

CITY OF LONDON LAW SOCIETY

FINANCIAL LAW COMMITTEE

MINUTES of a meeting held at the offices of Sidley Austin, Woolgate Exchange, 25 Basinghall Street, London EC2V 5HA on Wednesday 2 December 2009 at 12.45pm.

Present: Dorothy Livingston (Herbert Smith LLP - Chair) ("DKL")
Geoffrey Yeowart (Lovells) ("GY")
John Davies (Simmons and Simmons)
David Ereira (Linklaters)
Robin Parsons (Sidley Austin)
Mark Campbell (Clifford Chance) ("MC")
Richard Bethel-Jones (Allen & Overy)
Sarah Paterson (Slaughter & May)
Alan Newton (Freshfields Bruckhaus Deringer)
Mark Evans (Travers Smith)
Richard Calnan (Norton Rose)
Nigel Ward (Ashursts)
James Curtis (Denton Wilde Sapte)
Simon Roberts (Allen & Overy)
Philip Wood (Allen & Overy)

In attendance: Rachael Hoar (Herbert Smith LLP – taking minutes)

1. APPROVAL OF MINUTES AND APOLOGIES FOR ABSENCE

The minutes of the last meeting which had taken place on 23 September 2009, had previously been circulated and were approved.

Apologies for absence were received from John Naccarato (Cameron McKenna).

2. EFFECT OF COMPANIES ACT 2006 ON THE ULTRA VIRES DOCTRINE

The Committee was informed that the working party set up to discuss this issue had recently met and concluded that there had been very little change in law and that in practice firms were likely to continue to check a company's articles. MC had kindly agreed to produce a draft note for the Committee to consider adopting.

3. COMPANIES ACT 2006

3.1 Overseas companies

The Committee was reminded of an existing problem in relation to searching for overseas companies who may be registered at Companies House, namely that overseas companies are allowed to register an alternative name to their original name of incorporation and that the search facility provided by Companies House may not link the two. The Committee concluded that in the short-term the only way to address this issue was to obtain a representation from the relevant overseas company in facility documentation and/or a certificate confirming whether or not the overseas company had registered an establishment at Companies House and, if so, under what name.

3.2 Review of charge registration requirements

The Committee was reminded that a general review of the charge registration regime was due to commence in 2010. Therefore, the working party which had previously considered proposed changes to the charge registration regime would reconvene early in 2010.

Afternote: Work has begun and the DBIS consultation paper is awaited.

3.3 Scottish Floating Charges

The Committee was reminded that under the Scottish Bankruptcy and Diligence Act 2007, floating charges over Scottish assets will (when the relevant sections are in force) be required to be registered in Scotland and must be in Scottish form. Failure to do so will result in the floating charge being ineffective under Scots law. This part of the Act is not yet in force and was not expected to come into force until 2011. GY reported that after concerns had been raised by practitioners, the Keeper of the Scottish Registers was organising a working party which would consider this further. GY is a member of that working party (with DKL as his alternate).

Afternote: Two meetings have taken place and there is an active exchange of views.

4. FINANCIAL STABILITY: BANKING ACT 2009, SPECIAL RESOLUTION REGIME

4.1 Consultation on investment banks

The Committee was reminded that the consultation on whether to have a separate insolvency regime for investment banks has now closed. The government was expected to publish a green or white paper in mid-December. The Committee would therefore await further developments. Working Party meeting arranged for 3 March 2010 on further Treasury Consultation Document.

4.2 Small company netting

It was noted that there had been no further developments on this issue since the last Committee meeting. (See CLLS minutes of 23 September 2009 – paragraph 3.2.). The issue was under further consideration in the Banking Liaison Panel in relation to the terms of Safeguards Order under the Banking Act 2009.

4.3 **Compensation regime**

The Committee noted that the timeframe within which a depositor was required to make a claim under the compensation regime under the Banking Act 2009 was extremely short. Accordingly, this issue was likely to be raised with the government.

4.4 **Amendments to Banking Act 2009 in clause 33 Financial Services Bill**

The Committee noted that the newly published Financial Services Bill contained some amendments to the Banking Act (section 48a). These included very broad drafting in relation to the "creation of liabilities" in connection with a property transfer order. It was also noted that the Bill did not contain any amendments to the wide trust provisions in section 34(7) of the Banking Act. This wide drafting had previously been raised as a concern by the Committee. Accordingly, the Committee should suggest appropriate amendments to the Bill to address this issue.

The Committee further noted that the Bill contained provisions for new class actions to be brought against banks and other financial service providers. The eligibility test for being party to such a class action was currently drafted on the basis of UK domicile. It was considered that a clearer test would be that used in various EU regulations of "habitual residence".

Finally, the Committee noted the wide drafting of clause 36(3) of the Bill under which any enactment could be amended or repealed by an order if thought expedient or necessary, provided this is consequential on a provision of the Bill. (Note in contrast the drafting of clause 75 of the Banking Act.)

Afternote: David Ereira represented the CLLS before the Parliamentary Scrutiny Committee at which the Bill was discussed. We continue to keep a watching brief. The Treasury does not consider changes are required in any of the areas identified.

5. **FINANCIAL STABILITY: FSA, BASEL AND EU MOVES**

DKL reported that she had taken part in some telephone conferences on various issues relating to financial stability and that there may be some issues for the Committee to pick up on in the future.

Afternote: The developed issues are highly technical and are being taken forward by the BBA and other trade bodies.

6. **INSOLVENCY**

6.1 **Insolvency consultation**

The Committee noted that following closure of the consultation, the Insolvency Service had announced that only the moratoria proposals had been widely supported and would be developed further in the future. Views on the rescue finance proposals had been more varied and would be kept under review.

Afternote: A stakeholders' meeting took place on 18 January 2010 and GY, DKL and RP attended on behalf of the Committee.

6.2 Insolvency Rules Modernisation – draft Rules published in November

The Committee noted that a draft amended version of the Insolvency Rules had been published in November and were due to come into force on 6 April 2010. The main changes dealt with pre-administration expenses, insolvency practitioner remuneration and creditors' rights to challenge such remuneration if excessive.

7. EXECUTION OF DOCUMENTS: MERCURY TAX GROUP CASE

It was reported that a draft Law Society note on execution had been due to be considered by the Law Society on 17 November and the outcome of that meeting was as yet unknown.

It was further reported that the two outstanding issues between counsel (the question of multiple original documents and late amendments to deeds) had been resolved and that minor adjustments to the joint CLLS paper were in the course of being agreed.

Afternote: The revised note is now on the CLLS website and the Law Society has also published its paper.

8. SETTLEMENT FINALITY DIRECTIVE AND FINANCIAL COLLATERAL ARRANGEMENTS DIRECTIVE

There was nothing to report since this matter had been discussed at the last meeting.

9. UNIDROIT CONVENTION ON SUBSTANTIVE RULES FOR INTERMEDIATED SECURITIES

It was reported that since the UNIDROIT Convention had now been agreed, the next stage was likely to be an EU directive or regulation. The Committee would therefore keep a watching brief.

10. CONSULTATION ON DEBT RELIEF FOR POOR COUNTRIES

It was reported that there had not been widespread support for the Treasury's proposal on possible legislation to extend debt relief to Heavily Indebted Poor Countries.

Afternote: The Treasury issued a response to the Consultation responses, including those expressed on behalf of the Committee at a Stakeholders meeting relating to confidence in the UK legal system. This emphasises the narrow scope of the legislation proposed. A private members' bill is presently before Parliament which appears intended to act on enforcement measures in the UK (regardless of governing law), and, potentially limit impact to claims for repayment of loans. The Parliamentary processes in the run-up to an election mean that, if there is "in principle" cross party support, the Bill may pass with very limited drafting scrutiny, although it may be a casualty if there is an early election.

11. ROME I REGULATION

The Committee noted that the Rome I Regulation on the applicable law in contractual obligations would come into force in the UK on 17 December.

It was also noted that the Ministry of Justice had already launched a consultation on the assignment provisions in Rome I and responses were due by mid-February. As the

assignment provisions were important in the context of financial transactions, it was agreed that the existing Rome I working group should meet early in the new year to prepare a response. New members to that working group would be welcome. (RC volunteered to join and DE volunteered to nominate a colleague.)

Afternote: The consultation period has been extended to 9 March and there is a meeting of interested parties on 4 March. The working party response will be submitted after the meeting.

12. CASES TO NOTE

12.1 Perpetual Trustee Co Ltd case in New York

The Committee briefly discussed the recent case of *Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd and Lehman Brothers Special Financing Inc* in which the UK Court of Appeal had considered the anti-deprivation principle. It was noted that a related hearing was due to be heard in New York, where a similar principle, commonly referred to as the *ipso facto rule*, would be considered.

Afternote: The New York decision is in the opposite sense to the UK decision. The practical issues are being considered further by the New York Court and the implications will require careful consideration.

12.2 Sigma Finance Corporation (in administrative receivership)

The Committee briefly discussed the recent case of *Sigma Finance* and noted that a point of construction in a security trust deed had gone all the way to the Supreme Court.

13. CLOSE

There being no further business, the meeting was closed.