

CITY OF LONDON LAW SOCIETY

INSURANCE LAW COMMITTEE

Minutes of the meeting that took place at the office of Kennedys Law LLP, 25 Fenchurch Avenue, London EC3M 5AD on Tuesday 4 December 2012 from 17:00 to 19:00

Present:

Richard Spiller – Holman Fenwick Willan LLP (Chair) ("**RS**")
Beth Dobson – Slaughter and May ("**BD**")
John Farrell – Kennedys Law LLP ("**JF**")
Christopher Foster – Herbert Smith Freehills LLP ("**CF**")
Stephen Lewis – Clyde & Co LLP ("**SL**")
Francis Mackie – Edwards Wildman Palmer LLP ("**FM**")
Martin Mankabady – Mayer Brown International LLP ("**MAM**")
Michael Mendelowitz – Norton Rose LLP ("**MIM**")
Terry O'Neill – Clifford Chance LLP ("**TO'N**")
Christian Wells – Hogan Lovells International LLP ("**CW**")
David Wilkinson – Kennedys Law LLP ("**DW**")
David Hertzell – Law Commissioner for commercial and common law, Law Commission ("**DH**")
Robert Leeder – Policy & Committees Co-ordinator, City of London Law Society ("**RL**")
Will Reddie – Holman Fenwick Willan LLP (Secretary) ("**WR**")

1. Remembrance of Geoff Lord

- 1.1 RS gave an appreciation of Geoff Lord's substantial contribution to the Committee over many years. The Committee passed a vote of gratitude for his work as a member, and Chairman, of the Committee.
- 1.2 The Committee also recorded its condolences to Geoff's family and partners. JF said that Geoff's wife had been pleased to receive the Committee's messages of condolence.
- 1.3 JF stated that Kennedys would be willing to assist the Committee to ensure a smooth handover to RS of the role of Chairman.

2. Apologies for absence

Apologies were received from Ken McKenzie (DAC Beachcroft LLP), Michelle Bramley (Freshfields Bruckhaus Deringer LLP) and Paul Wordley (Holman Fenwick Willan LLP).

3. Appointment of Chairman

- 3.1 RL confirmed that the process to appoint RS as Chairman of the Committee was complete and that RS had been officially appointed.

3.2 RL stated that general policy issues concerning the CLLS would be sent to RS to pass on to the Committee.

4. Approval of Minutes

4.1 DS confirmed that he had sent the minutes of the meeting of 4 September 2012 to RS. RS stated that he would review these minutes and circulate them for approval, together with the minutes of the meeting of 4 December 2012.

5. Consultations

Law Commission Consultation Paper "Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties"

5.1 RS introduced DH and invited him to summarise the position in relation to the Consultation Paper.

5.2 DH explained that the Law Commission's proposals were not radical and that existing authorities had been used as a base for the proposals. He noted that one particular problem for the Law Commission was that it had generally been clear at the time of the Marine Insurance Act 1906 (the "**1906 Act**") which person or body was the insurer, broker and assured in any given situation and that consequently it was clear who would have certain information and should be subject to certain obligations. However, this was less clear in today's market.

5.3 DH explained that the Law Commission wanted to ensure that the proposed remedies were as neutral as possible and did not favour the insurer or the broker. DH also wanted the proposed remedies to reflect what those in the market would expect to get in the event of a default. The proposals regarding the remedies for non-disclosure had changed from the first consultation. The proposed position now was that proportionate remedies would be the default remedy for non-disclosures and misrepresentations which were not dishonest. Insurers would be entitled to reduce the amount of any claims paid where the assured failed to disclose information. DH stated that this would incentivise policyholders to be careful.

5.4 DH also explained that the proposals were designed to reflect market practice and were targeted at the middle ground (for example, property underwriters) but gave parties the scope to vary the default position. The responses to the Consultation Paper supported the "one size" approach and in particular that small businesses should not be carved out into a separate regime.

5.5 DH stated the responses were generally positive, though some concerns were raised by specialty underwriters. He also discussed one of the areas which was still subject to discussion, the proposal that a company would be deemed to know anything that its board knew. DH explained that insurers had concerns about this proposal as they considered that entering into a policy would be an atypical event for an assured, so the knowledge of an assured's board would realistically be communicated for the purposes of a policy. However, insurers considered that it was unrealistic to expect an insurer's board to pass to the underwriters everything that might be relevant to an insurance

policy. Furthermore, even different departments within an insurer may not share information, for example the claims department may have little or no contact with the underwriting department.

- 5.6 RS asked about the Law Commission's proposals regarding the concept of an insurable interest and whether the proposed legislation would define this. DH explained that the Law Commission had not yet concluded how best to deal with this, as the views of those in the market differed. DH stated that many responses on this point considered that an insurable interest kept insurers on the "straight and narrow". RS said that the Committee was not ad idem itself on this issue and that one proposal put forward was to require an assured to have at inception a "real probability of acquiring an insurable interest". TO'N suggested that all that was required was an insurable interest at the time of the loss. DH stated that none of the responses suggest that radical reform was needed, so a statutory definition of "insurable interest" would probably not be introduced and the issue would likely be revisited at a later date.
- 5.7 FM asked whether the Law Commission proposed to retain the concept of a "prudent insurer" or whether this would be replaced in relation to section 18(2) of the 1906 Act by the test of a "reasonable insured" which had been mentioned in the 2007 Consultation Paper: "Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured". DH replied that the Law Commission did not intend to move away from the "prudent insurer" test.
- 5.8 FM also asked whether the legislation that resulted from the proposals would replace the 1906 Act. DH replied that he anticipated that only the parts of the 1906 Act that were under review would be replaced and that the rest would remain in force. The new legislation would set a default position which parties could then vary. DH considered that marine insurers might contract out, as much of the 1906 Act which would remain in force was marine-based.
- 5.9 In total, around 50 responses had been received to the Consultation Paper. DH believed that the responses gave a fair impression of attitudes in the market, as responses had been received from industry bodies such as the ABI and major insurance companies such as AIG. DH expected the responses to be published in early 2013.
- 5.10 Once the English and Scottish Law Commissions had finalised and approved the proposals, a draft Bill would be prepared to be put before Parliament. The draft Bill would also incorporate the proposals from Law Commission Consultation Paper "Insurance Contract Law: Post Contract Duties and other Issues", except for marine elements of this consultation which are still being discussed.
- 5.11 DH expected to be able to use the Law Commission procedure for uncontroversial Bills and would aim to secure a slot before Parliament by the end of 2014 at the latest. The Bill should then become law in 2015 and enter into force in 2016.
- 5.12 RS thanked DH for the time he had taken to attend the meeting.

FSA Consultation Paper "Review of the client money rules for insurance intermediaries"
– Richard Spiller's paper

- 5.13 RS had prepared a paper on behalf of the Committee in response to the FSA's Consultation Paper, which focused on the legal issues raised by the Consultation Paper. CW agreed that the RS's paper should not address points beyond the legal issues, as this would require consideration of complex practical problems. RS noted that TON had made some comments on RS's paper which RS would incorporate.
- 5.14 RS raised with the Committee the issue of business transfers by brokers and the difficulty that brokers would have in obtaining clients' consent to the transfer of their money. The Consultation Paper proposed a mechanism whereby clients would give pre-consent to such a transfer, for example by virtue of clauses in a broker's terms of business. RS proposed to support this but asked for the Committee's view.
- 5.15 TON suggested that brokers should be allowed to use a mechanism similar to the Part VII transfer, and DH agreed. However, RS noted that the pre-consent mechanism would be quicker and less expensive than a Part VII-type process, as the courts would not be involved.
- 5.16 RS commented that he disagreed with the FSA's proposals regarding unclaimed balances, which would permit firms to donate any unclaimed balances to charity after six years and after efforts had been made to trace the client but would remain liable to the client if it later made a claim. RS considered that a firm should be released from liability if the client demanded the return of the balance after the six year period and after the balance had been donated to charity, as this would effectively force firms to retain any unclaimed balances in case the client surfaced and demanded its money.
- 5.17 A copy of the paper which was submitted to the FSA is attached.

MD2: proposed revisions to the Insurance Mediation Directive in 2012 – has a Treasury Consultation been announced?

- 5.18 CW stated that there was not currently a Treasury Consultation regarding the Insurance Mediation Directive. However, CW explained that he was due to respond to an EU consultation on the Directive. CW considered that giving feedback at this level was preferable, as by the time feedback was requested at the UK level (for example, via a Treasury Consultation) it may be too late for any comments to be accommodated.
- 5.19 The Committee discussed how responses could be submitted to EU consultations. BD explained that it was hard to make comments unless they were made through an industry body. RS mentioned that the London & International Insurance Brokers' Association ("LIIBA") was close to the European Commission, so it may be helpful to invite a LIIBA representative to a meeting to establish a conduit through which responses could be submitted. CW agreed to invite David Hunt from LIIBA.

6. Future direction of Insurance Law Committee

Committee members

- 6.1 RS would like to have a definitive list of Committee members and their alternates (if applicable). RS had received a list from Geoff Lord which appeared to be out of date. RS will, with DW/JF's assistance, compile a list of members and circulate this.
- 6.2 RL stated that Committee members could appoint a specified alternate if they wished but that they were not required to do this. CW noted that members were meant to attend sufficiently regularly that they would not require a specified alternate. CW also mentioned the Chairman's duty to remove members that failed to attend on a regular basis.
- 6.3 RL confirmed that there would usually be one member per firm. In some cases there might be more than one, for example RS and Paul Wordley of Holman Fenwick Willan are both members but RS's membership preceded his move to Holman Fenwick Willan.
- 6.4 MIM questioned whether the Committee should include members from other firms. The Committee discussed suitable firms which did not currently have a representative on the Committee, and suggestions included Ince & Co, Reynolds Porter Chamberlain, Reed Smith, Allen & Overy and Fishburns. The Committee agreed to produce a list of firms which should be approached.
- 6.5 TO'N stated that he had an application from Philip Hill of Clifford Chance to join the Committee in place of TO'N. RS agreed to put the application before the Committee at the next meeting.
- 6.6 The Committee discussed the application of Robert Carr ("**RC**") to join the Committee. The application had been approved at the Committee meeting on 4 September 2012 but it was unclear whether this had been communicated to RC. JF stated that he would make sure that RC was made aware of this decision.

Committee's role

- 6.7 RS noted that the Committee tended to respond to consultation papers but queried what else the Committee should aim to do. MAM stated that the Committee could discuss market issues, such as the approach taken by insurers to large brokers' "market services" fees in TOBAs.
- 6.8 RS asked RL whether open meetings for non-members were encouraged. RL replied that some open meetings had taken place in the last couple of years but that these were not the norm and tended to be reserved for meetings where it was helpful to have a broader discussion of a particular issue. RS agreed that open meetings would be most useful where the topic merited wider discussion.
- 6.9 DW suggested inviting a "special purpose" guest to each meeting to discuss a topical issue. The Committee was in favour of this.

6.10 RS mentioned the BILA Committee responsible for training and education. RS suggested that, where appropriate, the Committee co-ordinated with the BILA Committee when submitting responses to consultation papers. MIM noted that BILA's members included market practitioners and had more of an educational function, and considered that a joint event between the Committee and BILA could be helpful in broadening the Committee's audience. JF and BD suggested the Old Library at Lloyd's as a venue, and MIM stated that it should be possible to obtain the venue by speaking to Kees van der Klugt at the LMA.

7. Meetings for 2013

7.1 RS proposed four meetings in 2013, on the first Tuesday in March, June, September and December.

7.2 RS suggested that the meetings should be rotated around different members' offices each meeting. This was agreed and RS asked for volunteers to host the meetings in 2013.

7.3 It was agreed that the meetings for 2013 take place on the following dates at the following venues:

7.3.1 As RS is travelling on 5 March 2013, the next meeting is proposed for 12 March 2013 at Holman Fenwick Willan LLP, 65 Friary Court, Crutched Friars, London, EC3N 2AE;

7.3.2 4 June 2013 at Clyde & Co LLP, The St. Botolph Building, 138 Houndsditch, London EC3A 7AG;

7.3.3 3 September 2013 at Hogan Lovells International LLP, Atlantic House, Holborn Viaduct, London EC1A 2FG;

7.3.4 3 December 2013 at Herbert Smith Freehills LLP, Exchange House, Primrose Street, London EC2A 2EG.

7.4 If relevant consultation papers are released in January or February, they will be added to the agenda for the next meeting.

7.5 MAM stated that he would prepare a paper on broker market services agreements and will lead a discussion on this paper at the next meeting.

7.6 CW stated that he would like to discuss discretionary mutuals at the next meeting, which are being offered as a type of insurance vehicle which does not require FSA approval. CW will provide further details in due course.

7.7 There being no other business RS declared the meeting closed.