

City of London Law Society

Insurance Law Committee ("the Committee")

Minutes of the meeting that took place at the office of Eversheds LLP, 1 Wood Street on Tuesday 2 December 2014 from 17:00 to 18:30 (hosted by Simon Brooks).

Present:

Richard Spiller – Holman Fenwick Willan LLP ("**RS**") (Chair)

Simon Brooks – Eversheds LLP – ("**SB**") (Host)

Francis Mackie – Weightmans LLP ("**FM**")

Joanna Page – Allen & Overy LLP ("**JP**")

Ken McKenzie – DAC Beachcroft LLP ("**KM**")

Helen Chapman – Hogan Lovells International LLP ("**HC**")

Jonathan Teacher ("**JT**")

Philip Hill – Clifford Chance LLP ("**PH**")

Terry O'Neill ("**TO**")

Beth Dobson- Slaughter and May ("**BD**")

In attendance:

Priti Lancaster – alternate for Michelle Bramley – Freshfields Bruckhaus Deringer

Kate Fisher – Holman Fenwick Willan LLP

1. **Apologies for absence**

- 1.1 Apologies were received from Michelle Bramley (Freshfields Bruckhaus Deringer), Robert Carr (Greenwoods Solicitors), Christopher Foster (Herbert Smith Freehills LLP), Nigel Frudd (Minorities Law), Simon Garrett (CMS Cameron McKenna LLP), Chris Jefferis (Ince & Co International LLP), Martin Mankabady (Clyde & Co LLP), Michael Mendelowitz (Norton Rose Fulbright LLP), David Webster (Reynolds Porter Chamberlain LLP) and David Wilkinson (Kennedys Law LLP).

2. **Approval of minutes**

The minutes of the meeting of 9 June 2014 and 23 September 2014 were approved.

3. **Continuing Discussion Topics**

(a) Update on the Insurance Bill ("the Bill") (Richard Spiller)

- 3.1 RS reported that he had spoken with David Hertzell earlier in the month but that at that point it had been unclear which of the Bill's provisions would be retained by the House of Lords and which might be amended or deleted. It was noted that the House of Lords Special Public Bill Committee

on the Insurance Bill (the "**Lords Committee**") would meet on Monday 15 December 2014 to pass any amendments, and that RS was sending Kate Fisher (his trainee) to attend the session. RS explained that David Hertzell had given his evidence to the Lords Committee on 2 December 2014.

- 3.2 It was asked whether the Lloyd's Market Association ("**LMA**") had been invited to give evidence and it was noted that Kees van der Klugt had been invited. RS noted that the LMA was opposed to the proposals to require insurers to pay damages for late payment of claims and to require a breach of warranty to be relevant to the loss suffered.
- 3.3 It was also noted that the position in Clause 4 of the Bill on the knowledge of the insured was wider than s.19 of the Marine Insurance Act 1906 and that Reynolds Porter Chamberlain LLP had lobbied against these provisions for non-consumer insurance. RS considered that the position in Clause 4 would be balanced by the practice of the insured agreeing an overriding waiver (usually given by a broker on behalf of an insured) and was not concerned by the knowledge provisions. RS considered that not much was expected of insureds beyond the existing law.
- 3.4 In relation to the knowledge of brokers that would be attributed to the insured, TO noted the potential problem of having third party documents in open court where the dispute did not include the third party. RS predicted that there would be more non-disclosure agreements between policyholders and brokers to establish confidentiality for this purpose.
- 3.5 It was noted that the impact of the Bill would vary between classes of business and would have no impact on some classes of business where terms were presented by brokers for the insured as non-negotiable. For bespoke risks, in particular, it was considered likely that parties would contract out of the Bill.
- 3.6 In terms of the new remedies for breach of the duty of fair presentation, the Committee's view was that consideration had been given to how an underwriter would demonstrate that it would have insured the risk on different terms had the reality of the risk been reflected in the insured's presentation. It would be hard in these circumstances for an underwriter to say that it would not have underwritten the risk at all. SB and RS noted that this was already an evidential issue under the current regime. TO's view was that it was predictable what an underwriter would say when faced with a breach by the insured of the duty of fair presentation, i.e. that it would not have underwritten the risk at all. However, it would be difficult to prove this given that detailed underwriting manuals are used by most insurers (especially in the life and health sector) and could be used to evidence what the underwriter would have done in a different factual situation. JT noted the impact of the contracting out provisions on this issue, i.e. that the parties could write back into their contract the "all or nothing" approach to misrepresentation.
- 3.7 Clause 10 of the Bill (breach of warranty) was also discussed and JT noted that this could also be contracted out of where the insured was not a consumer, provided there was adequate disclosure of the contracting out. RS noted that the "all or nothing" approach could equally be written back into contracts on this issue. JT noted that conditions precedent would be given more attention over time and summarised the recent case of *Ted Baker v AXA* where the insurer had escaped liability because of a condition precedent regarding the filing of management accounts.
- 3.8 It was concluded that the members of the Committee should compare views of how they thought that market practices would change following enactment of the Bill.

3.9 It was proposed that the Committee could invite Stephen Lewis (the new Law Commissioner) to a future meeting.

(b) European Insurance Contract Law reform (Joanna Page)

3.10 In October 2014 JP had attended the ERA Conference on Insurance Law on behalf of the Law Society. Dirk Staudenmeyer from DG Justice, who has spearheaded the debate on European insurance contract law attended, as did two of the other experts from the expert group (in addition to Joanna). These were Professor Jurgen Basedow from the Max Planck Institute (who has also been closely involved in the Common European Sales Law) and Ursula Pachl, the Deputy Director General of the European Consumers' Organisation (BEUC).

3.11 At the conference, Dirk Staudenmeyer reported on further work undertaken by the Commission regarding the potential for a European Insurance Contract Law since the conclusion of the experts' report in February 2014. Dirk Staudenmeyer reported that the Commission has been consulting a number of interested parties. The Commission has in particular reached the conclusion that tax represents an immovable barrier in relation to cross border pensions products. More generally, the Commission has concluded that it needs more data.

3.12 Accordingly there have since been two calls for tender seeking economic analysis of need for cross border insurance products (including behavioural economic analysis as to whether there is a latent demand).

3.13 JP noted that Brussels still seemed keen on the project despite there being a strong consumer and industry opposition to previous consultations. HC asked whether a date for draft legislation had been indicated and JP responded that the Commission had intended for there to be a draft in place by the end of the year, but this had been delayed as a result of the views of the Expert Group.

3.14 JP reported that there would be more evidence gathered before draft legislation was produced and nothing would go before the Commission or Parliament at this point, but that the reform project could not be considered to have gone away.

(c) Verdict in Bluefin judicial review: company director was not an eligible complainant for the purposes of the Financial Ombudsman Service (Richard Spiller)

3.15 RS explained that the court had upheld the decision of the Financial Ombudsman, which had decided that it had no jurisdiction to entertain a co-director's complaint under a D&O policy. The director in question had been held not to be an eligible "consumer" under the jurisdiction of the Financial Ombudsman, since his liability had been incurred in the course of his trade or profession.

(d) Consultation on Solvency II

3.16 RS noted that three consultations had been issued in the last week of November 2014.

- (i) CP 24/14 related to further measures for the implementation of Solvency II. These measures were largely non-legal (aside from the appendices). It was noted, however, that there was a new requirement on Lloyd's to submit returns to the PRA. This new reporting requirement was aimed at enabling the PRA to become more knowledgeable about underwriting at syndicate level and to assess the risks that syndicates may pose to the market.

BD noted that there were draft supervisory statements in the appendices to the consultation which raised issues regarding the treatment of subordinated debt at group level. BD explained that a group subordinated loan would be discounted for solvency purposes. BD explained that she was part of a Solvency II working group that intended to respond to this supervisory statement as it did not agree with the PRA's interpretation of the Solvency II Directive.

RS noted that this consultation would be open until 30 January 2015 and asked BD whether the Committee should be involved in her submission. BD explained that the working group on this issue was informal and based at Hogan Lovells, and that Committee members should contact her if they wished to be involved.

It was concluded that Solvency II should be a topic in the agenda for the next meeting.

- (ii) CP 25/14 contained proposals for redrafting certain sections of the PRA Handbook. It was noted that, although some of the provisions transposing Solvency II would be contained in the new PRA Rulebook, some of the guidance would be in supervisory statements and other items such as letters.
- (iii) CP 26/14 contained rules on fit and proper requirements for senior insurance managers (also referred to as SIMR (Senior Insurance Managers Regime)). This consultation was open until 2 February 2015. It was noted that there were different senior management requirements for insurers to those for banks.

BD explained that further rules about non-executive directors were expected in early 2015.

RS explained that many clients were concerned about the rules relating to groups that could bring insurers' headquarters outside the EEA within the scope of Solvency II. RS noted that this would be a big issue for insurers to consider in the next 12 months.

(e) The FCA's market study on the sale of general insurance add-on products.

3.17 The Committee agreed to pick this up in March 2015, as the consultation was expected to be published in early 2015.

(f) The FCA's market study on the retirement income market

3.18 The Committee also agreed to pick this up in March 2015. There had been no developments since the terms of reference were published in June 2014.

4. New issues for Discussion

As Simon Garrett was absent, the discussion on the FCA's review of the management of conflicts of interest by intermediaries was postponed to the next meeting.

5. Monitoring of sector developments

5.1 RS noted the following:

- (a) On 7 November 2014, the *Diffuse Mesothelioma Payment Scheme (Levy) Regulations 2014* were published. The Regulations required certain insurers to pay a share of an annual levy for the purpose of meeting the costs of the diffuse mesothelioma payment scheme. This scheme had been established under the *Mesothelioma Act 2014* and made payments to eligible people with diffuse mesothelioma, or eligible dependants of people who had died of diffuse mesothelioma.

A copy of the Act can be found here: <http://www.legislation.gov.uk/ukpga/2014/1/contents> and a copy of the Regulations can be found here: <http://www.legislation.gov.uk/uksi/2014/2904/contents/made>

- (b) On 17 October 2014, the Insurance Fraud Bureau announced that, from 2015, it would target organised fraud to product lines beyond motor insurance. It appeared that the IFB intended to target organised liability fraud, including "slip and trip" scams, and fraudulent industrial disease or injury claims.
- (c) On 17 October 2014, Lloyd's published guidance on the use of sanctions clauses in insurance and reinsurance contracts. The guidance related primarily to EU and UK sanctions but many of the principles might apply to US sanctions. The guidance can be found here: <http://www.lloyds.com/~media/files/the%20market/communications/market%20bulletins/2014/10/y4832.pdf>

RS noted that sanctions clauses were already in policies as a matter of course but that issues might arise with back-to-back policies where one contained a sanction clause and the other did not.

It was noted that insurers were also trying to include a "floating" provision relating to the choice of jurisdiction for sanctions purposes, e.g. that the court/parties would have to apply the law that had the most liberal sanctions regime. It was noted that if the governing law of one of the back-to-back policies was US law, the floating provision could not be used and the risk simply could not be insured under the relevant policy. TO and RS discussed the case law in *Vesta v Butcher* and *WASA v Lexington* regarding choice of law in relation to back-to-back reinsurance. RS mentioned a more recent case in which the court had ignored a floating law clause and applied the underlying law of the policy to the back-to-back reinsurance contract.

- 5.2 On 14 October 2014, the PRA issued a consultation on its approach to with-profits insurance business (CP22/14). The proposed rule changes included deleting all existing PRA-designated COBS 20 provisions and replacing them with three new rules. A copy of the consultation paper can be found here: <http://www.bankofengland.co.uk/pradocuments/publications/cp/2014/cp2214.pdf>

BD noted that there was a draft supervisory statement repealing some of COBS 20, and that the market would need to look at the draft statement as well as the rules.

- 5.3 On 6 October 2014, the PRA issued a consultation on changes to its rules on insurance policyholder protection (CP21/14). The PRA intended to replace the Compensation sourcebook (COMP) and those parts of the Fees sourcebook (FEES) which applied to the FSCS with separate scheme rules which were expected to take effect in July 2015. A copy of the consultation paper can be found here: <http://www.bankofengland.co.uk/pradocuments/publications/cp/2014/cp2114.aspx>

6. **Other Items**

6.1 The Committee noted that Chris Foster would give a summary of *International Energy Group v Zurich* once the judgment was released. Nigel Frudd had also offered to present on the FCA's thematic review of the misselling of PPI.

6.2 KM mentioned an FCA report on the managing of bribery and corruption in commercial insurance broking (TR 14/17) <http://www.fca.org.uk/news/tr14-17-managing-bribery-and-corruption-risk-in-commercial-insurance-broking>.

7. **Membership**

7.1 It was noted that Stephen Lewis had retired from Clyde & Co and therefore the Committee. A vote of thanks was passed to recognise Stephen's contribution to the Committee.

7.2 RS explained that Martin Mankabady (who had been a member of the Committee before joining Clyde & Co, and who had appeared as Stephen Lewis' alternate) had expressed interest in rejoining the Committee. The Committee voted in favour of Martin Mankabady rejoining the Committee.

7.3 RS explained that Tim Scott of Linklaters had now rejoined the PRA. RS proposed to invite Tim to resign as it may not be appropriate for the PRA to have a representative on the Committee. RS proposed to ask Linklaters to nominate a replacement. The Committee voted in favour of these steps.

7.4 KM noted that there was some inconsistency in the position over whether or not a member would be deemed to have attended a meeting if he or she had sent an alternate. All were in favour of members being deemed to have attended if they had sent an alternate.

7.5 The Committee agreed to deal with any other vacancies at the next meeting.

8. **2015 Dates for meetings**

8.1 It was agreed that:

- (a) Helen Chapman at Hogan Lovells would host the next meeting on 3 March 2015.
- (b) Joanna Page at Allen & Overy would host the meeting on 2 June 2015.
- (c) Philip Hill would host the meeting on 8 September 2015 at Clifford Chance's Coleman Street office.
- (d) David Wilkinson at Kennedys would host the meeting on 1 December 2015.

8.2 There being no other business, RS thanked SB for hosting and declared the meeting closed.