

## THE CITY OF LONDON LAW SOCIETY

### INSOLVENCY LAW COMMITTEE

(the **Committee**)

Minutes of a meeting of the Committee held at Freshfields Bruckhaus Deringer LLP,  
65 Fleet Street, London EC4Y 1HT on Tuesday 17 March 2009 at 8 am

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**Present:** Hamish Anderson, Norton Rose LLP (Chairman)  
Ken Baird, Freshfields Bruckhaus Deringer LLP  
Mark Hyde, Clifford Chance LLP  
Jennifer Marshall, Allen & Overy LLP  
Mark Andrews, Denton Wilde Sapte LLP  
James Roome, Bingham McCutchen LLP  
Stephen Gale, Herbert Smith LLP  
Rita Lowe, CMS Cameron McKenna LLP  
Ben Larkin, Berwin Leighton Paisner LLP

**Apologies:** Ian Hodgson, Slaughter & May  
Chris Mallon, Skadden Arps Slate Meagher & Flom (UK) LLP  
Mike Woollard, SJ Berwin LLP  
Patrick Corr, Sidley Austin LLP  
Tony Bugg, Linklaters LLP  
Stephen Foster, Lovells LLP

**In attendance:** Rebecca Oliver, Norton Rose LLP

#### **1 Opening of meeting**

The Chairman opened the meeting.

#### **2 Minutes of the meeting held on 15 January 2008**

The draft minutes of the meeting held on 15 January 2008 were approved.

#### **3 Banking Act/financial stability and depositor protection**

- (a) Financial Law Committee Response to the November 2008 HM Treasury Consultation Document on a Special Resolution Regime: safeguards for partial property transfers dated January 2009 & published by FMLC 19 February 2009.

The response was noted.

- (b) FSA consultation paper - Financial Services Compensation Scheme reform: Fast payout for depositors and raising consumer awareness.

Stephen Gale reported the Banking Act Working Party are reviewing and will report.

- (c) The Bank Insolvency (England and Wales) Rules 2009 No. 356 and the Bank Administration (England and Wales) Rules 2009 No. 357.

It was noted that the Bank Insolvency and Bank Administration Rules came into force on the 20th February 2009. The Chairman reported that there had been no consultation the

drafting stage of these rules. It was agreed that any comments made on the rules at this stage would be unlikely to be taken into consideration and all key concerns had already been raised in the context of the various responses to consultations on the Banking Act, the key area of concern being set-off and protections on partial property transfers.

#### **4 Defra Consultation on the Rules of Court for the water and sewerage special administration regime**

Rita Lowe and Ben Larkin reported that Stephen Foster had circulated a draft report in response due to be submitted by 20 March. The Chairman to contact Stephen Foster and arrange for submission of the response via CLLS.

#### **5 Payment Services Regulations 2009 - section 19 Safeguarding Requirements**

The Regulations were noted.

#### **6 Update from Insolvency Service**

##### **(a) Consolidation of secondary insolvency legislation**

The Chairman reported that a Dear IP letter indicated new rules on advertising were to be issued replacing all advertising requirements with discretionary obligations which seemed to be a first step to the process of consolidation of secondary insolvency legislation.

##### **(b) Insolvency process for Limited Partnerships**

No formal response had been received from the Insolvency Service as to whether any review was intended relation to the insolvency of limited partnerships formed under the Limited Partnership Act 1907, but it had now been brought to the attention of the Insolvency Service as a matter of practitioner concern where such limited partnerships are utilised in finance structures.

Both items would be added to the matters under observation list.

#### **7 Matters under observation**

The following matters remain under observation:

##### **(c) Summary of responses to HM Treasury's consultation on amendments to part 7 of the Companies Act 1989**

##### **(d) European Commission White Paper on financial stability (expected in 2009)**

##### **(e) Financial Markets Law Committee: Administration set-off and expenses**

##### **(f) European High Yield Association proposals**

James Roome noted that the European High Yield Association were continuing to action their proposals and on 4 March 2009 co-hosted a roundtable entitled "Is now the time for the UK to adopt a formal proceeding for restructuring distressed companies?"

##### **(g) The European Commission's consultation on the reorganisation and winding up of credit institutions**

##### **(h) UNCITRAL's work on the treatment of enterprise groups in insolvency**

##### **(i) Evaluation of the EC Insolvency Regulation (Insolvency Service consultation paper expected in 2009; European Commission consultation paper expected in 2010)**

##### **(j) Financial Markets Law Committee: proposal for a mandatory insolvency set-off rule for building societies and incorporated friendly societies**

It was agreed that the matters under observation should be subject to quarterly review.

## **8 Any other business**

- (a) Jennifer Marshall referred to the recent case of *Oakland v Wellswood (Yorkshire) Ltd* UKEAT/0395/08 in which the Employment Appeal Tribunal had rejected the view expressed in the BERR Guidance that a relevant transfer in the context of an administration would always fall within Regulation 8(6) rather than Regulation 8(7) Transfer of Undertakings Protection of Employment Regulations 2006. In this case, the transferor employer in administration was subject to “bankruptcy proceedings or any analogous insolvency proceedings ... instituted with a view to the liquidation of the assets of the transferor” on the basis that the appointment of joint administrators was with a view to the sale of the business as a going concern rather than a rescue of the company.

The Chairman to make enquiries as to the views of the Department for Work & Pensions on this outcome.

- (b) The Chairman reported that the Treasury are currently working on legislation to introduce protected cell companies similar to that of the Channel Islands so that it will be possible for a company to hold sub-funds that may be identified to meet certain liabilities and isolated from the claims of other creditors. This would be a matter to be kept under observation.
- (c) Jennifer Marshall reported that the Treasury’s Expert Liaison Group had insolvency procedures for investment funds under consideration, in particular trust, client asset and client money issues and also open trades and derivatives. Both market led and regulatory led frameworks are being considered with legislative reform as a last resort.

Stephen Gale noted that judgment was about to be handed down on a case relevant to this topic and he would circulate to the Committee when available.

## **9 Next meeting**

It was agreed that the next meeting would be at 8 am on Tuesday 19 May 2009 hosted by James Roome, Bingham McCutchen LLP at 41 Lothbury, London EC2R 7HF.

## **10 Close of meeting**

There being no further business, the meeting closed.