CERTIFICATE OF TITLE

(Based on the CLLS Certificate of Title (Sixth Edition))

Guidance Notes

Introduction

Property lawyers are increasingly called upon these days to grant certificates of title for various purposes. They are sometimes used as a substitute for the purchaser's solicitors examining title and they are frequently used in banking transactions. The PSG therefore decided to launch its own version of certificate of title, which it is assumed will be used principally in the context of banking transactions but which can be adapted for other purposes. The assumption is that the certificate will be granted by the solicitors acting for the purchaser/borrower, and it would require to be adapted if it were to be granted by the seller's solicitors in any given transaction.

The form of certificate is based on the City of London Law Society Land Law Committee long form certificate of title ("the CLLS Certificate") which is the industry standard these days in England. While the CLLS is not in a position formally to endorse the PSG Certificate, given jurisdictional differences etc, the PSG Certificate has been produced in liaison with the CLLS, who have happily lent their support to the project. The use of the PSG Certificate is seen as facilitating cross border transactions, where English solicitors will work from the CLLS Certificate and will expect the Scottish solicitors to work from a Scottish version of that document. This is therefore the proposed Scottish version. It can of course be used on a stand alone basis for Scottish transactions.

This version of the PSG Certificate is based on the sixth edition of the CLLS Certificate. The CLLS Certificate can be found on the CLLS website http://www.citysolicitors.org.uk/Legal%5Factivities/defaulton.asp?s=3&lo=3&on=13

There have been some important changes to the format of the CLLS Certificate from the fifth to the sixth edition and these changes have been mirrored in this version of the PSG Certificate. For those familiar with the earlier editions of the Certificate an explanation of the changes is set out below.

Basic Structure of the Certificate

The certificate takes the form of a front end certificate, with a Schedule of 5 Parts attached, each Part serving a specific purpose: some provide further statements forming part of the certification or details or descriptions of the Property, and some detail documents and searches or disclosures against the statements in the earlier part of the certificate. There are therefore essentially two distinct elements to the certificate – the **Certification**, contained in the front end and in parts 1-4 of the Schedule, and the **Disclosures**, contained in Part 5 of the Schedule. This is a change from the previous edition of the certificate where the disclosures were made in a number of parts of the Schedule.

The Certification sections provide the template which sets out the ideal position that the recipient of the certificate is seeking to have certified. The Disclosure section is then used to provide further information on details of title, leases etc. and most importantly, to make any qualifications necessary in relation to matters where there is any departure from the ideal position stated in the Certification, in effect, proceeding by way of exception reporting. The Certification sections should be regarded as sacrosanct (subject to necessary drafting to tailor defined terms etc. to the particular circumstances) unless there are specific transactional requirements (on which both parties agree) to make amendments to the text. A new paragraph 4 in Part 1 of the Schedule states that no changes have been made to the certificate and would need to be disclosed against if amendments were agreed. The Certification sections themselves should never be amended by way of making qualifications or disclosures which properly belong in the Disclosure sections. For example, if there is a title issue, the Certification sections of the certificate should still state that the title is valid and marketable, but the appropriate Disclosure section should contain details of the defect or flaw or other issue affecting the title which qualifies the statement made in the Certification. It is essential that this principle is followed if the certificate is to be used properly.

As a general rule, the certificate should summarise the effect of the title and other documents and copies of them should **not** be attached. The certificate is intended to replace an investigation of title by the recipient’s solicitors. If they have to read, not only the certificate, but also a bundle of documents attached to it, the point of the certificate is to some extent lost. Having said that, there are occasionally circumstances when a document, or a part of a document, is so important and so complex that it cannot be summarised accurately. The PSG believes that such circumstances are rare, but where they do exist, it would be appropriate for the document, or an extract from it, to be annexed to the certificate.

Changes in format

As well as updating the certificate, the PSG has made some important alterations to the format of the certificate to reflect changes in the CLLS Certificate. These alterations should improve the user-friendliness of the certificate.

The new certificate better highlights some of its key provisions by putting them at the front of the certificate. Examples include the statement that there is good and marketable title and the "no other matters to be disclosed" statement. All of the definitions, interpretation and other boilerplate clauses are moved to Part 1 of the Schedule.

Most of the "variable" information is now in one place. Part 5 of the Schedule of the certificate provides details of the particular Property, searches, Lease, Letting Documents and qualifications to the certificate's statements. The details of the searches, Lease, Letting Documents and qualifications are in tabular form. These changes are designed to make the certificate easier to use.

Statement of Lease Provisions

An important change from the previous edition is that in relation to the Lease and Letting Documents, the certificate contains an additional series of statements describing material provisions of a "typical" headlease and institutional occupational lease. Such an approach is intended to reduce the amount of information in relation to the Lease and Letting Documents which needs to be incorporated in the certificate. The certificate provider will highlight any departures from the certificate's statements in the qualifications in Sections 7C and 8C of Part 5 of the Schedule.

This approach raises the question of how much of a departure from the wording of a statement must there be for a qualification to be made. The precise wording of the certificate's statements is unlikely to be reflected in the wording of the particular Lease or Letting Document. The PSG's view is that a qualification should be made when the certificate provider considers that there is a material difference in the wording. Whilst this introduces an element of subjectivity, that position is no different from the requirement under the previous edition to specify "material" details of the Lease and Letting Documents.

The PSG also considers that this approach makes the certificate more useful in that it focuses on those aspects that are different from the norm.

Construction Documents

The treatment of construction documents has been simplified in this edition of the certificate. The certificate should disclose through qualifications to the statements in paragraph 26 of Part 2 of the Schedule whether there has been any construction works and provide basic details. Full reports on construction documentation should be dealt with elsewhere. One simple reason for this is that neither the person giving the certificate nor the person reading the certificate are likely to be the individuals responsible for reviewing the construction documentation.

Insurance and Licensing

The section in the previous edition of the certificate (Part 4 of the Schedule) dealing with specific insurance details in relation to the Property has been removed, as insurance is usually dealt with separately. Equally, the section dealing with licensing in the previous edition (Part 8 of the Schedule) has also been removed as again licensing is usually dealt with separately.

Environmental Matters

The certificate does not consider environmental assessments, reports etc and the recipient of the certificate should consider what investigations it wishes to make in relation to environmental matters.

Professional advice for the recipient of the Certificate

The certificate has been prepared on the basis that the recipient will take his own professional advice on the contents of the certificate if he considers it necessary to do so. It is clear that some solicitors used to take the view that a certificate of title should be in a form in which the recipient could rely on it without needing to take his own professional advice, i.e. it should not only highlight problems but also provide some assessment of the risks arising from these problems.

The PSG's view is that the function of the certificate is to provide specific information about the Property. The recipient of the certificate, with the help of his own professional advisers, can then decide whether the Property is one which can be accepted for the transaction in question.

However, if the recipient of the certificate, or those advising him, reasonably consider that more information needs to be provided by the firm giving the certificate to enable a proper assessment to be made of any risks disclosed by the certificate, the recipient or those advising him should be entitled to ask for this information.

Cap on liability for those giving the Certificate

The solicitors giving the certificate may seek a limitation or "cap" on liability where the same certificate is addressed to more than one person, in order to prevent a double claim against the solicitors and to ensure that the solicitors' liability to all ultimate addressees does not exceed the liability to the original addressee of the certificate. The PSG's view is that any such limitation or cap must be a matter to be agreed by the solicitors and the addressees on a case by case basis.

More detailed comments on the PSG Certificate now follow.

Main Certificate

1.1 The identity of those to whom the certificate is to be addressed needs careful consideration in view of the terms of this clause. With the increase in properties being bought in the name of a company specially formed for that purpose (a special purpose vehicle or "SPV"), those giving such a certificate may wish to consider whether, in these circumstances, it is appropriate for the certificate to be given to the SPV. If subsequently the shares in the SPV are sold, rather than the property itself being sold, the liability of the firm giving the certificate will continue for the benefit of a second purchaser. Had the property itself been sold, as has normally happened in the past, liability would effectively have ceased on sale. Further, where the certificate is intended to be for the benefit of, say, banks who are for the time being the members of a syndicate, the certificate can be addressed to them, or the optional wording in this paragraph can be included. In either case, a suitable definition of the term "Banks" will have to be incorporated, based on that in the loan documentation. Where the creditor and the banks are different (e.g. if the creditor is a security trustee), this paragraph may need to refer to both the creditor and the banks.

2.1.3 This clause is designed to cater for various situations including both properties that are held in outright ownership and those that are held leasehold, those where the Company’s interest is registered in the Land Register and/or the transaction induces first registration, and transactions involving the grant of a standard security and those which do not.

2.1.5 This is a distinctively Scottish provision which is necessary in the case of certificates granted in connection with standard securities. Note that there is no provision in the certificate regarding the equally distinctive Scottish matter of the granting of a letter of obligation: that is regarded as something to be dealt with separately by the parties and outwith the scope of the certificate.

4 Note the statement that a final draft of the certificate has been sent to the Company (i.e. the client of the solicitors granting the certificate) and due confirmation has been given as to its accuracy. It will accordingly be necessary to send the final draft of the agreed certificate to the client for that purpose so that that written confirmation can be given.

Part 1 of the Schedule

All the definitions are now set out in this part of the Schedule. The definitions should be largely self-explanatory. If the certificate is not being used in a banking transaction, the various references to "Banks", "Creditor" etc. should be removed. Likewise, "Seller" and "Seller's Group" are relevant only if the certificate is being given simultaneously with the purchase of the Property. Consequential references to these defined terms in the certificate should be deleted. (If one is relying on confirmations given by the seller, consideration may need to be given to how that information is warranted to the purchaser but that matter is outwith the scope of these Guidelines). Note the distinction between "Premises" and "Property". Generally, regardless of whether the property, the title to which is being certified, is held by way of outright ownership or leasehold it is the "Property". The term "Premises" is used only when referring to the whole or part of the Property let to any occupational tenant(s).

Part 2 of the Schedule

This part of the Schedule forms part of the Certification, and contains the main certified statements in respect of the Property. Any disclosures against, or qualifications to the statements made in this part of the Certification should be made in Section 6 of Part 5 of the Schedule.

Paragraph 1.2 states that all title deeds are either fully stamped or accompanied by a certificate as to the submission of a land transaction return for the purposes of stamp duty land tax ("SDLT"). It should be borne in mind that:

(a) From 1 December 2003, SDLT became payable by the first unconnected assignee of a lease in cases where the original lease benefited from any of the exemptions listed in paragraph 11(2) of Schedule 17A of the Finance Act 2003. Even where there is no chargeable consideration, the assignee may need to complete a land transaction return.

(b) An assignee may also be required by virtue of paragraph 12 of Schedule 17A to submit a SDLT return or a further SDLT return in the circumstances set out in the paragraph.

(c) It is therefore essential that, when acting for a prospective assignee of a lease, copies of all SDLT returns and details of all exemptions claimed and clawed back are obtained from the assignor.

In paragraph 1.3 there is a statement that no further land transaction return is required in respect of any transaction involving the Property which has an effective date prior to the date of the certificate. This statement should be seen together with new paragraph 7.2 of Part 2 of the Schedule, which states there are no obligations to make future payments in respect of overage, clawback, deferred consideration etc. These statements seek to deal with any concern of the addressee of the certificate as to possible liabilities in that regard.

In paragraph 3.1 there is a difference between the PSG Certificate and the CLLS Certificate. In the CLLS Certificate details of the burdened property affected by the Benefits need to be set out. As there are occasions in Scotland where it is not possible to identify the burdened property (for burdens created pre- 28 November 2004) the PSG did not replicate this provision but where the burden was created post 28 November 2004 and the burdened property is clear from the titles details of the burdened property should be disclosed.

In relation to the certification regarding adverse rights (paragraph 8), note the obligation of the Company to carry out an inspection.

A six month period is suggested in relation to current planning permissions (paragraph 15), but there are no hard and fast rules here, and this period can be altered by agreement.

So far as construction work etc. is concerned (paragraph 26), a ten or twelve year period is normally regarded as being as far back as one need go in seeking to establish the existence of warranties that might have any continuing commercial value: twelve years is therefore proposed for the purposes of the certificate.

Part 3 of the Schedule

This Part of the Schedule forms part of the Certification and sets out statements in respect of the Lease. As with the main certificate, these statements themselves should not be amended, but any disclosures or qualifications in respect of them should be inserted in Section 7C of Part 5 of the Schedule.

The VAT provisions have been simplified both in paragraph 17 of this Part of the Schedule and in paragraph 18 of Part 4 of the Schedule.

There is a new section dealing with SDLT issues in relation to the Lease in paragraph 18.

Part 4 of the Schedule

This Part of the Schedule also forms part of the Certification, and any disclosures or qualifications in respect of the statements it contains should be inserted in Section 8C of Part 5 of the Schedule

In paragraphs 5.1 and 5.2 the wording in the PSG Certificate goes further than in the CLLS Certificate in that it states that the tenant is responsible not just for keeping the Premises in good and substantial repair and condition but also "renewed, reinstated and replaced". This is because the word “repair” has a wider meaning in English law than it does in Scots law.

In the CLLS Certificate (paragraph 9.2) various payments under the lease (such as payment for the insurance premium) are specified to be payable "as rent". This is a requirement under English law if the landlord is to be able to recover these sums without serving a notice under section 146 of the Law of Property Act 1925. There is no similar requirement in Scotland so the words "as rent" do not appear in the PSG Certificate.

There is no provision in the certificate that the rent deposit should be registered as a charge which appears in the CLLS Certificate paragraph 25 [as this is not relevant under Scots law].

There is also an alternative version of the Letting Documents parts of the schedule for use where the certificate relates to a property subject to a large number of leases, all or most of which are in standard form e.g. a shopping centre. Guidance Notes for use of the alternative structure appear at the end of this Guidance.

Part 5 of the Schedule

Here and elsewhere the description of, for example, "Benefits" should be succinct, containing all requisite information but not simply reiteration of the entire provisions of the titles. The conveyancing description, on the other hand, must be a full and proper description for the purposes of any standard security to be granted as provided for in clause 2.1.5 of the main certificate.

Section 3 of Part 5 of the Schedule

Note, in relation to disclosures against the Burdens (paragraph 4 of Part 2 of the Schedule), that these disclosures should be succinctly stated, should deal only with material matters and should not simply be a verbatim repeat of the text of the underlying property documents.

Section 5 of Part 5 of the Schedule

This section contains a list of the standard searches and other enquiries that would normally be obtained in a sale or security transaction. Note that the dates of the searches are to be specified where relevant, but in the case of some searches a mere statement that the searches have been conducted is adequate and the actual date of the search is not relevant for the purposes of the certificate. Note also the need to specify in appropriate cases the source (i.e. provider) of the search.

Section 7 of Part 5 of the Schedule

If the Property is leasehold, Section 7 is where certain specified details of the Lease under which it is held should be set out in table format, and again the details to be inserted here should be succinctly expressed.

Section 8 of Part 5 of the Schedule

Where the Property is subject to occupational leases (either already in existence or granted by the purchaser/borrower), Section 8 of this Part of the Schedule provides for details of such leases to be set out in much the same way as details of any Lease under which the Property is held are dealt with in Section 7 of Part 5 of the Schedule, again with the emphasis on being precise but succinct.

Client Questionnaire

A client questionnaire accompanies the certificate. The purpose of the questionnaire is to elicit from the client the answers necessary to complete those parts of the certificate which are stated to be based on information supplied by the client.

Alternative Part 4 and Part 5 Section 8 of the Schedule, where property is subject to multiple occupational leases

This alternative version of Part 4 of the Schedule and Section 8 of Part 5 of the Schedule is intended for use where the Certificate relates to a property that is subject to a large number of leases, all or most of which are in a standard form or fairly closely follow a standard form.

Where it is agreed that this alternative version is to be used, appropriate disclosure should be made to Part 1 of the Schedule at Paragraph 4. Suggested wording is as follows:

"In view of the fact that an alternative Part 4 of the Schedule and Section 8 of Part 5 of the Schedule are to be used, please note that, in consequence, changes have been made to Part 4 of the Schedule to;

delete references to licences, consents and other ancillary documents in paragraph 1;

delete the whole of paragraph 13 (former tenants and guarantors);

alter cross-references to Section 8 of Part 5 of the Schedule ; and

changes have also been made to Section 8 of Part 5 of the Schedule in relation to the Letting Documents."

The intention is that the generic terms of the "standard form" lease (eg specified insured risks) should be set out in Section 8A of Part 5 of the Schedule . Section 8B will set out how the "standard form" lease differs from the lease described in Part 4 of the Schedule. Section 8C will contain the specific information for each Letting Document that is required to be provided and Section 8D will contain details of how each document differs from the "standard form" lease. It is thought more helpful to retain the terms of Part 4 of the Schedule in the same form as in the published form of Certificate so far as possible. There are no substantive changes to Part 4 of the Schedule except for:

(i) deletion of the words "and any rent review memoranda, licences for works, consents and other ancillary documents are listed in Section 8B of Part 5 of the Schedule" from paragraph 1;

(ii) deletion of paragraph 13 relating to former tenants and guarantors (with consequent renumbering); and

(iii) changes to cross-references to Section 8 of Part 5 of the Schedule necessary as a result of the revised version in this document.

No other changes should need to be made to Part 4 of the Schedule.

It may be preferable for the parties to agree at the outset what are considered to be “material variations”, in the context of the transaction, to be reported on in Section 8D.

An alternative to Section 8D (disclosing material variations to the “standard form”), should the parties prefer, would be to provide a section immediately beneath each lease listed in Section 8C into which those points would go.

Where there is more than one “standard form” of lease in the property – perhaps an older and a newer form – then it may be more helpful to define two (or more) separate standard forms (perhaps Type A and Type B).

If all of the leases to which the property is subject are in materially different/varying forms, this approach may be inappropriate and it may be preferable to have a shortened form of report for each occupational lease.

If this version of Part 4 of the Schedule and Section 8 of Part 5 of the Schedule is used, you will need to amend clause 2.4 in the front end of the Certificate to read:

> “The Letting Documents are fairly summarised in Sections 8A and 8C of Part 5 of the Schedule and the statements set out in Part 4 of the Schedule are complete and accurate in all respects except to the extent that they may be qualified in Sections 8B and 8D of Part 5 of the Schedule.”

Management licence information is not to be provided where this alternative version is used: appropriate disclosure to this effect may be made, against clause 2.4 in the front end of the Certificate, in Section 6 of Part 5 of the Schedule.

Insurance - this alternative version permits either that the particular percentage payable by each tenant towards the cost of insurance is specified in Section 8C of part 5 of the Schedule or, if the leases instead require tenants to pay a due proportion by reference to a particular methodology then details should instead be incorporated within Section 8A of Part 5 of the Schedule.