

## THE CITY OF LONDON LAW SOCIETY

### INSOLVENCY LAW COMMITTEE

(the **Committee**)

Minutes of a meeting of the Committee held at Linklaters LLP, One Silk Street, London EC2Y 8HQ, on 17 January 2008 at 12 noon

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- Present:** Hamish Anderson, Norton Rose LLP (Chairman)  
Stephen Gale, Herbert Smith LLP (Deputy Chairman)  
Elizabeth Elliott for Mark Andrews, Denton Wilde Sapte LLP  
Peter Fidler, CMS Cameron McKenna LLP  
Ian Fletcher, Stephenson Harwood  
Stephen Foster, Lovells LLP  
Ian Hodgson, Slaughter and May  
Mark Hyde, Clifford Chance LLP  
Jennifer Marshall for Gordon Stewart, Allen & Overy LLP  
Sandy Shandro, University College London
- Apologies:** Ken Baird, Freshfields Bruckhaus Deringer  
Tony Bugg, Linklaters LLP  
James Roome, Bingham McCutchen LLP
- Excused:** Chris Mallon, Skadden, Arps, Slate, Meagher & Flom (UK) LLP
- In attendance:** Susan McFetrich, Norton Rose LLP

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

The Chairman welcomed Sandy Shandro to his first meeting since being invited to join the Committee in his capacity as the Dean of the Faculty of Laws at University College London.

The draft minutes of the meeting held on 15 November 2007 were approved.

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

The Deputy Chairman explained that, although a draft contribution had been made to a joint response being drawn up by the Financial Law Committee of the City of London Law Society, the European Commission's deadline for responses had passed before the joint response could be submitted. The Deputy Chairman will consult the chair of the Financial Law Committee to establish whether a late response might be submitted.

#### **3 The Insolvency Service's consultation on a Legislative Reform Order for the modernisation and streamlining of insolvency procedures**

The Chairman reported that a response to this consultation had been submitted on behalf of the Committee, and that (in light of concerns expressed by some members of the Committee) a follow-up note had been sent to the Insolvency Service urging caution in considering the effects of the proposal to require creditors to "opt in" if they wish to participate in insolvency proceedings.

#### **4 Liquidation expenses**

It was noted that section 1282 Companies Act 2006, which inserts the new section 176ZA in the Insolvency Act 1986, will come into force on 6 April 2008 by virtue of the Companies Act 2006 (Commencement No. 5, Transitional Provisions and Savings) Order 2007.

A revised draft of the Insolvency (Amendment) Rules 2008 (which give some control to floating charge-holders and preferential creditors to limit the nature and quantum of expenses in certain circumstances) is awaited.

## **5 Legislation for a special bank insolvency regime**

As noted in the minutes of the Committee's November 2007 meeting, a meeting had been held at the Bank of England in November to invite comments from insolvency professionals on the tripartite authorities' discussion paper of 11 October, "Banking reform - protecting depositors".

It was noted that the Chancellor of the Exchequer, Alistair Darling, had given an interview published in the *Financial Times* on 3 January 2008, in which he had appeared to indicate that legislation may be introduced as early as May 2008 for a special insolvency regime for banks which can be initiated by the Financial Services Authority.

The *Financial Times* article indicated that a consultation will be announced in the next few weeks. In view of the short legislative timescale, it was agreed that the Committee will need to respond promptly to any consultation, and so some of those present volunteered to form a working party to keep a watching brief for and report to the Committee on the proposals.

## **6 Empty property business rates relief for companies in administration**

It was noted that the Department for Communities and Local Government had announced on 17 December 2007 that secondary legislation will be made under the Rating (Empty Properties) Act 2007 to provide for (amongst other things) companies in administration to have a permanent exemption from empty property rates. The announcement states that the aim is to lay this secondary legislation before Parliament so that it can come into effect on 1 April 2008.

This will be kept under review.

## **7 The European High Yield Association's submission to HM Treasury on insolvency law reform**

This matter was discussed at previous Committee meetings, at which it had been agreed to write to the Insolvency Service to offer the Committee's preliminary comments on the paper, which include suggesting the extension of the company voluntary arrangement and administration moratoria to contractual insolvency termination provisions.

A draft letter had been circulated to Committee members in December and, taking into account comments made on it, a revised draft had been circulated with the agenda for this meeting. Concern was expressed about the likely need for a carve-out for certain financial markets transactions (if indeed the suggested extension is to be pursued), and it was agreed to qualify the letter accordingly.

Subject to this amendment, the letter will promptly be sent to the Insolvency Service.

## **8 UNCITRAL's work on the treatment of enterprise groups in insolvency**

It was noted that, according to papers published on the UNCITRAL website, an UNCITRAL working group has been considering the treatment of corporate groups in insolvency, with a view to making legislative recommendations. Sandy Shandro volunteered to try to find out more, and the Committee agreed to keep a watching brief on developments.

## **9 Cases of interest**

- It was agreed to keep under review the provisional liquidation under Cayman Islands law of a Cayman-registered company, *Basis Yield Alpha Fund (Master)*, in which just the previous day a US bankruptcy judge, Robert E. Gerber, had denied the joint provisional liquidators summary judgment in their petition under chapter 15 of the US Bankruptcy Code for recognition of the Cayman proceedings as foreign main proceedings because of the existence of issues of fact as to the location of the company's centre of main interests. It is understood that the petition will now proceed to an evidentiary hearing.
- The decision of Briggs J in *In the matter of Cheyne Finance PLC (in receivership)* [2007] EWHC 2402 (Ch) was noted, and Stephen Foster undertook to try to find out whether it is being appealed [*subsequently reporting no appeal anticipated*].
- There was a debate about the decision in *Re Permacell Finesse Limited (in Liquidation)* (30 November 2007, Birmingham District Registry No. 4792 of 2007) (floating chargeholder's shortfall not provable in the "lifeboat" for unsecured creditors under section 176A Insolvency Act 1986), with some doubts expressed about whether it reflected what some had understood to have been the Insolvency Service's intention at the time of enactment of section 176A.
- The Chairman mentioned that the appeal to the House of Lords has been heard in *Re HIH Casualty and General Insurance Ltd and other companies McMahon and others v McGrath and another* [2006] EWCA Civ 732 [2006] All ER (D) 65 (Jun), with judgment pending.
- It was noted that a petition had been lodged with the House of Lords for permission to appeal (using the leap-frog procedure) the decision of the High Court in *Day v Haine* [2007] EWHC 2691 (Ch) that protective awards made by an employment tribunal to former employees did not constitute debts provable in the liquidation of the company where they were made after the date of the liquidation, and that the decision on permission to appeal is expected by mid-February.

## 10 Committee membership

The Chairman explained that Chris Mallon had tendered his resignation from the Committee upon moving his practice from Weil, Gotshal & Manges LLP to Skadden, Arps, Slate, Meagher & Flom (UK) LLP, and had excused himself from this meeting so that the Committee could consider his request to continue his membership under his new practice.

The Committee noted the nature of Chris Mallon's new position and approved his continuing membership.

## 11 Any other business

Ian Fletcher announced that he will retire from the Stephenson Harwood partnership on 30 April 2008 and accordingly will retire from the Committee at the end of the next meeting. He will continue to be involved in other activities both within and outside the legal profession.

It was agreed to invite the new Chief Executive of the Insolvency Service, Stephen Speed, together with the Insolvency Service's Director of Policy, Stephen Leinster, to a Committee meeting later this year, and the Chairman undertook to do this.

## 12 Details of next meeting

The next meeting will be held at 12.45 pm on Wednesday 19 March, at the London office of Slaughter and May.

## 13 Close of meeting

There being no further business, the meeting closed.

