

**CITY OF LONDON LAW SOCIETY
FINANCIAL LAW COMMITTEE**

**Minutes of a meeting held at the office of Eversheds, 1 Wood Street, London EC2V 7WS
on 11 September 2013 at 1.00pm**

Present: Dorothy Livingston (Herbert Smith Freehills – Chairman)
Simon Roberts (Allen & Overy)
Nigel Ward (Ashurst)
John Naccarato (Cameron McKenna)
Charles Cochrane (Clifford Chance)
Nick Swiss (Eversheds)
Alan Newton (Freshfields)
Jeremy Stokeld (Linklaters – alternate for David Ereira)
Emma Giddings (Norton Rose – alternate for Richard Calnan)
John Woodhall (Sidley Austin – alternate for Matthew Dening)
John Davies (Simmons & Simmons)
Presley Warner (Sullivan & Cromwell)
Mark Evans (Travers Smith)

Apologies: Philip Wood (Allen & Overy)
David Ereira (Linklaters)
Richard Calnan (Norton Rose Fulbright)
Matthew Dening (Sidley Austin)
Sarah Paterson (Slaughter & May)

In attendance: Rachael MacKay (Herbert Smith Freehills – taking minutes)

1. **APOLOGIES FOR ABSENCE, MATTERS ARISING, MINUTES OF LAST MEETING, MEMBERSHIP**
- 1.1 The minutes of the last meeting which took place on 22 May 2013 had been circulated and were now approved.
- 1.2 Apologies for absence were received from David Ereira (Linklaters), Richard Calnan (Norton Rose Fulbright), Matthew Dening (Sidley Austin), Sarah Paterson (Slaughter & May) and Philip Wood (Allen & Overy).
- 1.3 The Chairman reminded the Committee that the appointment of a new deputy Chairman and the future membership of the Committee was still under consideration. The meeting decided to postpone further consideration of this matter until the next meeting.
- 1.4 The appointment of new members following the resignations of Sarah Paterson and Geoffrey Yeowart was considered and the candidates put forward and following advertisement, were reviewed. It was concluded that the best qualified candidates were Penny Angell of Hogan Lovells and Andrew McClean of Slaughter and May. There was no basis at present for further expanding the Committee and all candidates would be advised accordingly and thanked for their applications.

2. **REGISTRATION OF CHARGES**

The Committee had already received an update on this item from Richard Calnan. In summary the new registration arrangements seemed to be working quite well, with those using the web filing system being pleased with the speed of the registration process.

One issue had arisen among property lawyers in relation to rentcharges which were no longer expressly excluded from the registration requirements. It was hoped that this unfortunate issue could be resolved, but meantime it was clear registration was advisable.

3. **SECURED TRANSACTION REFORM WORKING PARTY**

The Committee had already received an update on this item from Richard Calnan and a draft discussion paper on fixed and floating charges had recently been circulated to the working party for comment.

4. **CASE: *FONS HF (IN LIQUIDATION) V CORPORAL LIMITED AND ANOTHER* [2013] EWHC 1801 (CH)**

The Committee noted the recent *Fons* case in which the court held that a shareholder loan agreement did not fall within definition of a "share, security or debenture", which the Committee felt was the right outcome. It was also noted that an appeal had been filed, which was currently scheduled for hearing between December 2013 and April 2014. The Committee would await further developments.

5. **COMPETITION COMMISSION PROVISIONAL DECISION ON REMEDIES IN STATUTORY AUDIT SERVICES MARKET INVESTIGATION**

The Committee was reminded that the Competition Commission had conducted an investigation into the statutory audit services market and, in July, had announced its provisional decision on remedies which included a proposal to prohibit provisions in loan agreements which restrict the choice of a company's auditor.

The terms of the proposed order would require consideration and, if appropriate, it was agreed that the Chairman would write to the Competition Commission to explain any concerns that the proposed remedy would affect third parties, in the UK and elsewhere.

Afternote: To be considered further in the light of the proposed application of the order to UK registered companies, rather than lenders or their advisers. The timetable provides for informal consultation this month and next and publication of draft orders in January with a 30 day consultation period.

6. **BIS TRANSPARENCY AND TRUST DISCUSSION PAPER**

The Committee's attention was drawn to a discussion paper issued by BIS entitled "Transparency & Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business" dated July 2013. It was reported that whilst the discussion paper was mainly relevant to corporate and insolvency lawyers, the "beneficial ownership" aspect could have impact on finance transactions where lenders take security over shares.

It was agreed that the Chairman would contact the chairman of the Company Law Committee with a view to contributing to any response which that Committee might submit on the share security aspects.

7. **FINANCIAL STABILITY**

7.1 **EU Recovery and Resolution Directive proposal**

The Law Society Multi-Disciplinary working group and the FMLC were both continuing to comment to the EU and UK authorities on this proposal and the Committee continued to keep a watching brief. Uncertainties on bail-in remain.

Afternote: FMLC submission of 18th October 2013. <http://www.fmlc.org/Pages/home.aspx>

7.2 Treasury/DBiS Banking Reform: Changes in Financial Services Act 2012, Financial Services (Banking Reform) Bill, draft subsidiary legislation

The Committee was reminded that the Bill provides a "ring-fencing" mechanism for large retail banks, which is intended to insulate them and their customers from certain activities and make these banks easier to resolve. Draft statutory instruments had been issued over the summer. Most issues are prudential or regulatory, but some important issues relate to practicality and the ability of ring-fenced banks to meet client needs in international financial transactions. There were also some drafting anomalies. The FMLC and the Law Society Committee are both active and responses are attached.



FMLC Issue 175 -
Addendum to Ring-fencing



Law Society
response - Banking Reform

8. INSOLVENCY

8.1 Financial Sector Resolution

The Committee was reminded that at the end of July the Treasury had published a summary of responses to its "Financial sector resolution: broadening the regime" consultation, which had set out a series of proposals and questions on enhancing the mechanisms available for addressing the failure of systemically important "non-banks". The Government proposes to extend the Banking Act powers by narrowing the definition of investment firms through secondary legislation and by extending the stabilisation powers of group companies to facilitate the resolution of a failing entity.

Draft legislation was awaited.

Afternote: now published on Treasury website.

8.2 Special Administration Regime proposals for payment and settlement systems

It was reported that the proposals for a special administration regime were intended to ensure continuity of clearing and settlement services if such a service provider were to fail. The proposals were much narrower than the Banking Act regime and were part of an international initiative. More proposals were expected later in the autumn.

8.3 Draft Deregulation Bill

It was reported that this wide ranging Bill was intended to reduce the burden on business and others included some insolvency measures, which, it was felt, were more within the remit of the CLLS Insolvency Law Committee to consider.

8.4 Insolvency Red Tape Challenge

Nothing new to report in the banking context. The Committee would keep a watching brief.

Afternote: The Insolvency Committee's comments on proposed changes are on the CLLS website.

8.5 Application of Insolvency Act to Industrial and Provident Societies and Credit Unions

The Committee was reminded that the Government was proposing to create formal insolvency regimes for Industrial & provident Societies and Credit Unions. It was further reported that the Treasury was expected to issue draft subsidiary legislation for consultation very soon. The Committee would keep a watching brief on developments, but felt that this was probably outside of its remit.

9. **INDICES AND BENCHMARKS**

The Committee was reminded that an EU Consultation on a Possible Framework for the Regulation of the Production and Use of Indices serving as Benchmarks in Financial and other Contracts had closed in November 2012. In June an ESMA-EBA Final report on Benchmark Setting Processes had been issued. The Committee would continue to keep a watching brief on developments.

10. **PROTOCOL FOR DISCHARGING COMMERCIAL MORTGAGES**

It was reported that the draft protocol for discharging commercial mortgages which the CLLS Property Law Committee may be nearing a final draft. Views among members of this Committee were, however, divided as to whether the protocol was suitable for multi-party and multi-jurisdiction deals. Further comments would be sent to the Land Law Committee.

11. **EUROPEAN ACCOUNT PRESERVATION ORDER PROPOSAL**

The Committee was reminded that this proposal was to create a new type of EU freezing order an "EAPO" that could be issued before judgment where considered necessary and automatically after any judgment. This Committee had responded to the consultation on the proposals in September 2011, setting out its concerns in relation to finance transactions and loan agreements. The UK had chosen to opt out of the proposals, but was able to participate in the EU discussions. According to the European Parliament forecast, an EP Committee first or single reading plenary session was scheduled for 3 February 2014.

12. **ANY OTHER BUSINESS AND CLOSE**

12.1 The recent case of *Torre Asset Funding Limited v The Royal Bank of Scotland plc* [2013] EWHC 2670 (CH), concerning the duties of an agent bank, was noted.

12.2 There being no further business the meeting was closed.

Nothing in these minutes should be considered as legal advice or relied upon as such.