

CITY OF LONDON LAW SOCIETY
FINANCIAL LAW COMMITTEE

MINUTES of a meeting held at the office of Cameron McKenna at Mitre House, 160 Aldersgate Street, London EC1A 4DD on Wednesday 1 December 2010 at 12.45pm.

Present: John Naccarato (CMck – Host)

 Dorothy Livingston (Herbert Smith LLP – Chairman)

 Geoffrey Yeowart (Hogan Lovells– Deputy Chairman)

 John Davies (Simmons & Simmons)

 Alan Newton (Freshfields)

 David Ereira (Linklaters)

 Nigel Ward (Ashursts)

 James Curtis (Denton Wilde Sapte)

 Charles Cochrane (alternate) (Clifford Chance)

 Mark Evans (Travers Smith)

 Richard Calnan (Norton Rose)

 Robin Parsons (Sidley Austin – via telephone)

In attendance: Hannah Williams (Herbert Smith LLP – taking minutes)

1. APPROVAL OF MINUTES AND APOLOGIES FOR ABSENCE

The minutes of the last meeting which had taken place on 15 September 2010, had previously been circulated and, subject to minor amendments were approved.

Apologies for absence were received from Simon Roberts (Allen & Overy), Sarah Paterson (Slaughter and May) and Mark Campbell (Clifford Chance).

1.1 Committee Membership

It was reported that Richard Bethell-Jones is retiring from Allen & Overy and will therefore cease to be a member of the CLLS Financial Law Committee ("**the Committee**") (Richard sat on the Committee in his own right for many years and latterly as an alternate for Simon Roberts).

The Committee expressed its thanks to Richard for his contribution over many years.

It was reported that Robin Parsons will be taking on an academic role at King College in relation to insolvency and reducing his involvement in private practice. The Committee

believed it was very important for the Committee to have a specialist in each area of financial law and for the US firms in London to be represented. The Committee considered this, together with the proposal that Matthew Denning, who specialises in securitisation and derivatives at Sidley Austin LLP, should join the committee. This was carried, nem com.

The Committee thanked Robin Parsons for his contribution and hoped that he would stay involved in its work by continuing to chair the standing working group in relation to the Financial Collateral Arrangements Directive. He thanked the Committee and said that he greatly appreciated what it was aiming to do, particularly in relation to the practical side of the law.

2. FINANCIAL COLLATERAL ARRANGEMENTS DIRECTIVE (2002/47/EC)

It was reported that there have not been any further developments since the last Committee meeting and that the consultation was due to close on 29 October 2010.

It was noted that following review of the Financial Market and Insolvency Regulations, the Committee decided that a definition of control and possession was necessary. The Committee was divided in relation to the definition of possession and had therefore put both definitions forward.

It was reported that the Treasury had raised two issues with the Committee:

2.1.1 That one of the proposals for change had already been achieved in a separate statutory instrument. This was noted, with the common concern that this method of amendment made it difficult to trace current law. The Treasury would be asked to concentrate on the Committee's other comments.

2.1.2 A request for a further explanation in relation to transactional arrangements. It was reported that Mark Evans had provided an answer.

It was reported that the Committee had suggested meeting with the Treasury to discuss these issues but that the Treasury had not reverted back. The Committee decided to chase the Treasury for a response, particularly in relation to the three points the Committee had initially raised.

Afternote: The Financial Markets and Insolvency (Settlement Finality and Financial Collateral Arrangements) (Amending) Regulations 2010 have now been made to meet EU deadline for implementation of amendments to the underlying Directive. They address only some of the Committee's concerns and work is ongoing.

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

3.1 Response to HMT Consultation and follow up

It was reported that the Committee has responded to pertinent points of the HMT Consultation and that the Treasury's earlier consultation and a summary of responses is now available online. It was noted that the Government is due to publish its conclusions and further proposals and that the Committee should expect to receive this in January 2011. It was noted that much of the Treasury's response would be guidance and not law.

Afternote: The Investment Bank Special Administration Regulations 2011 and The Investment Bank (Amendment of Definition) Order 2011 were made on 7th February 2011.

3.2 Banking Liaison Panel

It was reported that the authorities are considering further changes to the SRR:

3.2.1 New powers for the authorities to carry out a reverse transfer from a private sector purchaser; and

3.2.2 New measures to provide comfort to industry regarding the operation of bridge banks.

It was noted that the new power for reverse transfer is useful as a safeguard if parties need to correct an incorrect transfer, particularly when another creditor is involved or liability has been mistakenly transferred. The Committee also noted this may cause tax issues.

The Committee decided that it would welcome such proposals if they offered practical advantages but that the Committee cannot be certain that these changes are advantageous as a whole. This would be discussed further with HM Treasury through the BLP, of which DL is a member.

4. INSOLVENCY

4.1 Insolvency Reform

It was noted that the deadline for the Insolvency Service consultation on the restructuring moratorium was on 18 October 2010. It was reported that Geoffrey Yeowart had spoken to the consultation committee on 1 December and that there had been no further movement. It was noted that there is no indication whether the consultation is going ahead, but that it may be published at the same time as the paper on competition law.

4.2 Insolvency Rules Modernisation

It was reported that the substance of the provisions under the new Insolvency Rules, which came in force in April 2010 (and subject to further change in April 2011), would be published in the coming months for public comment. It was reported that Hamish Anderson of Norton Rose had some issues to raise and that Geoffrey Yeowart would discuss these with him. It was noted that it was unlikely a decision would be reached before January 2011.

Afternote: it now seems possible the work referred to 4.1 and 4.2 will be limited as a cost saving measure.

4.3 EU Communication

It was noted that it is difficult to deal with Cross Border Crisis Management since there are so many jurisdictions. However, the Committee noted that the European Commission has not yet issued an invitation to comment.

4.4 **Possible contact with UK Expert Committee Members: Lawrence Crowley (Hogan Lovells) and Geoffrey Davies (Bank of England)**

It was reported that the Expert Committee is currently looking at harmonisation of EU and national insolvency law. The Committee is currently identifying topics of law to address.

5. REGISTRATION OF CHARGES

5.1 **Overseas companies with a registered establishment in the UK and ability to register an alternative name (to its corporate name)**

It was reported that the Committee's response to the consultation had been submitted and that the Committee is still waiting to hear from DBIS.

See afternote to 5.3

5.2 **Scottish Charges: implementation of the BAD Act – update**

It was reported that it was two months since Dorothy Livingston and Geoffrey Yeowart had met the Scottish registrar and Scottish Experts considering the issues involved and preparing a report for the Scottish Government and that there had been no news since.

It was noted that Dorothy Livingston and Geoffrey Yeowart would update the Committee when it heard anything.

5.3 **Implementation of Companies Act measures to reform registration of charges more generally**

Proposals from DBIS were expected shortly.

It was noted that Professor Roy Goode had asked David Ereira to join a committee to discuss radically different proposals to those the Act provided for and similar to the Law Commission proposals in 2005. David had declined the invitation, as he shared the Committee's view that these were not the right way forward. It also seemed unlikely that reform in this area requiring new primary legislation would be a priority.

Afternote: The Government proposals were published on 10th December 2010 and further work is being undertaken to develop them, on which the Committee will comment. The proposals include the removal of the requirement for registration of charges by overseas companies with a UK establishment, which is in line with the Committee's submission.

6. BRUSSELS 1 REGULATION – GREEN PAPER

It was noted that there was nothing new to report.

Afternote: The EU Commission published proposals for amendment in December and the MoJ sought comments. The Committee has submitted a paper which will shortly become available on the CLLS website.

7. ROME I REGULATION – ARTICLE 14 ASSIGNMENTS

It was noted that the European Commission was considering conducting a further survey of EU and EEA states in relation to their position in Member States in relation to Article 14.

Afternote: We understand this is proceeding and there will be no change until after its findings have been considered.

8. CONLIB GOVERNMENT AGENDA

8.1 Independent Banking Commission

It was reported that the Independent Banking Commission is reviewing the structure of the banking industry (led by John Fingleton, former CEO of the OFT). It was noted that different banks are currently making submissions. It was noted however that the Committee would oppose radical changes being made to the UK structure alone as this would damage competitiveness of UK banks internationally. EU rules would mean that the UK could probably not legislate for banks regulated elsewhere in the EU generally.

8.2 Secured Lending Reform Bill 2010-2011 (Private Members' Bill sponsored by George Eustice MP)

It was noted that the Bill has been published and that it would place obstacles on execution against real property where there is a fixed charge and the borrower is in default. It was reported that trade bodies are likely to make representations opposing this and that the Committee may have to make a decision at a later date as to whether it should make any submissions.

Afternote: the 2nd reading has now been postponed to 4th March 2011

9. EUROPEAN CONTRACT LAW REFORM – COMMON FRAME OF REFERENCE: RESPONSE TO MOJ CONSULTATION AND WORK TO RESPOND TO EU CONSULTATION

It was reported that the Ministry of Justice consultation on the European Commission's Green Paper on a European Contract Law for consumers and businesses was complete and now available online. The EU consultation will be available from January 2011.

The Chairman was participating in a joint CLLS working party and also liaising with the Law Society. There was opposition to any optional or mandatory law on cost and cost effectiveness grounds.

Issues of subsidiarity and vires also arose. The Committee agreed with the approach being taken at CLLS level.

Afternote: Submissions have been made by the CLLS at both MoJ and EU levels.

10. INTERMEDIATED SECURITIES – NEW EU PROPOSALS AND WORKING PARTY. FATE OF UNIDROIT CONVENTION ON SUBSTANTIVE RULES FOR INTERMEDIATED SECURITIES ADOPTED ON 9 OCTOBER 2009

It was noted that there are new EU proposals in relation to securities held in accounts and that there is a committee comprising of Mark Evans, Dorothy Livingston, Geoffrey Yeowart, Dermott Turing and Guy Morton, which will be meeting for the first time on 3 December 2010.

There would be advantages in a harmonisation of law provided it was consistent with relevant international treaties and would not disadvantage EU holders, intermediaries and systems. The proposals did not seem in current form, to meet that objective.

Afternote: The Committee's submission is now available on the CLLS website.

11. BOND COVENANT PROJECT

It was noted that there was nothing new to report.

12. AOB

12.1 Legal Party for Legal Opinions

A working party under the Chairmanship of Geoffrey Yeowart was established to consider certain issues related to legal opinions. This work would be concerned with developing the profession's understanding of the legal and professional conduct issues arising in relation to opinions in lending transactions.

12.2 Steering Board of Insolvency Service

David Ereira reported that he was now a member of the Steering Board of the Insolvency Service. The Committee decided there would not be a conflict of interest.

13. CLOSE

There being no further business, the meeting was closed.