

Minutes for CLLS Land Law Committee meeting on 22 November 2023 at 12.30pm by Teams and in person

Attendees: Jackie Newstead, (Chair), David Hawkins (Vice Chair), Warren Gordon (Secretary), Jayne Elkins, Alison Hardy, Stephen Josephides, Daniel McKimm, John Nevin, Jeremy Shields, Sangita Unadkat and Patrick Williams.

1 **Apologies:** Kevin Hart (from the CLLS), Jeremy Brooks, Jamie Chapman, Caroline DeLaney, Adrian Footer, Vikki Hills, Matt Hooton, Paul Kenny, Brigid North, Franc Pena and Julian Pollock.

2 Committee membership

Martin Elliott has retired from the Committee. The Committee thanked Martin for all his contributions to the Committee's work over the years and wished him all the best for the future.

The Committee approved replacement members in Andy Bruce from Linklaters and Simon Kenley from BCLP (replacing Ian Waring).

There are a few further vacancies on the Committee and these positions will be advertised.

3 CLLS matters

- A representative of the main Board of the CLLS (Laura Uberoi) will be attending future Committee meetings. The idea is for the main Board to gain a better understanding of each Committee's workplan and key issues through being represented at the Committee meetings, to ensure that there is a synergy between the Committees and common themes can be better identified to facilitate Committees working together.
- The CLLS would like each Committee to set up a liaison point with the new CLLS AI specialist committee. This should be a current Committee member, but the member can propose a colleague at non-partner level or with tech/AI experience from their firm, to assist in the liaison work between the two Committees. Here is a link to publicity material in the Law Society Gazette highlighting the appointment of the new Chair of the CLLS's new specialist AI Committee.

<https://email.lawsociety.org.uk/collect/click.aspx?u=OWpVbiswMndrQVYvSWptRzFjVUYyVmNoR0VOeENGVTvtZWJWcG9IZy8xK3JYWFNTdIIKcGU3U3B3SzZMZRjS3h4SmtPK2JwTIIxQVNFYkNBNWtFUDkzN01PaGtDUWFXNDh1bHdRdUZRclJyQIJ2Z1gxV2syeHBtQTg5Yzh1R2liazdFK3drc1IUQzFVQ0NUZFPBZCtVV1FtcG9pcGNFcg==&rh=ff00b8aa875fe43085469960ff47adf69ce49561>

The AI committee is to work similarly to the ESG committee by way of sitting alongside all the other specialist committees and working with them on cross committee issues as they arise.

Alison Hardy expressed an interest in being the liaison point for the Committee on the AI committee.

4 **Approval of Minutes for September 2023 Committee meeting** – The Minutes were approved. The CLLS has a new website and all the precedent documents and minutes are in the course of being migrated to the new website.

5 Law Society consultation on the New Code for signing and exchanging property contracts

Responses to this consultation need to be provided by 4 December 2023.

The consultation is on a proposal to replace the existing Law Society formulae for exchange ([Formulae for exchanging contracts by telephone | The Law Society](https://www.lawsociety.org.uk/topics/property/code-for-signing-and-exchanging-property-contracts)) with a new code for signing and exchanging property contracts (1st edition, 2024) which is linked here <https://www.lawsociety.org.uk/topics/property/code-for-signing-and-exchanging-property-contracts>

The Committee will respond to the consultation.

At this time the Law Society is not looking for textual amendments to the draft document and instead they want views about the document as a whole. This is reflected in a limited number of questions in the response document.

The draft has wider scope than the existing formulae for exchange, also dealing with the use of electronic documents, holding the deposit to order and electronic exchange. The draft includes several protocols for dealing with different aspects of the exchange process, 2 of which replace the existing formulae for exchange.

The Committee's view was that, compared to the current Law Society formulae for exchange, the new Code was too long and complex. Since there will be different requirements for residential and commercial property transactions (for example there was quite a lot in the Code on chain transactions which are mainly only relevant for residential), there should be separate Codes for residential and commercial. As the Code currently stands, there are a very large number of matters to agree (in 3 protocols) before the contract can be signed and this will be particularly administratively burdensome on the residential side but also for commercial transactions.

The Committee expressed concern about the undertakings being given by individuals when in practice they are normally given by the relevant law firm.

The Code refers to the individuals being authorised by the seller or buyer that they represent to exchange contracts or to release the contract for exchange. The Committee considered that normally the law firm and not the individual would be authorised, otherwise there would be a need for further authority if another representative of the firm exchanged the contract etc.

There are many references in the Code to the solicitor being taken to give an undertaking or treated as undertaking and the Committee was concerned that in relation to this wide set of undertakings clients may change their minds.

The Committee was quite happy with the existing formulae for exchange, which needed minor changes for electronic signing and for the concern about money being held by the firm and being lost in the event of bank insolvency. The Committee would like the Law Society to re-consider its approach to the Code and look for something more straightforward.

6 Registration gap protocol – an update on the first meeting

There is a new project for a registration gap protocol.

This is a really important project to introduce greater consistency in drafting and approach in tackling what is a significant transactional and disputes issue and reduce the risk of error or points being missed. While the Land Registry say that delays should shorten next year and the Law Commission has an ongoing project on potential reform of Part 2 of the Landlord and Tenant Act 1954, neither of those are medium, let alone short-term solutions. So a Protocol can be very beneficial.

There are representatives on the working group from a number of Committees - the Law Society's Conveyancing and Land Law Committee and City of London Law Society Land Law Committee as well as the Property Litigation Association Law Reform Committee, representing both the transactional and disputes perspective and the Bar is also represented. Caroline

DeLaney, Matt Hooton, Brigid North, Jayne Elkins and Warren Gordon represent the Committee.

The Protocol will include a guidance note together with suggested balanced drafting for a sale contract.

A key point of discussion at the first meeting was whether the buyer should be the seller's agent, subject to appropriate protections. The consensus, which would be reflected in the Protocol, was that the default position is the buyer should be the seller's agent but with a focused set of matters to which the agency applies. Most sellers will understand why this is needed and will accept this with the protections. There will be a small number of sellers who will not be happy for the buyer to be their agent (desiring a greater degree of control over what the buyer does) and the Protocol will provide suggested drafting for that situation. However, the Protocol will indicate that the agency route is the preferred option. This is because otherwise the buyer who needs full power to manage its property, may be held up by the seller's requirements before it is prepared to co-operate.

The Protocol will also need to address the issue of whether a seller, who is no longer the beneficial owner of the property, can serve a section 25 notice specifying for example a redevelopment ground when it has no intention to pursue it. This is a separate point from proving intention to redevelop at the time of the hearing. It was considered that the Property Litigation Association Law Reform Committee should seek the views of a KC on this point and ask them to contribute to the Protocol. Since there appears to be no way around this intention concern whether an agency route is used or an alternative, the hope is that the KC can confirm that the intention issue is not a concern because of the registration gap circumstances and the need to have the seller as the relevant party.

The Protocol group is in the course of feeding back comments on the drafting and notes in a first draft document based on the agency route. There will also be drafting for a non-agency route. The next meeting will take place January 2024.

The Committee stated that there should be a security power of attorney to deal with seller insolvency. Clearly, there should be an indemnity for the seller.

It was hoped a draft can be provided to the Committee for the March meeting.

The Committee also reiterated the point that this wouldn't be necessary if the Land Registry delays were not so bad. In the light of previous comments from the Land Registry, the Committee very much hoped that the position would improve by Spring next year.

7 Report on title review and Certificate of title matters

This is a 2024 project. Adrian Footer, David Hawkins, Jeremy Shields and Stephen Josephides have volunteered. Please let Warren know if anyone else is interested.

Mention was made of an addendum development report for the Certificate of title which is being used by a few City firms. It is important to note that this report is not a market standard and the Committee has not signed it off for use in connection with the Certificate. The Committee will make further investigations to understand more about the context of this report. It was noted that it is more difficult to produce a standard Certificate for a development situation which by its very nature is more speculative and approach will vary depending on the stage of the development.

There will also be discussion at a future Committee meeting about the use of top-up insurance in relation to caps on law firm's liability for Certificates.

8 Government consultation on capping existing ground rent for residential long leasehold properties in England and Wales

The King's Speech on 7 November 2023 marked the introduction of the much-anticipated proposals to reform leasehold home ownership. One of the key proposals related to the potential capping of existing ground rent for residential long leasehold properties in England and Wales. The Government regard such existing ground rent as a historical anachronism with no legal requirement for the ground rent to be reasonable or linked to any service provided. The Ground Rent Act 2022 now in force already limits ground rent on new long leases of houses and flats (with certain exceptions) to one peppercorn per year.

On 9 November 2023, the Government opened a consultation portal (<https://www.gov.uk/government/consultations/modern-leasehold-restricting-ground-rent-for-existing-leases>), in which stakeholders are able to submit their opinions on existing ground rents and the various options for intervention that the Government has put forward in relation to the capping of existing ground rents.

This consultation period is only open for six weeks (closing on 21 December 2023).

The Government has noted that subject to this consultation, they will look to introduce a cap on existing ground rents through the Leasehold and Freehold Reform Bill. The consultation puts forward five options:

- Capping ground rents at a peppercorn – the Government particularly encourages stakeholders to share any evidence of the likelihood of freeholders leaving the market if a peppercorn cap is introduced, and if it were to happen, the potential impacts on freeholders, leaseholders, investors and the wider market;
- Setting a maximum financial value for ground rent;
- Capping ground rents at a percentage of the property value;
- Limiting the ground rent to the original value when the lease was agreed;
- Freezing the ground rent at current levels.

The Committee was very concerned about the impact of the proposal especially that to cap ground rents at a peppercorn.

Ground rent is an important source of income for investors and the proposal will create a great deal of uncertainty in the investment community. This will impact on pension funds for which ground rents are a significant source of income.

Ground rents often rise in line with inflation and such a rise should not need to be capped. Or if it is to be capped, there should be suitable compensation for the landlord. While there may be some gratuitous ground rent increases which should be tackled, introducing a blunt mechanism such as this will have unpredictable consequences curbing ground rents where there is no legitimate basis to do so.

While there may be some logic in introducing a cap for future increases of ground rent under existing leases, this should not be introduced for existing levels of ground rent (and certainly not for those based on inflation).

The Committee was also concerned about the dangerous precedent being set of legislation retrospectively altering existing agreements to take away value from a party to the agreement. The concern is if this change is enacted, this could be applied in other circumstances. The Committee was surprised that the sanctity of existing contracts was not being respected.

Regardless of which option the Government deems the most appropriate following its consultation, the result may have a significant adverse financial impact on the value of portfolios held by professional and institutional landlords and investors who rely on ground rent as an income stream.

The Committee will submit a response.

9 Building Safety Act 2022

There was a brief mention of the difficulties of a seller developer being able to access the relevant property to remedy defects once it had sold the property. Reserving the relevant rights in the sale contract is one option, but the new owner may not be happy with the seller returning to do works to its property.

10 Update on Use of disclaimers for documents on Committee's webpages – for future meeting.

11 Length of meeting – 1 hour 15 minutes

12 Dates for 2024 meetings, at 12.30pm and hybrid in person/virtual – to be confirmed by email. The Committee will try to ensure that its meetings do not coincide with the CLLS main Board meetings.

Warren Gordon, Secretary of the CLLS Land Law Committee