

CITY OF LONDON LAW SOCIETY

INSURANCE LAW 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 23 September 2014 from 17:00 to 18:35.

Present:

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

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

Christopher Foster – Herbert Smith Freehills LLP ("**CF**")

Simon Garrett – CMS Cameron McKenna LLP ("**SG**")

Michael Mendelowitz – Norton Rose Fulbright LLP ("**MM**")

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

Jonathan Teacher ("**JT**")

David Wilkinson – Kennedys Law LLP ("**DW**")

In attendance:

Martin Mankabady – Clyde & Co LLP ("**MMankabady**") (alternate for Stephen Lewis)

George Belcher – Reynolds Porter Chamberlain LLP ("**GB**") (alternate for David Webster)

Will Reddie – Holman Fenwick Willan LLP ("**WR**") (Secretary)

1. **Apologies for absence**

Apologies were received from Michelle Bramley (Freshfields Bruckhaus Deringer LLP), Simon Brooks (Eversheds LLP), Robert Carr (Greenwoods Solicitors), Helen Chapman (Hogan Lovells International LLP), Nigel Frudd (Minorities Law), Philip Hill (Clifford Chance LLP), Chris Jefferis (Ince & Co International LLP), Stephen Lewis (Clyde & Co LLP), Francis Mackie (Weightmans LLP), Ken McKenzie (DAC Beachcroft LLP), Terry O'Neill, Tim Scott (Linklaters LLP) and David Webster (Reynolds Porter Chamberlain LLP).

2. **Continuing discussion topics**

(a) Update on Insurance Bill (RS)

- 2.1 RS stated that the Insurance Contracts Bill (as it had previously been titled) had been renamed the "Insurance Bill" when it was introduced to Parliament. He considered that this was because the Bill now included an amendment to the Third Parties (Rights against Insurers) Act 2010.
- 2.2 RS explained that the Bill was basically same as the draft Bill that had previously been made available by the Law Commissions, but for a few key changes:
- (a) clause 11 on terms relevant to particular types of loss had been removed. RS stated that there was some opposition to this clause, meaning that there was no longer a consensus on its inclusion in the Bill;
 - (b) clause 6(3)(b) regarding the deemed knowledge of an individual acting as agent of the insurer had been deleted, so the common law position would continue to stand; and
 - (c) clause 14 on damages for late payment had been removed. RS believed that two industry bodies had lobbied for the removal of this clause. MM confirmed that the industry had pushed back strongly on this clause. BD believed that the Law Commissions would consider reinstating this clause. RS agreed, and said that other provisions that had been deleted or excluded from the Bill might be reinstated during the Parliamentary process.
- 2.3 BD stated that the Law Commissions had said that there would be a consultation on what constituted an "insurable interest" and that they might also consult on a reform of the requirement for a marine policy to be in writing.
- 2.4 CF asked whether the Bill covered reinsurance. RS said that this was a good question and referred to a note drafted by TO which had been sent to the Law Commissioner, David Hertzell ("DH"), and which set out several reasons why the Bill did not appear to apply to reinsurance.¹ In his response to TO's note, DH had referred to a case (quoted in *The Law of Reinsurance*, P.T. O'Neill and J.W. Woloniecki, (3rd Edition, 2012)) which stated that the term "insurance" included reinsurance.
- 2.5 MM considered that the application of the Bill to reinsurance might be best dealt with by the courts, and believed that a reinsurer might argue that the Insurance Bill (once enacted) did not apply to it. In addition, CF, BD and MM were aware of a Treaty stating that "insurance" did not include reinsurance.
- 2.6 RS considered that the Committee now had a watching brief on the Bill.

¹ This note was incorporated into the Committee's response to the consultation on the draft Bill. The Committee's response was recirculated to the Committee on 26 September 2014.

(b) Update on European Insurance Contract Law reform (JP)

- 2.7 JP stated that there was nothing concrete to report. She said that the Expert Group had completed its deliberations in January and its report had been finalised in February, and was now available online on: http://europa.eu/rapid/press-release_IP-14-194_en.htm
- 2.8 JP informed the Committee that the Expert Group would technically remain intact until Spring 2015. She believed that the Commission would proceed with its plans to introduce a common insurance contract law, although it might be introduced as an optional system that would run in parallel to the laws of member states.
- 2.9 JP stated that she had been asked to attend an ERA debate in Trier on 13 October on the pros and cons of a common insurance contract law. JP agreed to provide an update at the Committee's meeting in December.

(c) Update on the PRA's Solvency II consultations (WR)

- 2.10 WR explained that he was currently on secondment to the PRA's Insurance Legal department and was working on the rules that would implement Solvency II.
- 2.11 WR stated that the PRA's most recent consultation on the transposition of Solvency II (informally known as "CP3" as it was the third consultation on transposition) contained the main set of rules which would implement Solvency II in the UK. WR explained that the consultation paper contained 20 draft instruments (including the Glossary), some of which were new and some of which had been in the first consultation on transposition.
- 2.12 WR explained that a fourth consultation on transposition was due to be issued at the end of October. This consultation would build on the second consultation and would propose consequential changes to the PRA's existing rules.
- 2.13 WR agreed to provide an update on the consultations at the Committee's meeting in December.
- 2.14 GB noted an issue arising out of the PRA's draft rules. He explained that the draft Solvency II Directive set out different tiers of regulatory capital for insurance companies and that, in order for ordinary shares to be counted as Tier 1 capital, a company had to be able (in certain circumstances) to cancel a dividend that had been declared but not yet paid.
- 2.15 GB explained that the PRA's consultation paper stated that, unless the company's articles stated otherwise, a company's dividends should be considered as being cancellable prior to payment. GB considered that this raised questions regarding the nature of conditional dividends and the practical consequences of declaring dividends, which became a debt due to the shareholders once declared. GB stated that the PRA had suggested that companies changed their Articles to provide for conditional dividends.
- 2.16 JT stated that, in practice, the period between declaration and payment could be shortened in order to avoid the uncertainty of whether the dividend would be cancelled in the, for example, weeks or months before it was paid. MM wondered whether shareholders would say that, if a company's articles did not provide for conditional dividends (or prohibit them), that

conditional dividends were prohibited. GB considered that companies could avoid this problem by changing their articles to permit conditional dividends.

2.17 BD believed that the European Commission could challenge the PRA's implementation of EU law but was unsure that conditional dividends would breach company law. BD believed that the CLLS Company Law Committee may be better placed to consider the issue and, if appropriate, submit a response to the PRA's consultation.

2.18 GB agreed to prepare a note summarising the issue which could be passed on to the CLLS Company Law Committee.

3. **New issues for discussion**

The Committee did not raise any new issues for discussion at the meeting. However, several issues were identified for discussion at December's meeting during the course of the meeting.

4. **Monitoring of sector developments**

4(a) The FCA's thematic review of PPI mis-sales

4.1 RS stated that Nigel Frudd had offered to present on this issue at the Committee's meeting in December.

4.2 By way of background, RS stated that the sums involved in PPI mis-selling were huge: millions of complaints had been received from consumers, and firms had paid out billions of pounds in compensation.

4.3 MMankabady noted that the FCA was due to launch a further consultation relating to insurance add-ons. It was agreed that the Committee should monitor this.

4(b) consultation on proposed changes to the PRA's rules to implement the Solvency II Directive

4.4 This consultation was discussed during WR's update on the PRA's Solvency II consultations (see above).

4(c) European Commission consultation on review of the Insurance Block Exemption Regulation

4.5 RS explained that the consultation was seeking views on whether the exemption needed to be renewed. BD stated that the exemption would automatically end on 31 March 2017 unless it was renewed. RS noted that the scope of the exemption had been narrowed each time it had been renewed.

4.6 MMankabady stated that he had been coming across a lot of pools. RS considered that some pools were pro-competitive as they allowed smaller players in the market to club together and offer an alternative to the bigger players. He explained that removing the exemption for pools would not outlaw pools, but would instead make them subject to the normal competition rules.

4.7 MM stated that there were concerns in the market about the block exemption not being renewed in respect of pools. RS noted that the removal of an exemption for industry wordings had not caused problems and that, in practice, the non-renewal of the exemption in respect of pools may not prove to be a problem.

5. **Any other business**

5.1 The Committee briefly discussed the PRA's policy on schemes of arrangement. RS considered that the PRA's view would probably not be tested until a scheme in the public domain was challenged by PRA.

5.2 CF noted that the Supreme Court judgment in *International Energy Group Limited v Zurich Insurance plc* was due to be handed down shortly. CF explained that the case concerned an employee of the claimant, Mr Carré, who had contracted mesothelioma while working for the claimant. The employee had issued proceedings against the claimant, which were later settled, and the claimant had then claimed under its insurance policy with the defendant. CF stated that the issues before the court included the trigger for insurance cover and the level of cover that was available to the claimant. CF agreed to provide an update on this case at December's meeting.

5.3 SG stated that a first instance hearing involving Travelers and Godiva was due to start in November. He said that the issues before the court included what constituted a related matter/transaction. DW explained that the insurers considered that several instances of theft by one partner constituted one matter, but that the Law Society (which had intervened) considered that each instance constituted a separate matter. DW stated that the insurers' argument would have policy implications for the Law Society, as it would be required to meet any losses which were not covered by the insurers. It was agreed that WR would monitor this case and update the Committee when the judgment was handed down.

5.4 The Committee also noted that a judgment was due in the judicial review of the Financial Ombudsman Service's decision to accept jurisdiction over a company director's complaint against Bluefin, his D&O insurance broker. Again, it was agreed that WR would monitor this case and update the Committee when the judgment was handed down.

5.5 SG agreed that he would update the Committee at December's meeting on the FCA's ongoing review of the management of conflicts of interest by intermediaries.

5.6 There being no other business, RS declared the meeting closed.