

## **CITY OF LONDON LAW SOCIETY**

### **INSURANCE LAW COMMITTEE**

**Minutes of a Meeting held at the offices of Allen & Overy at 5pm on Tuesday 23rd September 2008**

#### **Present:**

Ian Mathers (Chairman) – Allen & Overy  
Martin Bakes – Herbert Smith  
Michelle Bramley – Freshfields  
Helen Clark (for Richard Spiller) – EAPD  
Beth Dobson (for Glen James) - Slaughter & May  
Glen James (for part) – Slaughter & May  
Stephen Lewis – Clyde & Co  
Geoff Lord – Kennedys  
Kenneth McKenzie – Davies Arnold Cooper  
Martin Mankabady – Mayer Brown  
Catherine Hawkins – Berrymans Lace Mawer  
Terry O'Neill – Clifford Chance  
Anna Tipping – Linklaters  
David Wilkinson - Dewey & LeBoeuf  
Paul Wordley – Holman, Fenwick and Willan

#### **Apologies for absence:**

Charles Gordon – DLA Piper  
Michael Mendelowitz – Norton Rose  
Christian Wells – Lovells

#### **1. Approval of minutes**

The minutes of the meeting of 10th June were approved.

#### **2. Membership**

Emily Benson's membership of the Committee was approved and David Wilkinson was welcomed to his first meeting.

#### **3. Insurance Contract Law**

Stephen Lewis provided an update on the Law Commission's progress, drawn from a presentation by David Hertzell at BILA's recent half-day conference. They had received no clear answers to their issues papers on business non-disclosure and intermediaries and would probably be sending out further papers on, at least, non-disclosure. As for treating small businesses like consumers, they were now looking more at "micro-businesses", but had not taken any decision on the point. They should also be sending out further issues papers on post-contractual good faith later in the year, starting perhaps with the late payment of damages. It seemed that they were on track to produce a second CP in 2009 and a final report in 2010. Helen Clark noted they were intending to circulate a summary of responses on business insurance next month which could give some indication of their thinking.

#### **4. Rome I**

The Chairman noted that the UK had applied to opt in to this Regulation; and although he had not seen any formal response, it seemed like a done deal.

#### **5. Part VII FSMA/other provisions**

The Chairman reported that he had been in touch with Jonathan Goodliffe, who proposed to submit a paper to the Committee identifying a number of technical defects in Part VII and other provisions of the FSMA; and suggested that this could be a suitable item for the next quarterly meeting in December. Michelle Bramley agreed: a draft paper was being considered within Freshfields.

#### **6. Equitable Life: Parliamentary Ombudsman's Report**

It was noted that there had been no substantive response by the Treasury to this report but Stephen Lewis drew attention to action taken by Equitable's Board and by EMAG by way of encouraging policyholders to write to their MPs and press for steps to be taken to compensate those who had suffered loss. There appeared to be some possibility of legal action should the Treasury refuse. It was noted that while the Ombudsman had made a number of findings of maladministration by the regulatory authorities and concluded that it was likely that many policyholders were likely thereby to have suffered a relative loss compared with alternative investments, she had not made any individual findings and instead had recommended that the Treasury and Parliament should establish a compensation scheme for that purpose, with the suggestion that it should be able to pay out within two years.

#### **7. AIG crisis**

It was noted that the steps which were being discussed to restore this group's financial position, following a deterioration in its FGI business (written through its subsidiary AIG Financial Products), were far from being finalised. The steps included both asset sales by the group and the \$85 billion loan from the Federal Reserve Bank of New York, but the details were far from being finalised, including the nature of any stock which might be issued to secure the loan. Meanwhile, individual holders of AIG policies would need to make their own minds up as to the risk attached to any renewals. Although it might well be (as brokers' reports appeared to suggest) that the group's non-FGI businesses would not be substantially affected, there must be some risk that if individual policyholders could see a viable option to renewal, they would take it. It was not easy to predict what effect the likely downsizing of AIG would have on the market. It would probably vary according to particular sectors. For D&O, in which AIG played a dominant role, there could be severe disruption. Paul Wordley noted that if the steps mentioned above were successful, various security ratings which had been downgraded could reasonably be expected to be restored. But he also drew attention to the regulatory spotlight which would surely be brought to bear generally on the sector; in particular the NYID's suggestion that derivative instruments of the kind that had been backed by AIG, or some of them, should be brought into insurance regulation. Meanwhile, the Paulson plan for a \$700 billion bail-out fund appeared to have run into significant opposition in Congress and it was difficult to forecast how this was likely to work through. It was not clear that the UK would wish to, or be capable of, following suit.

Geoff Lord noted that certain US class actions had already been opened against AIG's directors.

#### **8. CLLS profile raising exercise**

The Chairman reported on a recent discussion which he had had with the Society and Lehmann Communications about the desirability (or not) of raising public awareness of the activities of expert committees, with a view to increasing the weight which the views of the committees might carry. Specifically there had been a reference to (1) the provision of third party comment to the press, of the kind which commentators frequently sought from, or possibly on occasion planted by, firms; and (2) coordination with related trade and professional groups such as, in the case of insurance, the ABI, BIBA, the CII or

AIRMIC. He had expressed some reservations on both fronts on the ground that representations made by the Insurance Law Committee had generally aspired to be objective and dispassionate and should have a particular value for that reason. However, he could see advantage in expert committees becoming better known outside the Society and in a proper case the kind of steps suggested at (1) and (2) would have merit.

Stephen Lewis said that his recent contacts with the Law Commission confirmed that the relatively low key nature of the Committee's representations to them had at any rate not detracted from their influence, since the Commission had said that they had found them of the highest quality and value. However, there was general approval of the idea of providing third party comment on a case by case basis, always recognising that the Committee might very well, in any particular case, have difficulty in settling an appropriate comment, particularly against a tight deadline. It was agreed that the Law Commission's forthcoming papers could provide a suitable opportunity to trial the approach. It was also agreed that there would be value in seeking to coordinate our activities with other groups, and Helen Clark offered to contact her colleague Richard Hopley, who has spoken at various AIRMIC conferences and has contacts there, with a view to meeting up with them for this purpose.

In addition, Anna Tipping suggested that there were some more modest measures which the Society could already take, such as ensuring that written representations draw links to the Society's website and thus the nature and scale of the committees' activities; and publishing press releases on suitable subjects.

The Chairman undertook to report these thoughts to the Society.

## **9. CLLS Associate Forum**

The Committee welcomed the suggestion that the Associate Forum, if it so wished, should nominate one of its members to attend meetings of the Committee as an observer.

## **10. Training**

This item brought forward previous discussion as to whether the Committee could add value to the procedures adopted by firms for training solicitors involved in insurance work. However, the Chairman considered that anything the Committee might do, if it were to be of any real use, would be likely to be very resource intensive and he doubted that we should get into this field unless there was a clear demand. This was agreed. Anna Tipping noted that firms were likely to have very different demands, depending upon the nature of their insurance practices; and in her view, training was normally only effective if it was keyed into actual work experience.

## **11. Recent court decisions**

There was some discussion of *Mopani Copper Mines v Millenium Underwriting* involving crossed out language in a policy wording which the judge held to be admissible as an indication of the parties' agreement as to coverage which had not been agreed; and, following *Kidsons v Lloyd's Underwriters*, further litigation about the conditions of compliance with a requirement to notify circumstances which may give rise to a claim. It was understood that the Court of Appeal's judgment in *Wasa v Lexington*.

## **12. Items for future attention**

Beth Dobson said that the FSA's promised paper on the implementation of Solvency II might be issued within the next few days and that HMT's paper on the implementation of the Acquisitions Directive had just been published. The Chairman undertook to review these papers and consider whether they should be brought before the Committee. There was also some discussion of the proposed Equality Bill, particularly as regards its potential impact on premium differentials based upon age.

## **13. Next meeting**

The next meeting will be held at 5.00 pm on 9th December at the offices of Allen & Overy.