

Minutes for CLLS Land Law Committee meeting on 21 September 2022 by Teams and in person

Attendees: Jackie Newstead (Chair), David Hawkins (Vice Chair), Warren Gordon (Secretary), Caroline DeLaney, Jayne Elkins, Martin Elliott, Adrian Footer, Laurie Heller, Matt Hooton, Stephen Josephides, Paul Kenny, Daniel McKimm, John Nevin, Brigid North, Tom Pedder, Franc Pena, Jeremy Shields, Sangita Unadkat and Ian Waring.

1 **Apologies:** Jeremy Brooks, Jamie Chapman, Alison Hardy, Kevin Hart (from the CLLS), Vikki Hills, Julian Pollock and Patrick Williams.

The Committee welcomed Adrian Footer who is attending his first meeting in-person as a new Committee member.

2 Approval of Minutes for July 2022 Committee meeting

The Minutes for the July 2022 Committee meeting were approved and are on the Committee's webpage [Minutes-for-CLLS-Land-Law-Committee-meeting-on-20-July-2022.pdf](https://www.citysolicitors.org.uk/minutes-for-CLLS-Land-Law-Committee-meeting-on-20-July-2022.pdf) ([citysolicitors.org.uk](https://www.citysolicitors.org.uk))

3 Certificate of title

The consultation on the Certificate has been launched [News and Events – The City of London Law Society ~ CLLS](https://www.citysolicitors.org.uk/news-and-events-the-city-of-london-law-society-clls) ([citysolicitors.org.uk](https://www.citysolicitors.org.uk)) and the deadline for responses is 31 October 2022. Once we have those responses, the Committee can determine which changes are needed and then the accompanying notes and ancillary documents can be produced.

The working group will meet early November to determine which points need discussing at the Committee's November meeting.

Action: Meeting of working group early November to discuss consultation responses.

Incidentally, mention was made of a KC's advice on obtaining climate risk searches as part of due diligence. The advice will be circulated to the Committee with the Minutes and will be discussed further at the November Committee meeting.

Action: Discussion at November Committee meeting of KC's advice on obtaining climate risk searches.

4 Commercial Rent (Coronavirus) Act for COVID rent arrears

A number of arbitration awards have been made under the Act including *Signet Trading Ltd v Fprop Offices (Nominee) 4 Ltd and another (11 July 2022)*. Here the tenant lost since the business that it carried on at the particular premises was not required to close under coronavirus regulations, which meant that the business was not adversely affected by coronavirus and there was therefore no protected rent debt.

Other awards include *Commerz Real Investmentgesellschaft mbH v RHL Realisations 2022 Ltd (18 July 2022)*, *KXDNA Ltd v 60 SA Ltd (11 August 2022)*, and *Horsham District Council v Bills Restaurants Ltd (26 August 2022)*.

These awards have been common sense decisions primarily based on affordability. The 6 months' period of the statutory arbitration scheme will end on 24 September 2022.

5 Economic Crime (Transparency and Enforcement) Act 2022 ("Act")

Companies House's register of overseas entities was launched on 1 August 2022 and the land registration provisions came into force on 5 September 2022. Overseas entity purchasers or new tenants need to be registered at Companies House and produce the ID in order to be registered at the Land Registry. If financing is provided for the purchase, the entity will need to be registered at Companies House at the time of the charge, leading to Companies House registration sometimes being a completion precedent to completion of the charge. The Land Registry restriction for purchasers/new tenants takes effect immediately.

For overseas entities who became registered proprietor before 1 August 2022 (and from 1 January 1999), the Land Registry restriction has a transitional period expiring on 31 January 2023. This means that if the entity enters into a sale, lease or charge and the application to register the disposition is made to the Land Registry before 1 February 2023, the disposition will not be caught by the restriction (assuming no cancellation of the application).

In terms of the Companies House process, there haven't been any reports of significant problems and turnaround time is a matter of days. Most law firms are not providing the verification statement, but there are a number of organisations such as trust or company service providers with UK offices that are giving the statement and often also making the application and providing the requisite information to Companies House.

The PSL community has agreed some standard drafting for the Act for sale contracts that can be readily adapted for agreements for lease. This will be circulated to the Committee with the Minutes. Currently drafting is not being included in leases as a matter of course especially where there is a tenant's obligation to get registered at the Land Registry. Consideration should be given to whether to include equivalent drafting in options to renew. The key point of the drafting for the Act is ensuring that the provision of the up-to-date ID for the overseas entity is a completion deliverable.

There hasn't been any especial comment on the changes for the Act to the current Certificate of title and Report on title.

It was considered that the Committee's standard Borrower's solicitors' undertakings for the benefit of lender's solicitors do not need to be changed to address any post-completion matters arising from the Act. As mentioned, this is more likely to be dealt with as a condition precedent to completion of the relevant document.

6 Trust Registration Service

1 September 2022 was the deadline for trustees to register certain express non-taxable trusts (UK or offshore) on HM Revenue & Custom's Trust Registration Service ("TRS"). The obligation to register has a significant look-back period – in some cases, non-taxable trusts which were in existence on 6 October 2020 must be registered. In-scope trusts established on or after 4 June 2022, or registrable due to acquiring UK land on or after 4 June 2022, will have a rolling 90-day deadline for registration.

The change here is for non-taxable trusts, because it has been the position for several years that certain trusts subject to UK tax are registrable on the TRS.

There has been some discussion as to whether corporate nominees holding land for beneficiaries (i.e. bare trusts) fall within TRS and this remains a grey area. It is understood that the BPF is considering this issue in view of the wide impact if nominees do fall within TRS.

Where a trust arises by operation of law, that trust will automatically be out of scope of the registration obligation and this would appear to include implied or constructive trusts. HMRC has confirmed that offshore and UK unit trusts are not considered express trusts and therefore will not have to register. Joint ownership trusts (where the trustees are the same as the beneficiaries) are also excluded from registration.

Even if a trust is exempt from registration, the trustees will usually still have internal record-keeping obligations.

7 Suggested changes to the CLLS Overseas legal opinion

The sub-group has concluded its review and the revised form of Opinion was circulated with the papers for the meeting. The Committee agreed that the Opinion should not deal with the Economic Crime Act – this was a matter for UK advisors (being an entry at UK Companies House) rather than overseas counsel. The Committee approved the revised form of Opinion and this will be added to the CLLS website and the CLLS will be asked to publicise the document. Many thanks to the working group which produced the revised Opinion.

Action: Publicity for revised overseas legal opinion - CLLS

8 Law Society green leases project

Members of the Committee are 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. The discussions on this are still at a relatively early stage.

9 Building Safety Act 2022 (“BSA”)

The BSA received royal assent on 28 April 2022, but most of it is still to come into force. The BSA is a very significant piece of legislation and overhauls the way residential buildings are constructed and maintained in the UK following the Grenfell Tower disaster, while protecting tenants’ rights. The BSA will impact the real estate and construction industries in the UK particularly for residential construction, imposing wide-ranging new duties designed to increase the accountability, transparency and oversight of industry participants and the construction and development of “higher-risk buildings” (i.e. a building that is at least 18 metres in height (or has at least seven storeys) and contains at least two residential units, or is at least 7 stories high and contains student accommodation, a care home or hospital facilities). Whilst the BSA applies to dutyholders in England, there are also provisions that apply to the rest of the UK.

Among the provisions now in force are the extension of limitation periods for claims relating to a dwelling and the ability to bring claims under the Building Act 1984 -

- There is a 30 years’ retrospective limitation period for claims under the Defective Premises Act 1972 (“DPA”) for dwellings completed before 28 June 2022 and also for claims against construction product manufacturers for defective cladding. There is a 15 years’ prospective limitation period for other causes of action.
- There is a general right of action for breaches of the Building Regulations, allowing for a wider scope of claims than under the DPA. This could be relevant to commercial as well as residential property.

The BSA also now allows for liability under the DPA, for breach of the Building Regulations or for certain building safety matters, to be imputed from one body corporate to associated entities such as parent or sibling companies (making them jointly and severally liable) by orders obtained from the High Court, referred to as "Building Liability Orders". This captures developers who might otherwise have escaped civil liability for safety defects, because they had carried out a project through a shell company or special purpose vehicle. Such Building Liability Orders could be made in relation to projects or companies which have long since been sold, or which have only been recently purchased, long after construction has been completed.

A key part of the BSA relates to who bears the cost of any remediation works and restricts when and how much of the cost can be charged via the service charge. The restrictions on service charge recovery came into force on 28 June 2022. The provisions apply to a building that contains at least two dwellings and is at least 11 metres high or has at least five storeys. The restrictions apply to a "qualifying lease" (of a single dwelling granted before 14 February 2022 for 21 years or more, so do not benefit other leaseholders) and include:

- No costs relating to the removal and replacement of external cladding will be recoverable through the service charge.
- The cost of remedying non-cladding related fire-safety defects from tenants is not recoverable through service charge if the landlord on 14 February 2022 met the "contribution condition". The contribution condition is that the landlord's group net worth on 14 February 2022 was more than the threshold of £2million for each building in scope. The landlord's group includes any person associated with that landlord, which may capture directors, companies with common directors, subsidiary companies and companies with a controlling interest. The landlord as at 14 February 2022 is treated as meeting the contribution condition unless the current landlord provides a certificate to the tenant to show that the condition was not met. A buyer of a property with a qualifying lease might request from the seller the information needed for the landlord's certificate.
- Caps on the service charge recoverable.

If building owners cannot recover the cost from tenants, they may look to developers or manufacturers or Government funding.

Consideration will be given to whether the CPSEs need changing to reflect these statutory changes.

10 The decision in Hashmi v Lorimer-Wing and Fore Fitness Investment Holdings Ltd [2022] EWHC 191

This case related to whether a sole director of a company, that uses the standard model articles for private companies, can alone authorise the company's actions. It was argued that under the model articles there was a requirement for two directors for a board meeting to be quorate for any purpose other than taking steps to appoint new directors and since only one director had authorised the filing of a counterclaim by the company, he had no power to do so and acted ultra vires.

The High Court agreed and found that the quorum provisions in the model articles should be construed as imposing a requirement for a company to have a minimum of two directors.

The decision is somewhat surprising, particularly the judge's comment that the model articles must be amended if the company has only a sole director. This decision does not appear to reflect the industry consensus and the Department of Business, Industry and

Skills also seemed to consider that the model articles do not provide for a minimum number of directors.

11 Recent decision on Considering the reasonableness of a landowner's refusal to grant consent for construction of a dwelling under a qualified restrictive covenant (Davies-Gilbert v Goacher)

The court held that the owner of land benefitting from a qualified restrictive covenant had acted reasonably in refusing consent to build on the burdened land. The decision is of particular interest as it is an interesting expansion of the public law principles of 'Wednesbury' reasonableness to private law decision-making in the area of restrictive covenants. There is detailed analysis of the decision-making process of granting consent in the light of case law, looking at 'good' and 'bad' reasons and 'relevant' and 'irrelevant' considerations.

12 The Levelling-Up and Regeneration Bill

The right for local authorities to let certain vacant high-street premises through a High Street Rental Auction (Part 8 of the Levelling-up and Regeneration Bill); and the right for the Land Registry to collect information about dealings with land (Part 9 of the Levelling-up and Regeneration Bill).

The Bill, which is at Committee stage in the Commons, has an important impact on planning, but two issues have attracted some controversy.

The right for local authorities to let certain vacant high-street premises through a High Street Rental Auction. While the property owner has the opportunity to avoid this through letting the premises itself and also has appeal rights, some may regard the proposals as an undue state interference with private property rights. Importantly, no compensation is payable to the landlord in respect of the letting of the premises. This affects England. Some commentators have said that measures to reduce business rates may be a more effective way of filling voids in town centres.

The right for the Land Registry to collect information about dealings with land – this in part focuses on developer's contractual arrangements to control land, such as rights of pre-emption, options and conditional contracts. It also identifies attempts to evade the disclosure requirements under the Economic Crime (Transparency and Enforcement) Act 2022. There may well be concerns about how sensitive information may be protected in responding to the disclosure requirements. This affects England and Wales.

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

Members are occasionally encountering this legislation in practice.

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

This is currently going through Parliament and is at Report stage in the House of Lords.

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

Action: For the next Committee meeting - Kevin

16 AOB –

- The Land Registry has confirmed that difficulties for a new owner in serving Landlord and Tenant Act 1954 and break notices and accepting surrenders etc during the registration gap counts as a valid reason to request expedition of the application to the Land Registry. This may be helpful where it may be difficult to have the seller serve the notice etc.

17 Length of meeting – 1.5 hours

18 Date for remaining 2022 meeting, at 12.30pm and hybrid in person/virtual: 23 November.

Please also note the following proposed dates for the 2023 meetings, all at 12.30pm hybrid in-person/virtual –

25 January
22 March
17 May
12 July
20 September
22 November