

## **CITY OF LONDON LAW SOCIETY**

### **INSURANCE LAW COMMITTEE**

Minutes of the meeting that took place at the office of Norton Rose Fulbright, 3 More London Riverside, London SE1 2AQ on Monday 9 June 2014 from 17:00 to 18:40.

#### **Present:**

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

Michelle Bramley – Freshfields Bruckhaus Deringer LLP ("**MB**")

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

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

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

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

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

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

Jonathan Teacher ("**JT**")

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

#### **In attendance:**

Simon Cooper – Ince & Co International LLP ("**SC**") (alternate for Chris Jefferis)

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

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#### **1. Apologies for absence**

Apologies were received from Simon Brooks (Eversheds LLP), Robert Carr (Greenwoods Solicitors), Beth Dobson (Slaughter and May), Christopher Foster (Herbert Smith Freehills LLP), Nigel Frudd (Minorities Law), Simon Garrett (CMS Cameron McKenna LLP), Chris Jefferis (Ince & Co International LLP), Stephen Lewis (Clyde & Co LLP), Francis Mackie (Weightmans LLP), Tim Scott (Linklaters LLP) and David Webster (Reynolds Porter Chamberlain LLP).

#### **2. Approval of minutes of meeting of 3 December 2013 and 25 February 2014**

RS reported that the minutes of these meetings had been circulated only shortly in advance of this meeting. He asked that any comments on the minutes be sent to WR by 20 June.

### 3. Continuing discussion topics

#### (a) Update on European Insurance Contract Law reform (JP)

- 3.1 JP stated that she had nothing to report on the project. She stated that the parties were expecting a consultation to be issued towards the end of the year. She believed that the European Commission was not currently in contact with any members of the Expert Group.
- 3.2 JP reported that she had also been asked to prepare a presentation on professional indemnity issues for the London Common Law & Commercial Bar Association.

### 4. New issues for discussion

#### (a) Draft Insurance Contracts Bill (MM)

- 4.1 MM explained that the Bill had not yet been finalised but that several "unofficial" revised drafts had been prepared since the formal consultations in January and March. The most recent version was dated 21 May 2014, although it had not been made available to the general public. MM reported that David Hertzell ("**DH**") had said that the Bill was still in a state of flux, so it was likely that further revised versions would be prepared before the final version was published.
  - 4.2 MM explained that the Bill needed to be sent to Parliament's Regulatory Policy Committee by September or October to ensure that there was sufficient time for it to progress through Parliament before the general election. MM explained that legislation that had not completed its passage through Parliament could not be carried over from one session of Parliament to another. If the Bill did not complete the Parliamentary process before the general election, it would not be "lost" but would have to be reintroduced at the first stage, assuming that there was support after the election for its reintroduction.
  - 4.3 MM reported that DH had recently made two points on the Bill's approach:
    - (a) The Law Commissions had discussed with Parliamentary Counsel the possibility of simply amending the Marine Insurance Act 1906 (the "**MIA**") rather than introducing a new Act. Parliamentary Counsel had considered that it would not be advisable to amend the MIA, so the Law Commissions had decided to continue to pursue the Bill.
    - (b) DH had found that the views of the London insurance market were not the same on certain issues and therefore the Law Commissions had drafted the Bill with commercial insurance in mind, as this was considered to be the middle ground. Reinsurance and large, commercial risks were regarded as being at one end of the spectrum.
- MM noted that, as the Committee was aware, there had been some disagreement over whether section 53 of the MIA should be repealed. RS explained that, although the draft Bill did not include an amendment of section 53, it might be possible to make such an amendment when the Third Parties (Rights against Insurers) Act 2010 was amended prior to being brought into force.

MM explained that the Lloyd's Market Association (the "LMA") also had concerns over clause 11 of the draft Bill, which provided that a term (e.g. a warranty) which was aimed at reducing the risk of a particular kind of loss could not be relied upon by the insurer to limit its liability for loss of a different kind. MM stated that he could understand the market's concerns over this clause, as he could see why, as a point of principle, an insurer would want an insured to be held to his word.

- 4.4 MM explained that, in his role as a member of the BILA Committee, he had been involved in making representations to the Law Commissions on the draft Bill. MM explained that DH was due to attend the BILA Committee meeting on 10 June, at which the Committee would be discussing a draft letter to the Law Commissions. MM stated that BILA wanted to explore how much scope the Law Commissions had for considering any feedback that BILA provided, and believed that the Law Commissions were still quite receptive to receiving submissions.
- 4.5 RS updated the Committee on the meeting that the Committee's sub-committee had had on 10 April 2014 with DH to give feedback on the draft Bill. RS noted that the provisions regarding confidential information had been identified as problematic, as had the clauses on warranties relating to particular types of loss and damages for late payment.
- 4.6 MM stated that the 21 May 2014 version of the Bill took into account the outcomes of the Law Commissions' consultations, although he considered that there were still some drafting points that could be picked up.

*Clause 6: knowledge*

- 4.7 MM stated that he had prepared a mixture of general points and specific drafting points for the draft letter to the Law Commissions. MM explained that one of the points concerned clause 6(3). By way of background, clause 6(3) had been designed to replace section 19 of the MIA regarding the duty of disclosure of an insured's agent. MM explained that clause 6(3) would be relevant to, for example, major brokers who held a lot of information about a variety of relevant topics and which they had obtained from several sources. The obvious question at the placing stage would be whether the broker had to disclose all of this information. Under the duty of disclosure in the draft Bill, the information would need to be disclosed, subject to clause 6(3).
- 4.8 TO considered that the only way to test the effect of clause 6(3) would be in open Court, which seemed unlikely to happen where confidential information was involved. TO also noted that the Bill did not define "confidential information". He considered that it would be hard to obtain judicial guidance on the definition, as again the point was unlikely to be brought in open Court.
- 4.9 RS referred to the film finance cases. He stated that it had been argued that, when risks were placed with the non-Lloyd's market, the brokers should have disclosed that risks were accepted by the Lloyd's market and then reversed out. TO considered that it would be hard to know whether this knowledge would constitute confidential information, given that the Bill did not contain a definition. RS suggested that, if the draft Bill were applied to the film

finance cases, the broker would have had no duty to disclose its knowledge, but strangely the insurer would have had a duty to disclose information that it did not know.

- 4.10 TO noted that the draft Bill did not appear to give insurers the right to waive the duty to make a fair presentation. He noted that the only waiver was in clause 3(5)(e) and regarded a waiver of a particular circumstance. MM stated that clause 17 did allow the parties to contract out of the duty of fair presentation. TO agreed but stated that this was slightly different to a waiver.
- 4.11 RS stated that it was clear from speaking to DH that the knowledge provisions in the draft Bill were an issue and that, at the recent BILA colloquium, some of those present had voiced their disagreement with the tests and the remedies contained in the draft Bill. MM agreed and believed that parts of the market were of the view that the Bill would not work in practice. RS considered that the enacted legislation would have to be tested by the Courts, and case law would be needed to clarify its interpretation. DW observed that the meaning of clause 6(3) must be unclear if the Committee was arguing over it.
- 4.12 On the subject of the knowledge provisions, JT asked whether there had been any major discussion on clause 6(2) ("blind eye" knowledge). MM replied that the Law Commissions' third consultation had asked whether "blind eye" knowledge should be included, and that the responses had supported its inclusion in the draft Bill.
- 4.13 TO wondered whether, if the market considered that the law was unclear, insurers would simply seek to exclude the provisions of the Act once it was enacted. TO considered that insurers could insert a clause into their policies stating that the contract was governed by the law as at, for example, 1 January 2014. PH noted that, in accordance with Part 5 of the Bill, insurers would need to make it clear that the provisions of the Act did not apply.

#### *Other clauses*

- 4.14 TO considered that the draft Bill seemed to have forgotten brokers. He said that it was very hard to work out which individuals were being referred to in some places. He explained that the position was clear under the case law on section 19 of the MIA but that the draft Bill seemed to have confused the position.
- 4.15 TO also questioned whether the Bill applied to reinsurance. MM believed that the Bill was intended to cover all insurance and reinsurance except consumer insurance (other than where provided).
- 4.16 JT wondered whether the enacted legislation would apply only to contracts or variations that were entered into after the Act came into force. MM confirmed that this was correct, and was dealt with by clause 20 of the Bill.

#### *Timing and next steps*

- 4.17 DW asked about the Parliamentary procedure and any timing considerations. MM said that the Bill would be examined by a special committee in the House of Lords. RS explained that the draftsman of the Consumer Insurance (Disclosure and Representations) Act had temporarily come out of retirement to work on the Bill and that he was only available to DH

for a short period of time. RS also noted that DH's term of office was due to end this year. MM was unsure whether these factors would be an issue, as the Bill was due to be introduced into Parliament before the end of summer.

- 4.18 RS also identified a potential problem that could be caused as a result of a change in the Minister responsible for the draft Bill, as there was a risk that the new Financial Secretary to the Treasury would not be as supportive of the Bill as the previous Minister had been.
- 4.19 KM asked whether the Committee knew what changes would be made to the draft Bill before it was finalised. MM's view was that the Committee should "watch this space", as it was hard to know how the draft Bill might change.
- 4.20 RS stated that there was little value in the Committee duplicating BILA's work. He therefore suggested that MM seek BILA's consent to the letter being made available to the Committee, after which the Committee's sub-committee should review the letter and note any areas of agreement/disagreement. MM agreed to seek BILA's consent to the letter being made available to the Committee, and said that he would update the Committee after the BILA meeting.
- 4.21 RS considered that, in summary, the Committee's view was that some of the drafting in the draft Bill could be improved – particularly the provisions regarding knowledge – but that the Committee did not disagree with the general principles. RS noted that the LMA seemed to have raised issues of principle and, at the BILA colloquium, had suggested that the enacted legislation would give rise to significant uncertainty and litigation. The Committee noted that the draft Bill did not provide for punitive damages to be paid by insurers where there was an unreasonable delay in paying claims, so the Law Commissions could have put insurers in a worse position.

## 5. Monitoring of sector developments

### (a) PRA consultation (CP9/14) on subordinated guarantees

- 5.1 MM explained that the PRA had held a market briefing on the consultation. Chris Finney of Edwards Wildman Palmer LLP had attended and produced a note [available at: <http://www.edwardswildman.com/A-PRA-Roundtable-Discussion-for-Insurance-Sector-Trade-Bodies-06-02-2014/>].
- 5.2 RS asked for a volunteer to prepare a response to the consultation on behalf of the Committee. JT agreed that he would look at the consultation in more detail and prepare a draft response by the end of June, or earlier if possible.

### (b) FCA report on its thematic review of the management of conflicts of interest by intermediaries

- 5.3 It was agreed that there was little that the Committee could contribute at this stage, but that the FCA's action in this area should be monitored. It was agreed that the item should be included in September's agenda if appropriate.

(c) FCA report on its thematic review of household and travel insurance claims handling

5.4 The Committee had no comments on this report.

(d) The coming into force of the Omnibus II Directive on 23 May 2014

5.5 The Committee noted this development.

(e) PRA supervisory statements on its approach to schemes of arrangement (SS3/14) and capital extractions by general insurance run-off firms (SS4/14)

5.6 RS stated that the final supervisory statements were not significantly different to those that the PRA had consulted on in Autumn 2013. He considered that the PRA still intended to take a "one-size fits all" approach. It was not expected that the PRA would oppose every scheme of arrangement, but MM did consider that it would be interesting to see the PRA's reaction to the next scheme that was proposed. RS noted that clients had delayed their schemes while the PRA was deliberating over its approach, and that some had considered carrying out Part VII transfers as an alternative.

(f) *San Evans Maritime Inc v Aigaion Insurance Co SA* [2014] EWHC 163 (Comm)

5.7 DW noted that he did not consider the judgment in this case to be particularly unusual.

(g) FCA policy statement (PS14/5) and PRA supervisory statement (SS1/14) on mutuality and with-profits funds

5.8 The Committee had no comments on these statements.

(h) FCA report on its market study into general insurance add-on products

5.9 The Committee had no comments on this report.

(i) *Figurasin and another v Central Capital Ltd and another* [2014] EWCA Civ 504

5.10 The Committee had no comments on this case.

**6. Any other business**

(a) Date of, and venue for, September's meeting

6.1 RS said that the next Committee meeting was due to take place on Tuesday 2 September at HFW but that he would be away that week and the week after. He was happy for another member to host and chair the meeting, and suggested switching September and December's meetings round, with DW hosting and chairing September's meeting.

6.2 RS agreed to circulate some potential dates for the meeting. It was agreed that the weeks beginning 1 September and 15 September would not be considered, as people would be returning to work after the summer holiday and in Monte Carlo for the Rendez-vous respectively.

(b) Topics for forthcoming meetings

- 6.3 MB stated that the FCA had recently revised the Terms of Reference for its market study into retirement income. The FCA's report was expected by the end of the year. It was agreed that this project should be monitored, and should be included in September's agenda if appropriate.
- 6.4 DW stated that the Home Office had launched a consultation on a reform of the Riot (Damages) Act 1886. It was proposing to repeal the Act and replace it with a modernised version. DW stated that the new Act might restrict remedies under the Act to businesses with a turnover of less than £2 million. He agreed to review the proposals, prepare a summary for the Committee and consider whether the consultation merited a response from the Committee. DW reported that the consultation was due to close on 1 August 2014.
- 6.5 There being no other business, RS thanked MM for hosting the meeting, thanked SC for attending and declared the meeting closed.