

City of London Law Society

Commercial Law Committee (“the Committee”)

Minutes of meeting held at 1pm on 24 November 2016 at the offices of Travers Smith, 10 Snow Hill, London EC1A 2AL

Present:

Mr Oliver Bray, Reynolds Porter Chamberlain (Chairman)

Mr Richard Marke, Bates Wells Braithwaite (Secretary)

Mr Tom Purton, Travers Smith

Mr Richard Shaw, Berwin Leighton Paisner

Mr Jonathan Bartley, Penningtons Manches

Mr Stephen Sidkin, Fox Williams

Mr Mark Dewar, DLA Piper

Mr Paul Joukador, Hogan Lovells

Mr Rupert Casey, Macfarlanes

Mr Andrew Crawford, Devonshires

In Attendance:

Mr Alistair Williams, Bates Wells Braithwaite

1. Minutes of last full meeting

The minutes of the last full meeting were reviewed and approved.

2. Apologies

It was reported that apologies had been received from the following:

Mr Rohan Massey, Ropes & Gray

Mr Duncan Reid-Thomas, Baker & McKenzie

Mr Jeremy Sivyver, Bishop and Sewell

Mr Jonathan Davey, Addleshaw Goddard

Mr Anthony Woolich, Holman Fenwick Willan

3. Review of the action points from the last meeting

3.1 The Committee discussed the action points from the previous meeting:

- 3.1.1 The Committee discussed which members were receiving copies of the City Solicitor. Most, but not all, of the Committee received copies. Mr Bray said that he had hoped Mr Kevin Hart would attend to discuss the matter with the Committee, as he was currently not clear on the reach of the publication.
- 3.1.2 Mr Bray reported that Mr Marke had spoken to Mr Rupert Earle of Bates Wells Braithwaite regarding his article on Brexit, which covers various media law issues, and would forward it to members of the Committee.
- 3.1.3 Mr Bray noted that 5 December would be the date for a drinks event for the Committee.

4. **Brexit update**

- 4.1 Mr Sidkin noted that for the purposes of the Brexit sub-committee, he was interested to explore how clients are reacting and obtain any information members may have as to what may be emerging from Whitehall. He hoped the sub-committee would meet before the next Committee meeting in order to report back to the Committee.
- 4.2 Mr Bray reported that many clients are preoccupied with the General Data Protection Regulation (GDPR), on which he is receiving many instructions and providing training. However, he noted that an insurance client is aiming to get GCs together to discuss preparing for Brexit.
- 4.3 Mr Purton said that in the early stages there had been many enquiries, depending on the sector. For example, in the financial services sector, clients wanted to know their options if they no longer had passporting rights. However, clients do not want to “push the button” until they know what Brexit will look like. Longer term contracts with cross border elements are another area where clients are seeking advice on how to mitigate the impact of Brexit (for example, where tariffs are introduced, the current financial model may not work). Change control provisions are now very important, and questions are being asked about frustration and force majeure clauses.
- 4.4 Mr Purton has been drafting clauses which are similar to severance clauses, whereby if a clause becomes unenforceable then the parties agree to renegotiate based on the original commercial intention. Since it is very difficult to predict what will happen, this clause seeks to recognise that the basis of the relationship between the parties could become radically different. The clause could refer the parties to expert determination if they cannot agree. The clause would need to be specific to areas which need protecting and should allow the measurement of where the commercial bargain was before and after Brexit.
- 4.5 Mr Joukador suggested that the proposed clause was closer to a MAC clause than a severance clause. He thought it would be useful in longer term contracts, but noted that Clients were entering into such long-term contracts less often. He thought that there was currently a lot of work for accountants, engaging in financial modelling for cross border transactions.
- 4.6 Mr Joukador further suggested that there was no “one size fits all” solution for Brexit, citing the example of tech companies (Apple and Google are currently hiring) compared with financial services who are dependent on passporting rights.

- 4.7 Mr Marke noted that his firm's immigration team has been assisting clients in auditing which employees have residency rights: it has not mattered until now, but now it is necessary to explore routes not relating to the EU.
- 4.8 Mr Dewar suggested that medium entities in the regulated sectors may be seeking to reposition, taking the view that in light of possible divergence between the EU and UK, basing operations in the EU will be a safer option. Mr Sidkin noted in this respect that one of his clients is relocating to Spain. Mr Joukador thought that one aspect of the Nissan news story not reported on is that such a large investment cannot be moved overnight, though the situation may be reviewed in 10 years.
- 4.9 Mr Dewar said that in the field of payment services new e-money platforms were being created in Germany and Spain more cheaply, but subject to other regulatory burdens (for example, the need for wet signatures). Mr Bartley mentioned a Canadian data centre client who is concerned by the Investigatory Powers Act (due to receive Royal Assent by the end of the year). They take the view that it will be difficult to obtain an adequacy finding under the GDPR. Mr Casey suggested that an inadequacy finding would not prevent the UK trading with the EU, as it does with the US, Canada and Australia.
- 4.10 Mr Bray reported that he had spoken to Professor Ian Walden about the Investigatory Powers Act, who had suggested that it would put us in a worse position than the US. Mr Bartley thought it could open the UK to Max Schrems style litigation (i.e. an inadequacy finding based on surveillance).
- 4.11 Mr Bray suggested that contract drafting was something that the Committee could help with, and might set an industry standard. The Committee could produce a number of Brexit clauses and put the CLLS stamp on them.
- 4.12 Mr Dewar reported that he is on the PLC editorial committee, and said that PLC did not have any current plans to produce a clause. However, they may be interested in collaborating with the committee on this.
- 4.13 Mr Sidkin suggested that a CLLS established clause could be an important flag in the ground. He would check with CLLS whether the Committee could use the CLLS name on the product.
- 4.14 Mr Bray said that it would be useful if members of the sub-committee could meet to discuss their rough thoughts, having discussed the matter with their partners, with the aim of producing a working draft. They should aim to meet before the Committee meets again in January. Mr Marke suggested that the City Solicitor could be used as a launching point. Mr Bray agreed but noted PLC would be better.
- 4.15 Mr Marke reported that the following people were on the Brexit sub-committee:
- 4.15.1 Mr Sidkin;
- 4.15.2 Mr Bray;
- 4.15.3 Mr Woolich;
- 4.15.4 Mr Sivyer;

- 4.15.5 Mr Bartley;
 - 4.15.6 Mr Hart;
 - 4.15.7 Mr Dewar;
 - 4.15.8 Kevin Hart; and
 - 4.15.9 Mr Shaw.
- 4.16 Mr Bartley reported that, further to his action point from the last meeting, he had contacted the Law Society, explaining what the Committee is trying to achieve, and offering to meet to see how the Committee can feed into the Law Society's work on Brexit. He asked to be kept in the loop in this respect.
- 4.17 He noted that the Managing Partners' Forum was seeking to connect Brexit experts, particularly lawyers and financial directors with experience of financial services.

5. **Deputy High Court Judge Programme**

- 5.1 Mr Bray reported that Alexandra Marks, a former real estate partner at Linklaters, had been in touch regarding the Programme for Deputy High Court Judges. The deadline for applications was 29 November. Ms Marks had stressed that she had joined the programme and was from a non-contentious background. **Mr Bray would circulate the advert.**
- 5.2 Mr Purton noted that an organisation called BCKR had been set up to assist lawyers to transition to other careers. The Deputy High Court Judge Programme presents a good opportunity in this respect. There is little awareness of the opportunities for lawyers after leaving a law firm partnership. BCKR advertise vacancies and hold breakfast seminars. Mr Casey noted that the Professional Careers Partnership did something similar.

6. **Christmas Drinks**

- 6.1 Mr Bray reported that the Committee would meet for Christmas drinks on 5 December. It was agreed the venue would be Corney & Barrow, Paternoster Square.

7. **Secretary role**

- 7.1 Mr Bray reported that Mr Marke had indicated his intention to step down as Secretary, once a replacement could be found. He thanked Mr Marke for his contribution and asked any interested numbers to get in touch if they would like to take on the role.
- 7.2 Mr Bray also said he was happy to discuss whether it was now time for a change of Chairman. However, the Committee expressed no desire to change the Chairman and accordingly no vacancy exists.

8. **Case law**

- 8.1 Mr Bartley reported on the case of *Fluor Ltd v Shanghai Zhenhua Heavy Industries Ltd* [2016] EWHC 2062 (TCC). The case concerned the base piles for wind turbines for an offshore wind farm. The issue in dispute was the fitness for purpose clause. Turbine parts in three shipments had cracks in them, but the contractor could not say whether their fitness

for purpose was affected (judged as to whether they would last for 25 years). The question was whether fitness for purpose was objective. The Court held that there would be a breach of the fitness for purpose clause where a reasonable buyer had to investigate the fitness for purpose of the product. If they were not in a condition on delivery that allowed a reasonable buyer to install them on the sea bed without further investigation, they were not fit for purpose.

9. **AOB**

None

10. **The next meeting**

10.1 Dates for next Year's meetings would be circulated in due course, following the appointment of the new Secretary.

10.2 The meeting closed at 2pm.

11. **Matters not for publication**

None