

**CITY OF LONDON LAW SOCIETY**

**FINANCIAL LAW COMMITTEE**

Minutes of a meeting held at the office of Herbert Smith, Exchange House, Primrose Street,  
London EC2A 2HS

on Wednesday 14 December 2011 at 1:00pm

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- Present: Dorothy Livingston (Herbert Smith – Chairman)
- Richard Calnan (Norton Rose)
- John Davies (Simmons & Simmons)
- Matthew Dening (Sidley Austin)
- David Ereira (Linklaters)
- Mark Evans (Travers Smith)
- Kate Gibbons (Clifford Chance) (alternate for Charles Cochrane)
- Alan Newton (Freshfields)
- Sarah Paterson (Slaughter and May)
- Simon Roberts (Allen & Overy)
- Nick Swiss (Eversheds)
- Nigel Ward (Ashurst)
- Presley Warner (Sullivan & Cromwell)
- Geoffrey Yeowart (Hogan Lovells)
- In attendance: Rachael Hoar (Herbert Smith – taking minutes)

**1. APPROVAL OF MINUTES, APOLOGIES FOR ABSENCE AND WELCOME**

**1.1 Minutes**

The minutes of the last meeting which took place on 14 September 2011 had previously been circulated and were approved, subject to minor amendments.

Apologies for absence were received from Charles Cochrane (Clifford Chance), John Naccarato (Cameron McKenna) and Philip Wood (Allen & Overy).

**1.2 Committee Membership**

The Committee welcomed its latest new member, Nick Swiss (Eversheds).

## **2. REGISTRATION OF CHARGES**

### **2.1 Reform of the law on registration of charges**

It was noted that revised regulations for the registration of charges were awaited from BIS. These were expected to be released in February/March 2012 and would come into force in April 2013.

### **2.2 Scottish Charges: implementation of the Banking and Diligence Act and Scottish Law Commission paper regarding moveables**

The Committee was reminded that Geoffrey Yeowart and Dorothy Livingston are members of a group advising the Scottish Government on these issues. There was nothing new to report in relation to the Banking and Diligence Act. In relation to security over corporeal and incorporeal moveable property, it was reported that the Scottish Law Commission had published a discussion paper in June this year which proposed that there should be a new type of fixed security right that could cover both corporeal and incorporeal moveable property and that there would be a new online security register of moveable transactions which could be used to register security rights and transfers of financial rights (eg by securitisation and factoring). The consultation period had closed.

The proposals raised concerns among the Committee, and the Committee would monitor further developments.

The B&D Act Group had recently sent a report to the Scottish Government but this had not as yet been published.

### **2.3 Professor Goode's secured interests project and proposed Committee initiative**

It was agreed that a new working group would be formed to consider changes that might usefully be made to the English security regime. This would be led by Richard Calnan.

### **2.4 Secured Lending Reform Bill 2010-11 (Private Members' Bill sponsored by George Eustice)**

The Committee was reminded that the premise of this Bill was to stop banks foreclosing on property. Government support of the Bill would be required for it to proceed any further. The second reading had moved to 20 January 2012.

*Afternote: The second reading has now moved to 30 March 2012. The Committee should also note the Financial Services (Regulation of Deposits and Lending) Bill (second reading 30 March 2012), another private members' bill.*

## **3. LEGAL OPINIONS GUIDE**

The Committee was reminded that the Committee's new Legal Opinions Guide had been finalised and was now available on the CLLS website. Geoffrey Yeowart was thanked for his role in chairing the working party. The Committee agreed that it would be beneficial for the working party to continue to consider some further issues.

## **4. FINANCIAL STABILITY**

### **4.1 Euro issues**

It was noted that the eurozone crisis is creating legal challenges and that in relation to finance agreements there is unlikely to be a "one size fits all" solution. Governing law and jurisdiction clauses were likely to be key to outcomes in the event of breakup or reduction of the membership of the eurozone.

### **4.2 Independent Commission on Banking (ICB)**

The Committee was reminded that the ICB report had been released in September which included recommendations for:

- ring fencing of domestic and investment banking operations
- more stringent capital requirements
- (insured) depositor preference in bank insolvencies
- new bail-in powers

It was thought that the proposals would be legislated early next year with full implementation in 2019 to coincide with Basel III. The Committee continued to be of the view that there were potentially very significant effects on transactional matters which would require considerable adjustment to documentation and to the type of fundraising used by UK regulated banks. The Committee should consider this further when the Government's response to the ICB became available.

It was reported that an announcement by the Treasury was expected on 19 December.

*Afternote: On 19 December the Chancellor announced that the Government intends to implement most of the recommendations made in the ICB report (the recommendations for more stringent capital requirements are to be watered down).*

### **4.3 Banking Liaison Panel (sub groups: code of practice, small companies, building societies)**

DL reported that the ICB recommendations were the centre of discussions at the last BLP meeting.

*Afternote: See Treasury website for minutes and HMG response to ICB.*

### **4.4 Revised state aid regime for banks in financial difficulty**

It was noted that a paper had been issued by the EU Commission on 1 December 2011 which had, in view of market conditions, approved different pricing for guarantees issued by different States.

## 5. INSOLVENCY

### 5.1 Insolvency Service consultation on Petition Reform (Nov 2011)

The Committee was reminded that in November the Insolvency Service had issued a consultation on Reform of the Process to Apply for Bankruptcy and Compulsory Winding Up. The Committee noted the following areas of concern:

- 5.1.1 **Section 127 Insolvency Act:** This provision, rendering void any disposition of the debtor's property made after the commencement of winding-up proceedings, will continue to apply, but as there will be no filing at court of the winding-up application under the proposed regime, and no advertisement of the application, counterparties will not have any way of knowing whether or not section 127 applies. This could be an issue for business sales, banks running current accounts etc;
- 5.1.2 **Scope:** The proposals (such as the requirement to accompany a statutory demand with a notice telling the debtor where to get "free, independent debt advice") could be inappropriate where debts are owed by large companies;
- 5.1.3 **Test of Insolvency:** The proposals seem to assume that compulsory winding-up petitions are served on the basis of a statutory demand or unsatisfied judgment. Statistically, this is normally the case, but there is no real consideration of how applications based on impending illiquidity (section 123(1)(e)) or balance sheet insolvency (section 123(2)) would be treated; and
- 5.1.4 **Provisional Liquidation:** The proposals do not contemplate the circumstances in which provisional liquidation becomes necessary, in order to preserve the company's assets.

It was decided that the Committee should liaise with the CLLS Insolvency Committee to formulate and agree a response on these points if possible. It was also noted that the consultation closes on 31 January 2012.

David Ereira agreed to speak to the chairman of the Insolvency Committee to take matters forward.

*Afternote: the Insolvency Committee's response is available on the CLLS website and refers to these issues.*

### 5.2 EU Communication – latest developments on Cross Border Crisis Management

It was reported that a draft EU Directive concerning co-ordinated resolution management for financial institutions is expected to be issued early next year.

## 6. LEHMAN/NORTEL PENSIONS CASE

It was noted that the appeal in *Bloom v The Pensions Regulator* [2011] EWCA Civ 1124 is unlikely to be heard by the Supreme Court before quarter one of 2013.

## 7. FSA CONSULTATION ON COLLECTIVE INVESTMENT SCHEMES

It was noted that in the FSA's proposed changes to the Collective Investment Schemes sourcebook published in September, a question had been posed as to whether a loan

participation may be a transferable security or a debenture. The Committee's attention was also drawn to the response of the Company Committee of the Law Society dated November 2011. The Committee decided that a short response on this point should be prepared. Kate Gibbons agreed to liaise with Mark Evans in formulating a draft letter.

*Afternote: it was decided after further inquiry that discussions between LMA and the FSA were already addressing this issue and there was no need for the Committee to comment.*

## **8. BIS CONSULTATION ON AUDIT EXEMPTIONS**

The Committee noted that BIS had issued a Consultation on reducing the audit and accounting requirements for some companies in September. The Committee's attention was drawn to two of the proposals:

- Dormant subsidiaries will not be required to prepare or file accounts and will be exempt from audit.
- If certain criteria are met, subsidiaries within a group will not be required to have an audit of their individual statutory accounts. The subsidiaries will still be required to prepare and file accounts, but one of the main criteria for taking the exemption will be that the ultimate parent must guarantee the debts (but not the wider liabilities) of the subsidiary.

The Committee was concerned that the second proposal was a form of automatic veil piercing or collective group responsibility, and could therefore be misleading to third parties, eg lenders. Also bankruptcy remote SPVs (which were essential in some financings) could be impacted.

*Afternote: In the event the Committee did not prepare a response, but the point appears to have been raised by other respondents.*

## **9. EU PROPOSAL FOR A EUROPEAN ACCOUNT PRESERVATION ORDER**

It was noted that since the last meeting the Committee's response had been finalised, sent to the Ministry of Justice and is available on the CLLS website. The CLLS Litigation Committee response, which made many of the same points, is also on the CLLS website. The Government has now decided that the UK should exercise its right to opt out of the proposal, but should continue to negotiate to see if the proposal can be made acceptable for later opt-in. This approach was in line with the representations of both CLLS Committees and several other bodies, including the BBA, and was to be welcomed.

The Committee would keep a watching brief on further developments.

## **10. EUROPEAN CONTRACT LAW REFORM – COMMON FRAME OF REFERENCE**

It was noted that a draft regulation for a Common European Sales Law had been published by the Commission. This would insert an alternative set of contract law rules into the legal systems of each Member State which could be chosen by contracting parties as the governing law for a sales contract. However, as it would not deal with transfer of title or related tort or delict issues, it would still require a choice of national law to cover these

matters alongside the ESL, where chosen. In other words, it is not a complete code, even as regards sales. The following additional points were raised:

- (a) it would not apply to financings, but the status of conditional sale arrangements was unclear.
- (b) it was not intended to apply to purely domestic contracts.
- (c) for some purposes, SMEs would be equated with consumers and obtain additional protections when dealing with larger businesses.
- (d) the drafting was in civil law style and UK lawyers would require substantial training to apply it.
- (e) there was some doubt about the legal basis for the proposed regulation and it could, therefore, be open to future legal challenge.

Even though the Regulation does not currently apply to financings, the Committee should keep developments under review, in particular through the CLLS and Law Society cross disciplinary working groups.

## **11. ANY OTHER BUSINESS AND CLOSE**

11.1 Intermediated Securities Law Directive: it was agreed this topic should be kept under review, although political agreement on the way forward was proving a bar to progress.

11.2 **Central Securities Depositories:** Mark Evans explained that there has been some delay in the publication of the European Commission's Proposal for a new Regulation containing measures addressing securities settlement and (International) Central Securities Depositories (the "CSD Regulation"). He was aware that a pre-consultation draft has been distributed to the (I)CSDs for comment. He suspected that the ensuing delay was a result of material concerns expressed by the (I)CSDs on some of the main proposals contained in the pre-consultation draft of the CSD Regulation. On the basis of discussions held by HM Treasury's Stakeholder Group on the early stages of the proposals, he thought that key issues might centre around the (I)CSD's ancillary banking activities and the proposals for the abolition of "Giovannini Barrier 9" (freedom for an issuer to issue its securities into any EU CSD).

*Since the meeting, the Commission has announced that it will publish its Proposal for a CSD Regulation on 7 March 2012.*

11.3 There being no further business, the meeting closed.