relating to environmental performance (paragraph 26 of Schedule 5).

The Certificate also includes more specific information about the rating of the energy performance certificate and when the EPC expires (paragraph 23(2) of Schedule 3).