

CITY OF LONDON LAW SOCIETY

INSURANCE LAW COMMITTEE

Minutes of the meeting that took place at the offices of Allen & Overy LLP, Bishops Square, London E1 6AD on Tuesday 6 June 2017 from 17:00 to 18:30.

Present:

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

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

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

Laura Hodgson (as alternate for Bob Haken) – Norton Rose Fulbright LLP ("**BH**")

Chris Jefferis – Ince & Co International LLP ("**CJ**")

Francis Mackie – Browne Jacobson LLP ("**FM**")

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

Matthew Rutter (as alternate for Ken McKenzie) – DAC Beachcroft LLP ("**MR**")

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

George Swan – Freshfields Bruckhaus Deringer LLP ("**GS**")

Jonathan Teacher ("**JT**")

Barnaby Winckler (as alternate for David Wilkinson) – Kennedys Law LLP ("**DW**")

In attendance:

Eilidh Brown – Clifford Chance LLP ("**EB**")

1. Apologies for absence

Apologies were received from Andrew Barton (MacFarlanes LLP), George Belcher (Skadden Arps Slate Meagher & Flom (UK) LLP), Simon Brooks (Eversheds LLP), Simon Garrett (CMS Cameron McKenna LLP), Bob Haken (Norton Rose Fulbright LLP), Martin Mankabady (Dentons UKMEA), Kenneth McKenzie (DAC Beachcroft LLP), Michael Mendelowitz and Victoria Sander (Linklaters LLP).

2. Continuing Discussion Topics

- (a) The practical consequences of the Insurance Act 2015 coming into force, and the approach of insurers, reinsurers, brokers, policyholders and others.

FM informed the group that he had been seeing more policies where the proportional remedies were set out in a schedule, normally at the insistence of brokers, which was often a slightly amended version of the provisions in the Insurance Act. PH noted that he had seen modifications in relation to disclosure in particular, for example amending those persons deemed to have knowledge.

FM noted that he had spoken to a broker who confirmed that they had no clients contracting out; BW had seen one insurer voluntarily saying they would contract out. PH noted that he had seen modifications in favour of the insured. CJ noted that s11 (*Terms not relevant to the actual loss*) was often contracted out of.

JP noted that she had not seen much recent change, as clients had had so much time to prepare for the introduction of the Insurance Act that they had already included relevant provisions in contracts. PH agreed, noting that this was mainly people trying to restate the Act, or paraphrase it, and that the main section he had seen amended was the question of whose knowledge counts for disclosure.

(b) The ongoing inquiry launched by the Treasury Committee into Solvency II.

PH noted that there had been one piece of additional evidence, presented by the PRA, since the last meeting of the Committee and that the consultation had been closed for the time being due to the election. BD noted that the PRA was continuing to work on issues arising from the inquiry, in particular in relation to evidence presented by the ABI.

(c) Brexit Committee

PH noted that GB, the Committee's representative on the CLLS Brexit Committee, had sent his apologies and that there had in any event been no update from the Brexit Committee.

(d) The Law Commission's insurable interests proposals

PH informed the Committee that Stephen Lewis of the Law Commission had confirmed that the Law Commission's insurable interests proposals had been put on hold because there had been some difficult issues to bottom out and other projects had taken priority. However, he expected there to be some further progress made on the insurable interest proposals later this year, which would (as the Committee had been informed) relate solely on life insurance. The Law Commission was not considering any other topics in relation to insurance.

3. New issues for discussion

(a) AIG Europe Ltd v OC320301 LLP (also known as AIG Europe Ltd v Woodman)

PH informed the Committee that on 22 March 2017, the Supreme Court had handed down its judgment in *AIG Europe Ltd v OC320301 LLP (also known*

as AIG Europe Ltd v Woodman). This was a case relating to the aggregation of claims under solicitors' professional indemnity insurance, and the meaning of "a series of related matters or transactions" under clause 2.5(iv) of the Law Society's Minimum Terms and Conditions, annexed to the Solicitors Indemnity Insurance Rules 2013. It was held that the Court of Appeal's formulation that matters had to have intrinsic relationship with each other, rather than an extrinsic relationship with a third factor, was not satisfactory and that the exercise of whether matters or transactions were "related" was an acutely fact-sensitive exercise.

CJ noted that this judgment neither helped nor hindered an analysis of whether specific claims should be aggregated, as it did not lay down any more specific test. FM noted that it was specific to the professional risk market and had little wider application due to the fact that the words used ("a series of related matters or transactions") were not used in other markets. It may be of interest to surveyors or architects but not more widely. PH noted that the case was unlikely to encourage others to adopt similar language.

(b) Update on responses to consultations by HM Treasury and the FCA on the implementation of the Insurance Distribution Directive

LH informed the Committee that responses to both consultations had been prepared and that BH had requested any comments on the FCA consultation, in respect of which an extension had been agreed so that the FCA would receive the Committee's comments on 7 June 2017, by the morning of 7 June 2017.

RS noted that one area of interest was the potential extension of the client money rules to reinsurance. LH noted that the IDD does cover reinsurance and that BH had noted in the consultation that the question was the extent to which CASS should apply to reinsurance mediation; BH was not suggesting that the full scope of CASS should apply. RS noted that the consultation paper had been thin on the applicability of CASS to reinsurance mediation and that it was difficult to see how it would apply, and that there was a risk that all reinsurance brokers would have to operate client money rules with no prior experience of having done so.

LH noted that the IDD was badly drafted in that it did not expressly exclude reinsurance from the scope of client money rules. In implementing IDD in the UK the FCA would therefore have to expressly state that the CASS rules were limited in respect of reinsurance if this was its intention. MR noted that the FCA was only considering whether to amend CASS 5 so that it was compulsory, rather than optional, for reinsurance intermediaries. BD noted that if the Committee's opinion was that CASS 5 should not apply to reinsurance mediation, it would be important to state how the relevant provisions of IDD would be complied with in respect of reinsurance. LH noted that she understood that a later consultation on CASS specifically would be launched.

MR noted that the relevant IDD provisions relating to the protection of client assets gave the FCA a choice – the IDD provided that it was mandatory to

protect client assets, but that this could be done in four different ways (the most obvious being client money rules).

RS noted that the FCA was also considering whether to narrow the scope of available options for reinsurance mediation by making CASS 5 compulsory but allowing only a risk transfer basis.

FM noted that people had historically been willing to do this contractually, which suggested it was workable. RS noted that the issue was who carried the credit risk and whether it was right that the reinsurer should bear the credit risk of its agent.

LH reiterated that there were four options under the IDD for the FCA to choose from. MH noted that it would be odd for the law to restrict reinsurance intermediaries to only risk transfer arrangements as it should be as flexible as possible. RS noted that pure reinsurers were generally not authorised to hold client money.

LH noted that there would be a new CASS proposal over summer so it seemed likely that the FCA would not be prescriptive at this stage. RS and LH both noted that a number of other EU jurisdictions chose to be more flexible and allow the minimum capital or guarantee fund route. RS noted that this would make sense as it seemed odd for the FCA to force more commercial transactions into the client money rules, which were already complex and difficult to understand. RS noted that a study had shown that roughly $\frac{3}{4}$ of intermediaries were not operating client money rules properly.

BD asked the Committee whether it agreed that the response should ask the FCA to consider all options available to it, including the financial capacity options, for reinsurance intermediaries, which LH agreed would be included in the consultation as well as a reminder to the FCA of the low level of CASS compliance.

MR noted that there was a throwaway comment in the consultation paper relating to commission information being given to retail customers. This had been addressed in the response, with the Committee pushing back firmly on the extension of IPID to commercial lines.

4. **Monitoring of sector developments**

(a) FCA discussion paper on distributed ledger technology in regulated markets

The Committee noted that this was quite a commercial paper and that there was no particular legal slant for it to focus on.

(b) Financial Advice Working Group report entitled *Consumer explanations of "advice" and "guidance"*

PH noted that the Financial Advice Working Group had released its report entitled *Consumer explanations of "advice" and "guidance"*, prepared for HM Treasury and the FCA with the aim of deciding on new terms for "advice" and "guidance" that would help consumers better understand these services when

they take decisions about their financial future. PH noted that the conclusion of the report was that there were no more suitable replacement terms and the group was not asking for external input at this stage.

BD noted that the main concern was that people were not sure when they were being given regulated advice and when they were just being given information, which RS noted linked into the regulatory proposals around changing the definition of "advice". MR noted that "advice" in the regulated sense would have to include giving a recommendation from January, as companies were currently reluctant to give information due to a fear of it being a regulated activity. JT noted that the intention was to allow providers to give more information to customers without the fear of it straying into regulated advice.

(c) FCA Business Plan 2017/18

PH drew the Committee's intention to the FCA business plan and the relevant sector priorities, noting in particular the priorities regarding distribution chains and competition.

(d) FCA policy statement on *Maintenance of the 'transitional measure on technical provisions' under Solvency II*

PH noted the FCA's policy statement on *Maintenance of the 'transitional measure on technical provisions' under Solvency II*. BD noted that there was a consultation in December and the relevant firms have been in dialogue with the PRA.

(e) PRA policy statement on Senior Insurance Managers Regime

PH noted that the final rules on SIMR had been published and that a consultation paper would be published on specific issues.

(f) FCA proposed guidance on its approach to the review of Part VII insurance business transfers

PH noted that comments on the FCA's proposed guidance on its approach to the review of Part VII insurance business transfers had been requested by 15 August. BD noted that the Committee should comment on the proposed guidance and that much of it was a restatement of the approach the FCA currently takes.

BD noted that a point of particular interest was the FCA's approach to conflicts between the Scheme and current COBS rules – the proposed guidance suggested that if a firm needs to carry out a Part VII of a fund run in accordance with the old Scheme rules, this will not be able to be carried forward.

[GS, VS and BD] volunteered to form a sub-committee to review the proposed guidance.

GS noted that much of the guidance just made concrete what the FCA already does in practice. JT noted that formalising the FCA's practice in this way

seemed odd given that the PRA is the lead regulator. GS noted the clear expectation in the proposed guidance that insurers should enforce any contractual rights they have to get customer information from brokers; BD noted that this went further than just formalising current practice.

- (g) FCA policy statement setting out its final rules regarding information prompts in the annuity market

The Committee did not have any comments on the FCA's policy statement setting out its final rules regarding information prompts in the annuity market, which was required to be implemented by 1 March 2018.

- (h) Update on Butterworths Insurance Law Handbook new edition

AB was not present to update the Committee on the new edition of the Butterworths Insurance Law Handbook.

5. **Membership**

- (a) PH noted that the Committee would need to advertise for new members and that an advert had been placed requesting responses by 30 June 2017. PH noted that in particular new representatives would be sought from Clyde & Co and Kennedys and that Mayer Brown had also expressed an interest.
- (b) PH noted that Fenchurch Law Ltd had expressed an interest in membership and explained that they were a policyholder firm and might offer an interesting different perspective to the Committee.
- (c) PH noted that Terry O'Neill had decided to formally resign from the Committee and had expressed his enjoyment of the Committee and its members over the years. PH requested that the Committee's appreciation of Terry's commitment be noted.

6. **Any other business**

- (a) FM noted that an interesting sector development was user-based insurance, which was a future selling concept being looked at by every big insurer. FM and a colleague had been to a conference in March at which every speech noted that user-based insurance would be the next big growth area, for example insuring an individual product for a certain time.

JT noted that there were apps in development for cedants in various areas. JP questioned whether these could encompass individual risk rating – MR believed that it could. JP noted that at a recent conference there had been push back from certain countries against the trend of forcing people into telematics. FM noted that many companies were saying this would change in the next three years or so due to consumer demand. JT believed that this was a generational behaviour shift.

RS explained that products were being developed which re-rated individuals every month. JT noted that policies like this had been in existence for a while,

for example HIV policies in South Africa. FM noted that it would be on everyone's radar within 12 months.

HC noted that from a conduct perspective such products did not necessitate much change.

- (b) RS requested that a vote of thanks to Terry O'Neill be given and noted in the minutes. The Committee agreed that Terry had been one of the greatest contributors to the Committee over his years as a member.