

CITY OF LONDON LAW SOCIETY

INSURANCE COMMITTEE

Minutes of the meeting that took place at the office of Holman Fenwick Willan LLP, Friary Court, 65 Crutched Friars, London EC3N 2AE on Tuesday 12 March 2013 from 17:00 to 19:00

Present:

Richard Spiller – Holman Fenwick Willan LLP ("RS") (Chair)
Robert Carr – Greenwoods Solicitors ("RC")
Christopher Foster – Herbert Smith Freehills LLP ("CF")
Jonathan Goodliffe – Freshfields Bruckhaus Deringer LLP ("JG")
David Hobart – Chief Executive, City of London Law Society ("DH")
Ken McKenzie – DAC Beachcroft LLP ("KM")
Terry O'Neill – Clifford Chance LLP ("TON")
David Wilkinson – Kennedys Law LLP ("DW")

In attendance:

Will Reddie – Holman Fenwick Willan LLP (Secretary)

1. Apologies for absence

Apologies were received from Beth Dobson ("BD") (Slaughter & May), Charles Gordon (DLA Piper UK LLP), Francis Mackie (Edwards Wildman Palmer LLP), Martin Mankabady (Mayer Brown International LLP), Michael Mendelowitz ("MM") (Norton Rose LLP), Christian Wells ("CW") (Hogan Lovells International LLP), Paul Wordley (Holman Fenwick Willan LLP) and Stephen Lewis (Clyde & Co LLP).

2. Approval of Minutes

The minutes of the meetings of 4 September 2012 and 4 December 2012 were approved.

3. Issues for discussion

(a) FSA Consultation Paper CP12/38 "Mutuality and with-profits funds: a way forward" – Beth Dobson's paper

- 3.1 JG explained that the Consultation Paper ("CP") proposed to allow mutuals to separate their with-profits business from the rest of their business without having to go to court.
- 3.2 JG stated that BD's comments in her paper did not challenge the FSA's proposals but instead focussed on certain legal points.
- 3.3 In relation to question 1 of the CP, JG explained that it was unclear from the CP and the FSA Handbook whether separation of the with-profits business constituted a reattribution. The CP suggested that a separation would be deemed not to be a

retribution but the FSA Handbook implied that a firm had the burden of proving that the separation was not a retribution. BD had raised this in her draft response.

- 3.4 In relation to question 2 of the CP, BD's draft response suggested redefining the term "with-profits fund" in the context of INSPRU so that it was clear that the mutual members' fund was not part of the with-profits fund. JG explained that consequent changes would need to be made to the capital adequacy requirements in the Handbook.
- 3.5 BD had circulated her draft response prior to the meeting and Alison Matthews had added a paragraph to the draft response to question 2. This paragraph stated that the PRA and FCA should co-operate in relation to any changes that were needed to the prudential rules as a result of the proposals in the CP. JG considered that this comment suggested that the Committee was telling the FCA and the PRA how to do their jobs, and thought that it should be left out.
- 3.6 RS said that the new Financial Services Act contained provisions requiring the FCA and PRA to communicate with each other. RS suggested that the paragraph could be amended to state that "appropriate changes will be needed to the PRA Handbook".
- 3.7 JG stated that if the definition of "with-profits fund" was carried through to the PRA Handbook, this issue would clearly be within the remit of the PRA. JG also noted that INSPRU would become part of the PRA Handbook. RS concluded that the Committee would leave BD to decide whether the Committee's response should include the paragraph on PRA and FCA co-operation. [*She subsequently decided to omit the paragraph.*]
- 3.8 RS asked whether the Committee members had any other comments on the CP or on BD's paper. There were no other comments and RS suggested that BD and JG proceeded to finalise the response.

(b) Discretionary mutuals – discussion led by Christian Wells

- 3.9 RS said that CW had planned to lead a discussion on discretionary mutuals but was unwell and unable to attend the meeting. RS stated that the discussion would take place at the next meeting instead.

(c) Law Commission Triennial Review: call for evidence

- 3.10 RS said that he did not intend the Committee to submit a response to the review of the Law Commission but that he wanted to make the Committee members aware of the review in case they wanted to provide feedback individually or from their firms.
- 3.11 KM asked whether the review was asking for a "mid-term report" on the Law Commission or whether it was asking whether the Law Commission should exist at all. RS confirmed that the aim of the review was to consider whether the Law Commission was still needed and, if it was, to ensure that it operated in line with government policies on corporate governance, transparency and accountability.

4. Monitoring of sector developments

(a) The Law Commission's summaries of the responses to its Consultation Paper "Insurance Contract Law: Post Contract Duties and other Issues"

- 4.1 RS said that the reform of the Marine Insurance Act was still controversial in some areas, as discussed at the meeting in December. RS explained that the Law Commission intended to use the procedure for uncontroversial Bills, so the draft legislation would not include proposals for reforming the controversial areas, unless a consensus could be reached.
- 4.2 JG asked whether this was because Parliament might not be willing to propose solutions to the controversial areas. RS said that the main issue was that there was insufficient time to resolve any controversial points if the Bill was to be passed before the next election. He said that this was one of the factors driving the Law Commission's timetable.
- 4.3 KM asked whether the Law Commission needed a certain percentage of respondents to support a proposal for it to be considered uncontroversial. CF said that he did not know whether there was a threshold percentage but considered that "uncontroversial" would depend on the market's view, not what a Member of Parliament thought.
- 4.4 DW asked about the timetable for the Bill. RS quoted the timetable proposed by the Law Commissioner, David Hertzell ("DH"), which was recorded in the minutes of the December meeting. DH had stated that he intended to secure a slot before Parliament before the end of 2014, which would mean that the Bill should become law in 2015 and should enter into force in 2016.
- 4.5 RS also explained that the Bill would not create a new Act but would amend the existing Marine Insurance Act.
- 4.6 The Committee considered in turn each of the Law Commission summaries of the responses to its Consultation Papers. RS explained that the Law Commission was not specifically inviting further comments on the summaries but was open to any additional comments.

(i) Responses to Chapter 1: Damages for Late Payment

http://lawcommission.justice.gov.uk/docs/damages-for-late-payment_responses.pdf

- 4.7 KM noted that a majority of respondents supported damages for late payment but DW and JG said that certain of the proposals remained controversial. JG referred to a Lloyd's Market Association paper prepared by Kees van der Klugt in which the LMA had opposed damages for late payment.

- 4.8 DW stated that such claims were rarely seen in practice, and JG explained that the Financial Services Ombudsman generally dealt with these claims. JG also considered claims for late payment to be a breach of ICOBS.
- 4.9 TON considered that the main problem for the Law Commission was establishing that the consequences for an insurer of failing to pay a claim should be having to pay compensation for the actual loss suffered by a policyholder, rather than interest on the claim. He considered that it would be hard to persuade Parliament that insurers should be forced to pay a policyholder's actual loss, rather than simply interest on the claim.
- 4.10 RS quoted the figures in support of the obligation to pay claims within a reasonable claim. He noted that there seemed to be substantial support for the Law Commission to legislate on this point.
- 4.11 DW said that it was interesting that insurers supported the introduction of damages for late payment yet wanted the ability to limit their liability for failing to pay within a reasonable time.
- 4.12 RS summarised that the responses appeared to suggest that damages for late payment should be available to policyholders and that, in consumer insurance, insurers should be prohibited from limiting or excluding their liability to pay damages for late payment.
- 4.13 CF asked what the Committee's position was on damages for late payment. TON said that the Committee was in favour of a duty to pay claims within a reasonable time and of damages for a failure to do so. However, he considered that setting the measure of damages and the consequences of not paying would be problematic, and that the new legislation would have to provide for damages to be payable for the consequences of the insurer's failure to pay, including any consequences arising as a result of an individual's impecuniosity.
- 4.14 JG said that the EU Motor Insurance Directive contains provisions regarding the late payment of claims. KM also mentioned the position in Spain, where damages may be increased by 20% if the insurer is late in paying a claim.
- 4.15 RS asked whether the Committee should make any further comments to the Law Commission regarding damages for late payment. It was agreed that the Committee would not, as there was little to add.

(ii) Responses to Chapter 2: Insurers' Remedies for Fraudulent Claims

http://lawcommission.justice.gov.uk/docs/insurers-remedies-for-fraud_responses.pdf

- 4.16 RS noted that MM had drafted a response to the Law Commission's Consultation Paper on insurers' remedies for fraudulent claims. JG noted that bodies representing consumer interests, such as Which?, had not submitted responses to this Consultation Paper.
- 4.17 Reviewing the responses, RS stated that 92% of respondents agreed that a policyholder who commits fraud should forfeit the whole claim to which the fraud relates. He said that 75% of respondents were in favour of a policyholder also forfeiting any future

claims where they were found to have committed fraud. RS noted that 94% of respondents agreed that claims which had been made before the fraudulent act should be unaffected.

- 4.18 RS also noted that the summary of responses had quoted the Committee's response which suggested that courts should be given discretion to order forfeiture of only part of the insured's claim, as this would enable courts to distinguish between different types of fraud by a policyholder. The Committee had suggested that where part of a policyholder's claim was allowed, the policyholder might be penalised in costs instead.
- 4.19 RS raised whether insurers should be able to recover the costs of investigating fraud where fraud was found to have occurred. 74% of respondents agreed that costs should be recoverable in this situation. The Committee had said that there was no need to legislate on this point as insurers would have the common law remedy of damages for the tort of deceit.
- 4.20 RS noted the responses regarding fraud by a policyholder where two or more policyholders are insured under the same policy. The summary of responses quoted the Committee's response that the current law was clear and, even if it could in theory operate harshly on innocent joint insureds, in practice it did not seem to cause many problems. BILA had submitted a similar response and 68% of respondents agreed that there was no need to legislate on the effect of fraud by one joint insured on the other joint insured's claim.
- 4.21 RS said that the Law Commission seemed to have a strong mandate on this Consultation Paper. JG said that the Law Commission seemed to have picked up the key points, so there was no need for the Committee to provide any further feedback on the issues raised by this Consultation Paper.
- 4.22 DW noted that the summaries of responses did not include proposals for the Law Commission's next steps. JG said that the FSA usually includes proposals in its summaries of responses. RS explained that the Law Commission would review the responses and consider the next steps. He said that DH is keen to come to the Committee meeting in September or December to explain what the Law Commission proposes to do next.

(iii) Responses to Chapter 3: Insurable Interest

http://lawcommission.justice.gov.uk/docs/post-contract-duties_responses_insurable-interest.pdf

- 4.23 RS explained that the Consultation Paper regarding insurable interest proposed to retain the requirement that a policyholder have an insurable interest in the subject of the contract but to restate this requirement in clear terms.
- 4.24 RS noted that 77% of respondents agreed that the requirement for an insurable interest should be provided for by statute. RS also noted that 80% of respondents, including the Committee, agreed that an insurable interest was needed at the time of loss. The parties

that disagreed had stated that the existence (or otherwise) of an insurable interest should be determined at the outset of the policy.

- 4.25 The Consultation Paper had also asked whether there should be a statutory definition of "insurable interest". RS stated that the Law Commission's proposals on this area were slightly more controversial.
- 4.26 RS noted that only 23% of respondents agreed that a definition of "insurable interest" should be left entirely to the courts. The Committee was among these respondents, as it had considered that it would be difficult to formulate a statutory definition.
- 4.27 The Law Commission had alternatively proposed that new legislation should contain a non-exhaustive list of the forms that an insurable interest may take. This proposal received greater support, with 69% of respondents in favour of this proposal.
- 4.28 The Consultation Paper had listed property rights, an economic interest and possession as three forms that an insurable interest may take, and asked whether this non-exhaustive list should contain any other forms. There was some support (35% of respondents) for not including any new categories of insurable interest.
- 4.29 The Consultation Paper had also asked whether there should be an insurable interest in life insurance which was based on an economic link between the person whose life was to be insured and the proposer. The Law Commission had proposed that there should be an insurable interest where there is a real probability that the proposer will retain an economic benefit on the preservation of the life of the insured, or will incur an economic loss on the death. 85% of respondents agreed with this proposal.
- 4.30 The Consultation Paper had asked whether there should be a cap on the amount for which a child's life may be insured. RS noted that the responses to this question were relatively split, with 65% in favour of a cap and 29% against. The Committee's response was that a cap should be calculated so that it covered only the funeral expenses of the child.
- 4.31 Another question on which respondents were relatively split was whether one cohabitant should have an insurable interest in the life of the other cohabitant. 61% of respondents agreed that an insurable interest should exist regardless of whether the cohabitant had an economic interest in the life of the other, with 22% disagreeing. The Law Commission also proposed that the insurable interest should arise only after the cohabitants had lived together in the same household as spouses for five years; only 40% of respondents agreed with this proposal, with 47% disagreeing.
- 4.32 The Law Commission had proposed the abolition of section 2 of the Life Insurance Act 1772, which requires that beneficiaries under a life insurance policy must be named in the policy. RS noted that 94% of respondents agreed with this proposal. The Law Commission had also proposed an updated statutory requirement for insurable interest, which would replace the requirement contained in the 1774 Act. 79% of respondents agreed with this proposal.

4.33 RS said that the responses to the Consultation Paper were fairly clear. He considered that the draft legislation was likely to make changes to the definition of "insurable interest" in the context of the life sector but not in the non-life sector.

(iv) Responses to Chapter 4: Policies and Premiums in Marine Insurance

http://lawcommission.justice.gov.uk/docs/post-contract-duties_responses_marine.pdf

4.34 RS stated that Holman Fenwick Willan have invited DH to speak at a seminar on the reform of section 53 of the Marine Insurance Act. RS suggested that the Commission discussed this issue and/or prepared a paper once DH has finished consulting.

(b) European Commission Expert Group on European Insurance Contract Law

4.35 RS said that two Committee members had volunteered to be the Law Society's representative on the Expert Group but that the Law Society had then put its own candidate forward, who was an expert on professional indemnity insurance. RS said that he expected the Expert Group to be formed mainly of academics.

(c) Consumer Insurance (Disclosure and Representations) Act 2012

4.36 It was noted that the Consumer Insurance (Disclosure and Representations) Act 2012 will come into force on 6 April 2013.

5. Committee membership

(a) Appointment of BD

5.1 RS explained that BD was Glen James's alternate but attended meetings regularly. He proposed that she be elected a member of the committee.

5.2 All of the Committee Members present were in favour of BD becoming a member of the Committee.

(b) Appointment of Philip Hill, Clifford Chance LLP

5.3 RS explained that Philip Hill was proposed as a replacement for TON. The Committee light-heartedly suggested that TON should not be allowed to retire. RS said that if TON wished to remain an individual member of the Committee, he would support this.

5.4 All of the Committee Members present were in favour of Philip Hill becoming a member of the Committee.

6. Issues for discussion at meeting of 4 June 2013

6.1 RS said that Martin Mankabady's paper on broker market services agreements would be discussed at the next meeting.

6.2 CW would also lead the discussion on discretionary mutuals that had been scheduled for this meeting.

- 6.3 JG noted that there had been a development regarding Solvency II. He explained that the European Insurance and Occupational Pensions Authority ("EIOPA") had announced that it would publish guidelines on the preparations that insurance companies should make for Solvency II. JG considered that this was strange, given that Solvency II had not yet been agreed; JG noted that Insurance Europe had actually written to EIOPA on 12 March 2013 saying this. EIOPA intended to issue a consultation paper on these Guidelines and JG suggested that this be discussed at the meeting in June.
- 6.4 RS explained that CW had tried to arrange for a representative from London International Insurance Brokers Association to attend the meeting to talk about the proposed new Insurance Mediation Directive but that the representative was unavailable. RS said that CW would try to invite the representative to the meeting in June.
- 6.5 JG stated that a colleague at Freshfields was on secondment to the Financial Markets Law Committee. He said that he would invite the colleague to the Insurance Law Committee's next meeting as the Financial Markets Law Committee was currently carrying out a review of insurance contract law.

7. Any other business

- 7.1 RS said that he had circulated the agenda for this meeting a few weeks before the meeting and asked whether the Committee members preferred this, rather than receiving the agenda shortly before the meeting. JG stated that he was in favour of receiving the agenda a few weeks in advance as it would help members to prepare and read any relevant papers. On this basis, RS agreed to circulate each meeting agenda a few weeks before the meeting.
- 7.2 There being no other business RS declared the meeting closed.