

Client KENNEDYS
Matter GAL/ CLLS-INSURANCE LAW-SUB COMM
File no. K24-106613
Date 05 September 2012
Author Natalie Lennon

Kennedys

Attendance note

GAL/ CLLS-INSURANCE LAW-SUB COMM

Meeting at Kennedys Offices at 25 Fenchurch Street at 5pm on 4 September 2012

In attendance:

John Farrell, Kennedys - Chairman ("JPF")

Terry O'Neill, Clifford Chance ("TO")

Beth Dobson, Slaughter and May ("BD")

Jonathan Goodliff, Freshfields ("JG")

Michael Mendelowitz, Norton Rose ("MM")

Graham Ludlam, DAC Beachcroft ("GL")

Richard Spiller, Holman Fenwick ("RS")

1 Apologies for absence

1.1 JPF apologised for the absence of Geoff Lord ("GAL") and noted that he himself was not as familiar with the matters for discussion as GAL would have been.

2 New Consultations

2.1 Law Commission Consultation: Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties

2.1.1 JPF advised that GAL is preparing a response to this but JPF would appreciate the committee's view as to how we move forward.

2.1.2 MM advised that BILA are more advanced in their response and have circulated a draft for comment, which broadly agrees with the proposals.

MM will check with BILA if he can forward their draft to GAL for his consideration.

- 2.1.3 TO was concerned that the intention intended to be a patch-up rather than a re-write of the Marine Insurance Act - in his view a patch-up would result in a complete mess. After some debate it was agreed that the language of the consultation indicates that a patch-up by way of deletions and amendments is intended (see paragraph 570 of the full consultation document for example).
- 2.1.4 MM did not think BILA had raised this concern but considered it a point worth making. JG noted that a rewritten Act would be more difficult to get through Parliament, which is probably why the consultation has opted to amend. GL will clarify with David Hertzell what the intentions are with regard to rewriting/amending the MIA.
- 2.1.5 JPF asked if the impression of the committee was that the Law Commission had listened to the feedback received following the earlier consultation. MM believed that they had listened.
- 2.1.6 TO said that the intention behind the amendments appeared to him to be to make result uncertain for insurers. The amendments will make an insurer lose confidence in warranties as the certainty of the outcome of their breach will be lost. It needs to be recognised that if cases do go to court pursuant to these amendments then the cases will necessarily become more complex because the questions that will need to be raised will be more complex. TO is not against the amendments but it must be recognised that this proposed solution is imperfect and is unlikely to receive much support from the market.
- 2.1.7 MM queried whether the agenda behind the proposals is a desire to encourage the insured and its insurers to negotiate; is this a valid motivation for the government?
- 2.1.8 MM noted that one of the specific questions posed is whether the proposals will reduce litigation costs - in his view they will not because the proposals raise more questions and more complex questions, as identified by TO. RS agreed that the proposals take the current law from black and white and introduces shades of grey, thus increasing the scope for litigation. In simple cases, the questions are more easily answered these days as insurers operate using models by reference to a proprietary model in, for example, motor policies, would show what the underwriter would have done had he received particular information (for example, increased premium, added restrictions). Obviously the larger the insured entity and the more bespoke the policy the less applicable are the models.
- 2.1.9 TO agreed with RS, summarising that the intention appears to be to shift the onus onto the underwriter to ask questions and to explain why they need to know certain information.

- 2.1.10 Turning to the warranty questionnaire, MM considered the proposal to change the effect of warranties where their breach has no causal connection with the loss suffered. The example of where insurance is not carried for the purposes of hire (e.g. in respect of a car or boat) was adopted. TO noted it would be very difficult to conceive a circumstance where the breach of a hire warranty could in itself *cause* the accident; the purpose of the warranty is to restrict the use of the item.
- 2.1.11 MM appreciated TO's point but noted that his thoughts run to whether the insurance regimes in other jurisdictions have been considered.
- 2.1.12 RS noted the suspensive nature of the proposed warranty regime would result in a boat in an accident which did not have passengers at the time, but which had at other times been carrying passengers in breach of a warranty, would be covered. One could argue that if the boat had not been in the habit of carrying passengers it might not have been out at sea at the time.
- 2.1.13 MM noted that there is recognition in the proposal that some breaches cannot be cured. RS added that many warranties speak to existing fact rather than future conduct.
- 2.1.14 TO said this questionnaire also inevitably requires a separate response from the committee. **JPF will check whether GAL is also intending to prepare a response to this questionnaire.**
- 2.1.15 **It was agreed that the committee should produce its own response to the Law Commission Consultation** because our views may differ to BILA (as they did for the Consultation on Insurance Remedies for Fraud) and the Law Commission would appreciate two informed response rather than receiving just the one.
- 2.2 FSA Consultation: Review of the client money rules for insurance intermediaries
- 2.3 BD noted that we did not respond to the original consultation. JPF noted that GAL did not think we needed to respond, with which BD and TO agreed.
- 2.4 The issue of "prudent over-segregation" was raised by RS, who whilst he agreed there was no need for this committee to respond, he would look at the issue from a broker's perspective.
- 2.5 TO queried whether this "prudent over-segregation" issue was related to delinking in Lloyds. TO explained that funds are linked to the slip in Lloyds - once the slip is processed, premium monies are automatically moved from the broker's account to the insurer irrespective as to whether the broker has received premium funds from his insured client. "Delinking" stops this automatic process so that the broker can wait until funds are received. Delinking is preferable as when the accounts are linked there is a higher audit requirement and the FSA is uncomfortable with the process.

2.6 RS had never considered “prudent over-segregation” issue to be related to premium trust funds but he will consider the Lloyds delinking issue as well. RS noted that CASS 5 considers intermediary funds issues. Will also research whether statutory trusts and non-statutory trusts are in fact both statutory trusts, as observed by TO.

2.7 FSA Consultation: tracing employers’ liability insurers - historical policies

2.7.1 It was agreed that this is not a matter to which this committee needs to respond.

2.8 FSA Consultation: Packages bank accounts

2.8.1 It was agreed that this is not a matter to which this committee needs to respond - it is more suited to the banking/FSA sub-committee.

3 Robert Carr

3.1 The committee members in attendance all endorsed Robert Carr’s membership of the Insurance Law Sub-Committee.

4 AOB

4.1 Notice of Agenda

4.1.1 JG requested more notice of the agenda. A simple agenda would suffice 7 days before the meeting. A detailed agenda such as the one provided today is very useful but he would not expect production of such a document for each meeting.

4.2 IMD2 (Insurance Mediation Directive)

4.2.1 TO noted that this was released in July 2012. BD said that by the time it comes out as a consultation in the UK it will be too late for views to be factored in to the EU’s consideration, but we are obliged to wait for the consultation to filter down to national level.

4.2.2 RS observed that the brokers will be keen to influence this and JG added that the ABI and similar bodies will be in a better position to respond to the consultation. The commission have a list of significant stakeholders to whom they have regard - JG does not believe any lawyers/law firms are on this list. RS noted that BIPAR would be involved and include Aon, Willis and so on.

4.2.3 The issue is significant because it touches on whether the broker is ever acting as agent for the insurer. By way of example, if an insurer pays claims monies to a broker, the broker does not transfer those funds immediately because it is waiting for other insurers to make their claims payments, meanwhile the insured has financial issues and cash flow problems lead to its customers/market to lose faith and for the company to fail - is the broker holding the claims money as agent for the insurer? Another scenario is when

the broker firm folds before it can pass monies on to the insured/insurer - TO noted that insolvency priorities need to be considered and a statutory trust did not appear to him to be the solution.

- 4.2.4 It was agreed to include this as an agenda item for December 2012 simply as a reminder to check whether the Treasury Consultation has started yet.

5 Meetings for December and 2013

5.1 Next meeting: 4 December 2012

5.2 Meeting dates for 2013 to be agreed at the next meeting