

CERTIFICATE OF TITLE

(based on the CLLS Certificate of Title (Eighth Edition 2023))

Guidance Notes



Introduction

This version of the PSG Certificate is based on the Eighth Edition of The City of London Law Society (CLLS) Land Law Committee Certificate of Title (CLLS Certificate), which can be found on the CLLS website:

<https://www.citysolicitors.org.uk/cls/cls-precedent-documents/certificate-of-title-and-related-document/s/>

We set out below the main changes in the Eighth Edition compared to the previous Seventh Edition 2016 Update. There then follow general comments on the Certificate. The solicitors who give the Certificate are described in various places in these Guidance Notes as the "certifier".

1 Main changes for the Eighth Edition 2023

Key points

The Seventh Edition of the Certificate of title of the CLLS Certificate was launched in 2012 with an update of that edition in 2016. It was, therefore, 10 years since the CLLS committee had undertaken a thorough review of the Certificate. The CLLS committee decided that the time was right to produce a new Eighth Edition of its Certificate of Title. For the first time the CLLS committee launched a wide-ranging consultation on the proposed new edition.

The CLLS committee considers that the Certificate has benefited from the input of a wide group of stakeholders, helping to ensure that all key issues have been addressed and that the proposed changes are generally accepted. The PSG sent a response to the consultation.

The structure of the Certificate for the Eighth Edition remains 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.

The accompanying documentation including the confirmation letters, questionnaire, wrapper and supplemental enquiries have also been updated.

We have made available on the website a comparison document showing the changes from the Seventh Edition 2016 Update.

Set out below are further details on and explanation of some of the changes for the Eighth Edition. The numbers refer to the relevant clause or paragraph number in the Certificate.

Version 1
June 2023



Detail of main changes for the Eighth Edition 2023 front end of the Certificate

Clause 1

- 1.8 The provision excluding liability for individual partners etc. has been amended to be clearer when the Certificate is being given by a law firm partnership. There is now a qualification that the exclusion of individual responsibility 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 A provision capping the Certificate provider's liability is included. Solicitors have caps in terms of engagement for their own clients, so there should be a cap for a certificate to third parties.
- 1.10 There is a new deadline for issuing and serving proceedings in connection with the Certificate.

Valuers provision

The Valuers provision in the previous edition has been removed as it did not reflect what usually happens in practice and it should be for the recipient of the Certificate to ensure its valuers are comfortable with the contents of the Certificate.

Clause 3

Clause 3.3 now expressly deals with the situation where the shares in the Company that owns the Property are being purchased from the Seller as part of completion of the Transaction. There is new wording in square brackets in clauses 3.2, 3.3, 3.3.1(e) and 3.3.1(g) for use if the Certificate is given in connection with such an acquisition and so that the statements in clauses 3.2 and 3.3 are applicable to the acquisition, subject to any Disclosures.

Clause 3.3.1(g) now allows for an agent or representative of the Company or the purchaser of the Company to inspect the Property.

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. The CLLS committee does not propose to produce a pro-forma Construction or Planning Report, as much depends on the particular circumstances. If there is a Planning and/or Construction Report produced by the provider of the Certificate, it is envisaged that this will be annexed to the Certificate. See Construction documents below for further information on construction reporting.

Schedule Part 1

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

Qualifications

- 3.3 The Qualification now confirms that the certifier has not considered any climate change risks to the Property, but the Qualification is subject to any disclosure in Part 6 of the Schedule if any climate change searches that have been carried out. This is mentioned below under Climate change provisions.
- 3.7 There is a new qualification that the provider of the Certificate expresses no opinion on whether the National Security and Investment Act 2021 applies to any transaction and has not investigated any related aspects. 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.

Third Party Rights and Jurisdiction

- 4 There is a new provision excluding the Contracts (Rights of Third Parties) (Scotland) Act 2017.
- 5 The jurisdiction clause now provides that disputes are to be submitted to the exclusive jurisdiction of the Scottish courts.

Schedule Part 2

The wording for the Economic Crime (Transparency and Enforcement) Act 2022 follows that used in the Seventh Edition 2016 Update, but with minor changes including a new reference to the date of the most recent update to the register of overseas entities. The wording is intended to be a signposting exercise for both certifiers and recipients of the Certificate, alerting the parties to steps that may need to be taken to comply with the 2022 Act, rather than a detailed analysis.

The confirmation as to the Existing Use of the Property has been made a Company confirmation.

Schedule Part 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.
- 1.4 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 or a copy of an acknowledgment from HM Revenue & Customs in relation to the option. The reference to the option not being disapplied or revoked is now “in whole or in part” (and similarly in paragraph 18.1 of Part 4 of the Schedule).
- 2 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.
- 7.2 The “Agreements” statement now refers to there being no obligations to make future payments of overage etc or other material positive obligations pursuant to the matters referred to in paragraph 7.1 (such as agreements for sale, estate contracts, options or rights of pre-emption), which are binding on the Property, or on the Company (either generally or by way of indemnity) in relation to the Property.
- 8 The “Adverse Rights” statement recognises that the inspection may be undertaken by the Company’s agent or representative on the Company’s behalf, rather than by the Company itself.
- 17 The “Pending applications” statement has been expanded to include a non-material amendment to a planning permission, and a listed buildings consent.
- 19 The “Listed buildings” statements have been expanded.
- 21 The “Compulsory acquisition” statement now also refers to rights over the Property.
- 24 The statement on Energy performance certificates has been expanded to require inclusion in the Disclosures of the rating and the date that the EPC is stated to be “valid until”. There is also a new Company confirmation that the EPC covers the whole of the Property and the EPC is registered on the relevant statutory register. If there is more than one EPC, there is a requirement to provide in the Disclosures the relevant information for each EPC including the part of the Property covered by the EPC.

- 25 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. Tenant’s alterations referred to in Part 5 of the Schedule should not be mentioned in paragraph 25.
- 26 Outgoings now include “other utility charges”.
- 28 There is a new section for confirming that no part of the Property is used for residential purposes. The CLLS Certificate contains a number of confirmations relating to residential legislation that does not apply in Scotland and so the PSG Certificate does not replicate these. If the Property is used for residential purposes the certifier and recipient of the Certificate should agree the level of detail required.
- 29 There is a new statement that there are no other material matters affecting the Property that the certifier considers ought to be brought to the attention of the recipient of the Certificate. There is an equivalent statement in Parts 4 and 5 of the Schedule and it was considered appropriate to have this in Part 3 of the Schedule.

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

Schedule Part 4

Section 2

- 9 One of the key changes is that there are now alternative sets of statements for the tenant and the landlord being obliged to insure the Property. The Disclosures indicate whether it is the tenant or the landlord who is required to insure and, therefore, which set of statements apply, or whether neither party is required to insure. There is a new statement that there are no options to determine the Lease in respect of damage or destruction of the Premises, reflecting the (usually) valuable and long term nature of the Lease.
- 11 The Certificate is now explicit in stating that the landlord cannot exercise a right of irritancy in the case of insolvency. Similarly with a superior leasehold title in paragraph 16.2 of Part 4 of the Schedule 4.
- 12 If an option to terminate the Lease/renew the term/purchase or a right of first refusal is disclosed, the Certificate also includes a Company confirmation that it has not been exercised.
- 21 There is a new statement that there are no material obligations under any agreement for lease relating to the Premises that are binding on the Company and which remain outstanding following the grant of the Lease pursuant to the agreement.

Schedule Part 5

There had been suggestions that the statements in Part 5 of the Schedule (on the provisions in Letting Documents) should be significantly streamlined to make it easier and more cost-effective to produce the Certificate. The CLLS 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. Part 5 of the Schedule is intended to reflect the key attributes of the institutionally acceptable lease and has been updated to better reflect the Model Commercial Lease (MCL) <http://modelcommerciallease.co.uk> and the PSG versions of those leases, and to

shorten the statements materially removes a key *raison d'être* of the Certificate. Equally, if the statements were made more basic, they may be 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 statements in Part 5 of the Schedule do not mirror the MCL/PSG lease provisions, but the statements have been amended to be brought closer to the MCL/PSG leases. While not everyone uses the MCL (or the PSG equivalents) or encounters it/them 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.

The CLLS 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).

Please also see Statement of Lease and Letting Document provisions below for further information about how to approach the statements in Section 2 of Parts 4 and 5 of the Schedule.

Section 1 Part A

Indication should now be given as to whether there is an internal demise under the Letting Document.

The company registration number (if applicable) should also be provided for the present tenant and any present guarantor.

Section 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. The assumption on compliance with landlord's obligations reflects the common tenant amendment of "except 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 also excluded. Paragraph 9.7 defines "insured risks" and "uninsured risks" and the latter carves out damage by the tenant's act or default.
- 7.3 There is a new statement that the tenant may not carry out any alterations which adversely affect the energy performance certificate rating for the Property. The alienation statement now separately refers to charging of whole.
- 8.5 This paragraph now provides that the tenant may sublet any permitted part (of the Premises) capable of separate occupation and use (as well as the whole of the Premises). In the case of subletting of a permitted part, the Disclosures should state the maximum number of self-contained units of occupation permitted at the Premises. Paragraph 8.5.1(c) highlights differences for a sublease of a permitted part in respect of insurance and service charge payments.
- 8.5.5 There is an additional control on subleases that the tenant (i.e. the landlord of the sublease) is not to reduce, defer, accelerate or commute any rent payable under the sublease.
- 8.6/8.7 The sharing of occupation statement at paragraph 8.6 has been tweaked and paragraph 8.7 is a new statement that there is no restriction on any 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 Seventh Edition did not deal with uninsured risks.

- 11 The irritancy statement also covers insolvency of a guarantor.
- 12 If an option to terminate the Letting Document/renew the term/purchase or a right of first refusal is disclosed, the Certificate also includes a Company confirmation that it has not been exercised.
- 14 This statement has been split so that the certifier confirms that any consents required under the Lease for the grant of the Letting Document have been obtained and there is a Company confirmation, so far as it is aware, that consents for the grant of the Letting Document (other than those required under the Lease) have been obtained.
- 21 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 and regularly encountered green lease provision (see Climate change provisions below).
- 24 This includes a reference to irritancy of the Letting Document as a trigger event for the landlord's right to require the guarantor to enter into a new Letting Document.
- 28 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 pursuant to the agreement.

The CLLS 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 Part 6

Environmental/flood searches have not been specifically included since practice differs as to whether such searches are obtained and if so, who does the search.

The CLLS Eight Edition has removed the coal search as a specified search as it is location dependent. However, the PSG has decided to continue to include this in Part 6 of the Schedule in the PSG version.

If these or any other searches not otherwise listed in Part 6 of the Schedule are carried out, they can be included under "Details of other searches or enquiries we considered to be appropriate".

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 (CLP). However, the CLLS 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 or other equivalent 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 CLLS committee will consider introducing further changes to address those issues, as an update to the Eighth Edition. This approach was endorsed by the majority of respondents to the consultation.

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 21 of Part 5 of the Schedule).

The Certificate also includes more specific information about the rating of the energy performance certificate and when the EPC is stated to be valid until (paragraph 24(2) of Part 3 of the Schedule).

There is a new qualification in Part 1 of the Schedule that the Certificate does not consider any climate change risks to the Property, except as disclosed by the results of the searches listed in Part 6 of the Schedule. In that sense, climate change risks are being treated in a similar way to environmental or flood assessment or reports, or other technical reports or surveys relating to the Property's condition. Practice on this may change over time and the Committee will keep this under review.

Use of Certificate

Certificates of title are used in many different transactions. However, the Certificate is most frequently used in a lending context (for example, solicitors for the borrower providing the Certificate to the lender); corporate transactions (such as where a business owns one or more critical property assets); the disposal of fractions of a property holding vehicle (for example, in a limited partnership context), in large transactions such as the disposal of portfolios; or for tenders where there are a number of bidders.

The Certificate is intended to be comprehensive and strike a reasonable balance between the interests of those to whom it is addressed and the solicitors who give it.

The Certificate is not designed to be a management tool or a report on title, although it can be of use to valuers for its key letting information.

The Certificate is not primarily intended for a proposed development situation. If it is proposed that the Certificate will be used in that context, the certifier and the recipient should agree the approach to be taken, including the extent to which Disclosures should take account of the proposed development.

The PSG has produced a "Certificate Wrapper" based on the CLLS Certificate of Title (Eighth Edition) Wrapper (available from the PSG website) that can be used in connection with reports on title. The production of the Certificate Wrapper was a response to the increasing use on transactions of "wrapper" documents. A common context for the wrapper is that a property has been purchased and the solicitors acting for the purchaser produced a report on title in relation to the acquisition for the purchaser's benefit. Within a short period after the production of the report, the new owner of the property wishes to re-finance the property and the party providing the finance requires a certificate of title for its benefit in the form of the CLLS Certificate of Title (Eighth Edition 2023).

Since the report was produced recently, there is considerable sense from an efficiency perspective for the solicitors, who provided the report, to re-issue it for the funder's benefit. However, since the funder requires the CLLS Certificate of Title, its front end must wrap around the report and certain additional confirmations have to be given by the certifying solicitors, so that the funder ends up with the benefit of a document equivalent to what it would have received if the Certificate itself had been provided.

As users will know, a primary purpose behind the Certificate is to reduce as much as possible the negotiation that takes place over the form of certificates of title. This objective seems to have been achieved, with the Certificate being accepted as the standard by most firms in England and Wales and in Scotland. Many lenders insist on the Certificate being used.

Users are reminded that the Certificate will not be suitable on every occasion and may require significant adaptation. For example, the Certificate is, usually, inappropriate for a rack rent lease. Also, the "Lease" described in Part 4 of the Schedule is a typical long lease granted at a premium and reserving a nominal rent with limited rent review provisions and more flexible alteration and alienation provisions than for a shorter rack rent lease. If, for example, the Certificate is to be used for a rent sharing lease, many of the standard statements in Part 4 of the Schedule will be inappropriate.

On occasions, the certifier and recipient of the Certificate may agree that a particular transaction requires a different approach to the Certificate. It is crucial that any changes to the form of the Certificate are transparent (clause 4 highlights that point). In particular, it is recognised that the Letting Documents Schedule can be difficult to complete where there are a large number of Letting

Documents and the Certificate offers some flexibility in their treatment. See Treatment of Letting Documents below for further information about this.

The Certificate is not appropriate for use in the circumstances of a "standard" mortgage of a private residence. The status of the Certificate as a well-respected standard, generally accepted by the legal and lending marketplace, reinforces the acceptability of its use by a borrower's solicitor for the benefit of the borrower's lender.

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. It can of course be used on a stand alone basis for Scottish transactions.

Format

The Eighth Edition does not make changes to the basic structure of the Certificate. The Certificate comprises:

- Main part containing provisions on Reliance, Certification, Confirmation of statements, Form of Certificate and Schedules.
- Part 1 of the Schedule containing Definitions and Interpretation, Assumptions, Qualifications, Third Party Rights and Jurisdiction.
- Part 2 of the Schedule containing specific Property details and confirmations in relation to registration in the register of overseas entities under the Economic Crime (Transparency and Enforcement) Act 2022.
- Part 3 of the Schedule relating to Matters affecting the Property (Title, planning, statutory matters, environment, general, residential and mixed use buildings and no other material matters).
- Part 4 of the Schedule relating to the Lease. Parts 1A and 1B include specific details of the Lease, Licences and other supplemental documents and Part 2 includes the statements.
- Part 5 of the Schedule relating to the Letting Documents. Parts 1A and 1B include specific details of the Lease, Licences and other supplemental documents and Part 2 includes the statements.
- Part 5 of the Schedule – Supplement, for multiple Letting Documents situations (see Treatment of Letting Documents below).
- Part 6 of the Schedule relating to Searches and enquiries.

In one response to the consultation on the Certificate, it was suggested that the Certificate be re-formatted and cross-referencing (including automatic updating) be included within the Certificate. The CLLS committee's view is that any further formatting or cross-referencing that is included in the Certificate may not be compatible with users' own systems and it is for the certifier to include their own formatting or cross-referencing if they consider it appropriate, provided that the Certificate remains in the form of the PSG Certificate of Title based on the CLLS Certificate of Title (Eighth Edition 2023), subject to any Disclosures.

The PSG has also taken the view that cross-referencing in the Certificate is not appropriate since the intention is not to amend the Certificate (and therefore its paragraph numbers should not change, but to disclose against each relevant paragraph).

Reliance on the Certificate and Limiting the liability of certifying solicitors

Some changes have been made to the provisions in the Certificate on Reliance and Limitation and they are highlighted in the Detail of the changes for the Eighth Edition above and are also referred to below.

Recipients of the Certificate should ensure that the definition of "Addressees" includes all relevant benefiting parties. The Certificate can be disclosed to a third party, but it cannot be relied on (clause 1.3).

The CLLS committee recognises that the certifier often seeks to cap its liability under the Certificate. For example, where the Certificate is part of a corporate transaction, liability will sometimes be limited to the same level as other liability limits on the transaction. Some certifiers argue that if they limit their liability to their own clients under terms of engagement letters, why should they not do so for third parties in respect of the Certificate?

The CLLS committee's view is that any limitation or cap on the liability of certifying solicitors (or any other type of limitation or cap) must be a matter to be agreed by the solicitors and the addressees on a case by case basis. In the Seventh Edition 2016 Update, the Guidance Note included some limitation wording as an example, but as mentioned in the Detail of the changes for the Eighth Edition, the Certificate now includes limitation wording in the front-end of the Certificate.

However, no figure is given for the cap. The cap is a matter of negotiation between the parties, which may be linked to the value of the deal, property or loan, but there are no absolutes here and the particular circumstances will dictate what is agreed. For example, if the property is of a high value, the parties will need to agree a sensible cap, which may be lower than the value of the loan or property. The certifying firm should check its internal procedures as to its policy on whether to limit its liability and, if so, the level of the cap.

Some certifiers will wish to use their own forms of limitation/reliance wording, although the certifier should highlight this as a Disclosure after the front end of the Certificate.

The CLLS committee recognises that the certifier 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. So clause 1.6 confirms that where the recipients of the Certificate ("Addressees") are more than one person, the certifier's aggregate liability to all the Addressees is no greater than the liability they would have had if the Addressees were a single person. An issue was raised with the CLLS committee about how this provision operates if the Addressees had different claims, for example, because one had senior debt and another mezzanine. The CLLS 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.

Clause 1.7 contains an acknowledgment that the Addressees are entitled to rely on the Certificate's statements even if any document or matter referred to in a statement is in the public domain or has been disclosed or made available in a number of specified ways such as via a data room. This is to prevent any argument that the Addressees cannot rely on the Certificate, because they or their professional team received Certificate information separately in the identified ways.

Clause 1.8 is an exclusion of personal liability for individual members, partners, shareholders, consultants or employees of the certifying firm. As mentioned earlier, 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.

In clause 1.10 there is a new deadline for the issue and service of proceedings in connection with the Certificate. The number of years to be referred to is a matter of negotiation between the parties having regard to the circumstances.

Disclosures

There has been no change in approach in the Eighth Edition to Disclosures.

There is a Disclosures box at the end of the main body of the Certificate before the Schedules and every statement in Part 4 and Part 5 of the Schedule is followed by a "Disclosures" box, where any Disclosure in respect of the statement can be inserted.

It is not necessary to insert "none" on each occasion if there are no Disclosures. Disclosures should be inserted in such a manner or style (e.g. italics) so as to distinguish them clearly from the statements and other provisions of the Certificate. "Disclosures" is used, rather than "qualifications", to avoid any confusion with the qualifications referred to in paragraph 3 of Part 1 of the Schedule.

A concern with allowing the insertion of Disclosures so close to the statements in the Certificate is the increased risk that the certifier unwittingly changes the substantive provisions of the Certificate. Consequently, as a matter of courtesy and good practice, when the Certificate is provided to the recipient, it should be accompanied by a blackline comparison document showing changes from the form of Certificate on the PSG Website.

The word "material" is used in various places in the Certificate. It was suggested in responses to the consultation on this Certificate that further guidance should be provided on what is "material". The CLLS committee considers that it is difficult to provide general guidance on this, as much will depend on the particular circumstances of the Property and the Transaction. This Note does highlight that there is some subjectivity in determining what is "material" and provides some specific examples in relation to paragraph 30 of Part 5 of the Schedule.

Information to produce the Certificate

A considerable amount of the information contained in the Certificate will be based on information provided by the owner of the Property. To that extent, the Certificate replaces the normal pre-contract enquiries. This means that the certifier will have to liaise closely with the owner of the Property (or solicitors on the owner's behalf) to obtain that information.

The terms of the Certificate (clause 3.2) state that the Company (or the purchaser of the Company) has confirmed in writing to the certifier, within the five working days before the date of the Certificate, that to the best of the knowledge, information and belief of the Company (or the purchaser of the Company) the information contained in the final draft of the Certificate is true and accurate in all respects. The certifier must ensure that such a confirmation is obtained. A Disclosure may have to be made where the Company (or the purchaser of the Company) cannot provide the confirmation, for example, there may be issues of confidentiality limiting the enquiries that may have been made, or, if there is an insolvency related sale, the Certificate may need to reflect the limited information that the Seller may provide.

In the case of the Company purchasing the Property from the Seller, or the shares in the Company that owns the Property being purchased from the Seller, it is appreciated that the Seller or the Seller's solicitors and its other advisers or agents are the primary source of knowledge and information about the Property and the Company/purchaser may have little information. However, as mentioned the Certificate requires the certifier to obtain the confirmation from the Company/purchaser - the Company/purchaser must highlight to the certifier if the confirmation cannot be provided.

The certifier will need to draw the Company's attention to the fact that the Certificate states that the Company (or its agent or representative) has inspected the Property not more than 20 working days before the date of the Certificate (paragraph 8.2 of Part 3 of the Schedule). If this is not the case, a Disclosure will have to be made, for example, where only a purchaser of the Company made the inspection (see clause 3.3.1(g)).

It is for the certifier to decide how best to elicit the information to produce the Certificate. To assist solicitors, examples of letters or questionnaires seeking information and confirmations from the owner of the Property or the purchaser of the shares in the Company that owns the Property appear on the PSG website, but the use of such letters and questionnaires is not obligatory.

Often, the Certificate will be given to a lender providing finance for the Company to purchase the Property, or for the purchase of the shares in the Company that owns the Property. In that case, the knowledge of the Company or the purchaser about the Property will be slight and it will be relying on the information provided by the Seller's solicitors. This is covered more fully in Company's confirmation where there is a Seller (below).

As mentioned, clause 3.3.6 confirms that the certifier will disclose in the Certificate where inadequate replies have been given.

The information required to produce the Certificate may come from a party other than the Company or the Seller, such as a managing agent or a company in the same group of companies as the Company. In that situation, it is very likely that the certifier will want to disclose that fact in the Certificate and the recipient will want to know the information source. Clause 3.3 (in a Seller context) provides an opportunity to disclose this.

In reporting on the sources of the information, the certifier is identifying the sources as a matter of fact and it is not expected that the certifier will evaluate or highlight any inadequacies in the information sources.

It is important for the certifier to have a clear audit trail as to the information relied on to produce the Certificate. Ultimately, it is a matter of judgement for the certifier to decide whether inadequate information from the Company, Seller or any other party requires a Disclosure against part of the Certificate.

It should not be forgotten that the recipient of the Certificate should obtain a warranty directly from the Company that the information provided by or on behalf of the Company to the solicitor so that it could produce the Certificate, is accurate. Where the Certificate relates to the purchase of shares in the Company that owns the Property, the warranty must be provided by the seller of the shares in the Company, rather than the Company itself.

Opinions on enforceability

There remains considerable debate about the extent to which the certifier should advise on the enforceability of provisions, for example, in leases. Should the certifier, for example, highlight that a lease provision may fall foul of competition law? Alternatively, should the certifier give the information in the knowledge that the recipient of the Certificate will take its own professional advice on the Certificate's contents? The vast majority of the CLLS committee considers that the latter approach should be adopted and the PSG agrees with this approach. Of course, the certifier should not deliberately mislead, but should give sufficient information about the relevant provision to enable the recipient's solicitors then to provide the recipient with the legal analysis including on questions of enforceability.

If the recipient of the Certificate, or those advising them, consider that more information needs to be provided by the certifier to enable a proper assessment to be made of any risks disclosed by the Certificate, the recipient or those advising them should be entitled to ask for this information.

Provision of documentation in addition to the Certificate

Another point which sometimes arises in relation to the Certificate is whether it should annex copies of documents, or extracts from documents, or should instead summarise the effect of those documents without attaching copies of them. The PSG's view is that, normally, the Certificate should summarise any relevant documents and that it should not be necessary to annex copies of them to it. 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, the PSG appreciates that there are 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.

See Other miscellaneous points on the Certificate below on the question of whether to annex search results under Part 6 of the Schedule to the Certificate.

Where documents, such as leases, are required to be provided in advance of completion, for example, as a condition precedent for lending purposes, the recipient of the Certificate (for example, a lender) is under no obligation to examine the documents and may rely solely on the contents of the Certificate including any annexures to the Certificate. Reference should also be made to clause 1.7 of the Certificate.

Special purpose vehicles

Property is frequently bought in the name of a company specially formed for that purpose, namely, a special purpose vehicle or SPV. Those giving a Certificate may wish to consider whether, in those circumstances, it is appropriate for the Certificate to be addressed to the SPV. If subsequently the shares in the SPV are sold, rather than the Property itself, the liability of the certifier will continue for the benefit of a second purchaser. Had the Property been sold, liability would effectively have ceased on sale.

Company's confirmation where there is a Seller

Clause 3.3 deals with the situation where the Company is purchasing the Property from the Seller or the shares in the Company that owns the Property are being purchased from the Seller as part of completion of the Transaction. The Seller is the primary source of knowledge and information about the Property.

Clause 3.3 provides information on how the Company acquired its knowledge, which will enable the recipient of the Certificate to understand more clearly the basis for the Company's confirmations, whether it is the Company's own investigations and searches, the Seller's solicitors' replies to the Due Diligence Questionnaire or other enquiries, other material provided by the Seller or its advisers, or an inspection of the Property by the Company (or the purchaser of the Company) or its agent or representative. There is also opportunity to disclose the identity of other parties who have provided information.

In relation to the Company's confirmations, it is made clear that the Seller and its advisers are the primary source of the Company's knowledge and that while the investigations of the certifier give no reason to doubt the accuracy of information provided by the Seller, the certifier does not accept responsibility for the information. There is also a provision that references in the Certificate to notices given or received by or actions taken or expected by the Company refer to the Company's knowledge of notices given or received by or actions taken or expected by the Seller. The recipient of the Certificate is also likely to want to know when replies or other information provided by the Seller are inadequate and clause 3.3.6 confirms that this is disclosed in the relevant part of the Certificate. Normal caveats relating to the Seller's awareness given by the Seller's solicitors in providing replies to enquiries (such as "not so far as the Seller is aware") should, usually, not be treated as an "inadequate" reply. An inadequate reply will, usually, be a lack of reply by the Seller's solicitors.

There are specific references in clauses 3.2 and 3.3 dealing with the situation where the shares in the Company that owns the Property are being purchased from the Seller as part of completion of the Transaction. So there is wording in square brackets in clauses 3.2, 3.3, 3.3.1(e) and 3.3.1(g) for use if the Certificate is given in connection with such a purchase and so that the statements in clauses 3.2 and 3.3 are applicable to the purchase, subject to any Disclosures.

Construction documents

The Certificate should reveal, through Disclosures to the statements in paragraph 25 of Part 3 of the Schedule, whether there have been any construction works and provide basic details. As mentioned above, there are optional Disclosures after the front-end of the Certificate and before the Schedule that refer to a Construction Report, which may be produced by the provider of the Certificate or a third party in the relevant circumstances.

It is not proposed that the CLLS committee (or the PSG) will produce a pro-forma Construction Report, as much depends on the particular circumstances. Construction reporting should be appropriate in the light of the relevant transaction and the Certificate's usual use for investment/portfolio situations. The certifier and recipient of the Certificate should agree the extent of the construction reporting and how any Construction Report dovetails with the Disclosures against the relevant paragraphs of the Certificate.

If there is a Planning and/or Construction Report produced by the provider of the Certificate, it is envisaged that this will be annexed to the Certificate.

Paragraph 3.3 of Part 1 of the Schedule to the Certificate provides that except as disclosed by the results of the searches listed in Part 6 of the Schedule, the Certificate does not consider technical reports or surveys relating to the Property's condition and the recipient of the Certificate should consider what investigations it wishes to make in relation to those matters.

Insurance, licensing, environmental reports and climate change risks

The Certificate does not deal with insurance details, licensing or environmental reports in relation to the Property since those matters are, usually, dealt with separately. Nor as mentioned earlier, does the Certificate deal with climate change risks to the Property. The recipient of the Certificate should consider what investigations it wishes to make in relation to those matters.

In relation to the statement in paragraph 9 of Part 3 of the Schedule on title policies, the certifier should check for any disclosure restrictions in the relevant insurance policies.

Statement of Lease and Letting Document provisions

The Certificate contains a series of statements describing material provisions of a "typical" headlease (in the "Lease" Schedule) and institutional occupational lease (in the "Letting Documents" Schedule). Such an approach is intended to reduce the amount of information in relation to the Lease and Letting Documents that needs to be incorporated in the Certificate. The certifier will highlight any departures from the Certificate's statements in the Disclosures box immediately below each statement.

This approach raises the question of how much of a departure from the wording of a statement must there be for a Disclosure 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 and confirmation that statements are "true and accurate" is not intended to mean that the wording is the same. The PSG's view is that a Disclosure should be made when the certifier considers that there is a material difference in the wording or its legal effect. While this introduces an element of subjectivity, the certifier elsewhere in the Certificate certifies as to whether or not there are any other material matters. The PSG also considers that the Certificate's approach makes it more useful, in that it focuses on those aspects that are different from the "norm".

There is a separate definition of Premises for use in the context of the Lease and Letting Documents. This distinction is particularly relevant where the extent of the let premises differs from the Property.

Please also see Detail of key changes for the Eighth Edition 2023, Part 5 of the Schedule above for further information about the changes to the statements in Section 2 of Part 5 of the Schedule.

Treatment of Letting Documents

Part 5 of the Schedule requires Sections 1A and 1B (Details of Letting Document and Licences, letters of consent and other supplemental documents) and Section 2 (Statements with Disclosures) to be completed for each standard Letting Document for the Property. This recognises that there will usually be at least one and possibly more standard types of occupational lease for a Property and Part 5 of the Schedule requires all of Sections 1 and 2 to be completed for each standard.

For all the other Letting Documents at the Property, the Supplement to Part 5 of the Schedule envisages that they may be certified by reference to one or more of the standard Letting Documents. The extent of the details to be included and the recording of material variations and licences etc are to

be agreed between the certifier and recipient of the Certificate and included in the Supplement. To assist users, the Certificate provides in the Supplement a tabular example of information that could be required for each Letting Document, with a box below the details of each Letting Document for Disclosures of material variations from the relevant standard. It is not mandatory to use this table.

As an alternative, Sections 1 and 2 of Part 5 of the Schedule may be completed for every Letting Document at the Property without using the Supplement.

Sublettings

A question that arises in relation to reporting on letting documents is whether the Certificate should cover leases derived from Letting Documents, such as a subletting. If there are such leases, they will need to be mentioned, for example, as a Disclosure to paragraph 22 of Section 2 of Part 5 of the Schedule, which relates to who is in possession of the Property. It is suggested that, generally, basic details should be provided of the "subletting" such as date of lease, parties, current tenant, premises and current rent. The recipient of the Certificate can request more information, if considered necessary. Treating such sublettings as Letting Documents is likely to create confusion in the presentation of the Certificate.

One possible exception where the subletting may need a more thorough treatment is if there is some underlying commercial necessity to look at the subletting, such as where the tenant under the Letting Document is renouncing its interest.

Other miscellaneous points on the Certificate

Please also consider Detail of key changes for the Eighth Edition 2023 above.

Part 1 of the Schedule

Paragraph 1 Definitions and Interpretation

"Benefit"- this does not include rights or servitudes being acquired through prescription, since no right has crystallised at that stage.

"Disclosures" – this includes disclosures made against Certificate statements and other disclosures relating to the Certificate such as some of the information provided in Part 2 of the Schedule and the disclosures in Part 6 of the Schedule.

"Letting Document" – this includes continuation of tenancies after the contractual expiry date whether by tacit relocation or otherwise.

3.3 The Qualification confirms that the certifier has not considered other technical reports or surveys relating to the Property's condition or any climate change risks to the Property, but the Qualification is subject to any disclosure in Part 6 of the Schedule.

3.10 This is a Qualification that the certifier has not considered whether a right is in the process of being acquired through prescription (see "Benefit" above), nor whether it has been acquired through prescription (unless it is set out in Part 2 of the Schedule).

Part 2 of the Schedule: Property Details

The Benefits in Section 2 specifically include rights granted to the tenant under the Lease and the Burdens in Section 3 specifically include the rights reserved to the landlord under the Lease. This has been done to ensure they are included in paragraphs 3.1 and 4.1 respectively of Part 3 of the Schedule.

Any substation lease or wayleave should be included as a Burden in Section 3 (and not in Part 5 of the Schedule). It is for the certifier and recipient of the Certificate to agree the level of detail required on such documents.

Part 3 of the Schedule: Matters affecting the Property

1.2.2 The statement does not cover title documents registered in the Land Register since the registration will not have taken place without the Land Register having been provided with the LBTT certificate (where relevant).

2 The wording including the use of the words "appears to", reflects widely held concerns about the difficulties of the certifier (for example, because of deficiencies sometimes encountered with local authority plans) in confirming that the Property abuts a roadway maintainable at public expense. The wording sets out the process commonly adopted by certifiers.

A confirmation that the Property appears to abut a roadway maintainable at public expense at each point where access is gained etc, can be given where it is not evident from a review of the plans referred to in paragraph 2.2 and any consultation with the Company, that there is a gap between the Property and the roadway at any such point. In those circumstances (where there is no manifest problem), there should be no need as a matter of course for a highway plan to be annexed to the Certificate.

4.4 The confirmation that no person is in the process of acquiring a Burden through prescription is stated to exclude rights to light and rights to air. This is also the case with paragraph 8.2. Rights to light or air are not ordinarily within the scope of the Certificate.

Part 4 of the Schedule: The Lease Section 2

4.3 There is no wording relating to the disregard of tenant's improvements, since the Lease (usually being a long lease without a rack rent) is unlikely to have a rent review clause with such a disregard.

15 The wording reflects the fact that the certifier can only give the confirmation in relation to consents to works or change of use that have been revealed to them, but there is also a Company confirmation that there have been no other works or change of use.

16.2 This paragraph confirms that no superior lease lets property other than the Property. This provides an assurance that the lease cannot be irritated, because of a breach in relation to other property let under the superior lease over which the Company has no control.

Part 5 of the Schedule: The Letting Documents

Section 1B – the certifier and the recipient should agree the level of detail to be included on the Licences and other supplemental documents and, among other matters, there should be highlighted any material inconsistencies between those documents and the tenant's obligations under the Letting Document. To the extent that the Licence or other supplemental document varies the Letting Document, it should be made clear whether the effect of the variation has been included in Section 1A of, or as a Disclosure in Section 2 of, Part 5 of the Schedule.

7.4 The certifier should, among other potential matters, mention in the Disclosures if the tenant is required on yielding up the Premises to remove any alterations or additions made to the Premises before the term of the Letting Document.

8.3 In terms of the level of detail required in the Disclosures for the restrictions and conditions in relation to assignation, while this should be a summary, the key aspects of each restriction or condition need to be clearly specified. The certifier and the recipient should agree the level of detail to be included.

30 Examples of other material matters could include provisions relating to environmental contamination; keeping open the Premises; "green lease" drafting; and landlord's obligations

(other than where already referred to in the Certificate's statements). There may of course be other material matters and it is for the certifier to determine what is material.

Part 6 of the Schedule

While plans from a search result might be annexed to the Certificate (for example, to show the route of cables or pipes), the search result itself should not normally be annexed to the Certificate and the certifier should instead disclose any material points arising from the result – this is consistent with the approach set out above under Provision of documentation in addition to the Certificate.