E-Briefing Detailed Version
(Covering the period from 5 June-10 July 2010)

Current consultations

As mentioned in the previous e briefing, the SRA consultation "The architecture of change: the SRA's new Handbook" was issued on 28 May 2010, with comments due on +20 August 2010 (http://www.sra.org.uk/sra/consultations.page" http://www.sra.org.uk/sra/consultations.page). The **CLLS's Professional Rules and Regulation Committee** (PR&RC) is taking the lead in responding to this consultation.

Recent submissions and publications

1. Specialist Committees

1.1 Insolvency Law Committee

The Insolvency Law Committee and the Insurance Law Committee recently both responded to HMT's consultation "Strengthening the administration regime for insurers". (See 1 for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=815&lID=0 for the Insolvency Committee's response.) (The Insurance Law Committee's response is referred to later in this document.) The consultation paper stated *inter alia* that:

> 1.21 The incidences of insurers being put into administration or being wound-up in the UK have been low, with no incidences occurring during the recent period of financial instability.
>
> …As a result the procedures and processes surrounding insurers entering into administration, which have evolved over time, have not been developed significantly either in practice or in law. However, in the light of reviewing other insolvency regimes across the financial services industry, and reflecting on the lessons learnt during the financial crisis, the Government considers that some aspects of the administration regime for insurers could be strengthened.
>
> …This consultation seeks views on Government proposals to improve the protection and payment of benefits for holders of insurance contracts with an insurer facing financial difficulties, in particular addressing gaps in protection that remain in the administration regime for insurers in comparison to the liquidation regime. The Government proposals include:
>
> - applying the existing rules for valuing contracts of insurance in liquidation to administration; and
> - revising the objectives of an administrator of an insurance company, by:
>   - changing the law to require administrators to provide assistance to the FSCS to enable it to administer the compensation scheme and secure continuity of contracts of insurance; and
>   - applying existing powers relating to continuity of contracts of long-term insurance on the liquidation of an insurer to administration.
>
> …Annex D sets out the draft Financial Services and Markets Act 2000 (Administration Orders Relating to Insurers) Order 2010.
>
> 1.6 The recent period of disruption in the global financial markets has had a widespread impact across the world. Like many industries, the UK insurance sector

has been affected; however, both the insurance industry and the UK's prudential regulatory regime for insurers have stood up well to testing economic conditions.

…1.8 In the light of reviewing other insolvency regimes across the financial services industry, and reflecting on the lessons learnt during the financial crisis, the Government considers that some areas of the administration regime for insurers, which has evolved over time, could be strengthened.

1.9 In this consultation, the Government seeks views on whether to refine the administration regime for insurers to improve the continuity of payments and protection for policyholders should an insurer go into administration, in particular, by:

- adopting certain aspects of the liquidation regime for contracts of long-term insurance incorporated in section 376 of Financial Services and Markets Act 2000 (FSMA), and under the Insolvency Act 1986 and the Insurers (Winding Up) Rules 2001; and

- adding specific duties to the objectives of the administrator of an insurer in addition to those currently required under Schedule B1 to the Insolvency Act 1986.

Where there are insufficient resources available to pay unsecured creditors (such as insurance policyholders) in full, an administrator can only act in a way that does not unnecessarily harm the interests of the creditors of the company as a whole. This approach may have a negative impact on insurance policyholders, particularly those with long-term contracts (such as life and annuity policies), who rely upon the cash-flows from their matured policies as their main source of income.

1.21 The incidences of insurers being put into administration or being wound-up in the UK have been low, with no incidences occurring during the recent period of financial instability. This has resulted in the procedures and processes surrounding insurers entering into administration not being highly developed either in practice or in law.

1.23 Despite the low number of insolvencies in the insurance sector, distinct gaps remain in the administration regime for insurers in comparison to the liquidation regime. This could result in policyholders, in particular those with long-term contracts of insurance, not receiving equivalent protection under insolvency law when an insurer is in administration as would apply when the insurer goes into liquidation. In particular:

- there are no rules for the valuation of general or long-term insurance contracts in administration, resulting in a lack of clarity on how to deal with these contracts once an insurer defaults; and

- although an administrator currently has the power to:

    - provide assistance to enable the FSCS to administer the compensation scheme and secure continuity of contracts of insurance; and
    - continue the business of the insurer and make payments under any policies; the administrator is not required to do so.

Valuation of insurance contracts

1.24 Although the Financial Services and Markets Act 2000 (Administration Orders Relating to Insurers) Order 2002 modified the administration regime for insurers to some degree, it did not provide a comprehensive regime for insurers, as at that time it was considered that the existing alternative provisions for insurers were sufficient. However, now further revisions are considered necessary as, for example, the rules for valuation of both general and long-term contracts in the event of a winding-up under the Insurers (Winding Up) Rules 2001 do not apply when an insurer goes into administration.

…1.26 For the FSCS process to work efficiently, it is considered that an administrator should be required to provide assistance to the FSCS to enable it to administer the scheme and to secure continuity of long-term insurance contracts, mobilising the administrative resources of the insurer.

…1.27 Section 376 of FSMA ensures that, where possible, long-term insurance contracts will continue where an insurer goes into liquidation. Unless otherwise directed by a court, the liquidator is required to maintain existing contracts so that they may be transferred to another insurer as a going concern.

1.28 In contrast, when an insurer is in administration, although an administrator currently has the power to continue the business of the insurer (activities of which includes collection of premiums, managing investments and the payment of benefits under any policies), the administrator is not required to do so.

…1.30 In the light of reviewing other insolvency regimes across the financial services industry and lessons learnt across the financial sector the Government has identified a number of areas where the administration regime for insurers could be strengthened. This consultation seeks views on proposals to amend the existing administration regime by:

- applying the existing rules for valuing contracts of insurance in liquidation to administration; and

- revising the objectives of an administrator of an insurance company, by:

    - changing the law to require administrators to provide assistance to the FSCS to enable it to administer the compensation scheme and secure continuity of contracts of insurance; and
    - applying existing powers relating to continuity of contracts of long-term insurance on the liquidation of an insurer to administration.

…2.1 This Chapter outlines the proposals to improve the continuity of benefit payments and protection under the insurance policies for policyholders should an insurer go into administration. The proposals are to:

- apply the existing rules for valuing contracts of insurance in liquidation to administration; and

- revise the objectives of an administrator of an insurance company, by:

    - changing the law to require administrators to provide assistance to the FSCS to enable it to administer the compensation scheme and secure continuity of contracts of insurance; and
    - applying existing powers relating to continuity of contracts of long-term insurance on the liquidation of an insurer to administration.

…2.7 The Government proposes to place an additional duty on an administrator, to provide assistance to the FSCS to ensure it is able to fulfil its obligations which includes securing continuity and payment of long-term insurance contracts…

…2.10 The continuity of long-term insurance by the FSCS is particularly important given that some policyholders may rely on the insurance payments, and any significant delays in these payments could result in hardship. For the FSCS to work efficiently, the Government considers that an administrator should be required to provide assistance to the FSCS to enable it to secure continuity of long-term insurance contracts, mobilising the administrative resources of the insurer.

…2.14 In contrast to the winding-up regime, the appointed administrator of an insurer does not have a duty to carry on the contracts of long-term insurance with a view to transferring them to an alternative insurer. Although policyholders have a right to compensation where an insurer defaults, and will therefore be able to recover the majority of the amounts due through the FSCS (though this is limited to 90 per cent of the claim in relation to long-term insurance contracts), this may only be after some delay due to, for example, the time required to make a claim to the FSCS, and for that claim to be administered. As many policyholders rely upon payments under these policies as their main source of income, any significant delays in payment benefits could result in hardship for a number of vulnerable sectors of the population, including pensioners and the sick.

….2.16 To alleviate any potential distress caused to holders of long-term insurance contracts with an insurer that has entered into administration, the Government considers that there is a need to adopt in administration the same protection as afforded in liquidation for the holders of long-term insurance contracts. This would need to be alongside the administrator providing assistance to the FSCS to enable it to issue continued payments and to continue the collection of premiums.

2.17 The proposed duty will impose a requirement on the administrator to carry out the insurer's contracts of long-term insurance with a view to the transfer of part or all of the business to another insurer, and it will be made clear that this duty is an exception to the administrator's duty to act in the interests of the company's creditors as a whole.

In response to the paper, the Insolvency Law Committee stated, *inter alia*, that

The principal concerns with imposing a duty on an administrator to assist the FSCS to enable the FSCS to administer the compensation scheme and making compliance with that duty an overriding priority above the duty to perform functions in the interests of creditors as a whole are obvious. Imposing that duty on an administrator would in effect oblige the administrator to act in accordance with the directions of the FSCS and its priorities at (presumably) no cost or liability to the FSCS or its levy payers.

In practice the administrators and the FSCS would have a common interest in avoiding policyholder hardship/payment delay. There would therefore be a high level of immediate and continued cooperation between the Insolvency Practitioner and the FSCS in terms of mobilising the administrative resources of the company to assist the FSCS in performing its compensation function, provided that to do so was consistent with achieving the purposes of the administration (which we would expect to be the case in almost every insolvency)

…Application of the Winding Up Rules could create problems for the ability of the FSCS to provide continuous compensation. This is because when the value of a policy is established under the Winding Up Rules, it is assumed that the policy itself is cancelled and the insurance cover is terminated. The policyholder is entitled to a dividend based on the value of the policy (subject to any later revision to the claim before all assets are distributed). The effect is as if the policy no longer exists. Thus where liability policies (including Employers' liability) are valued and paid out in this way, the risk is that any employee or third party who has a latent claim against the policyholder which matured after the payment of the dividend would be reliant on the policyholder having sufficient funds to pay that claim from its own assets at the relevant time, since cover would have terminated upon administration/liquidation.

Compensation from the FSCS to the employee/third party (whom as a matter of policy are also intended to be compensated by the FSCS) would not be available at that date, since the FSCS would have been required to pay compensation to the policyholder based on the value of the policy under the Winding Up Rules. An employee/third party could therefore be left without any compensation in the future if the policyholder became insolvent after receipt of the FSCS compensation and was unable to pay the claim in full.

A scheme of arrangement can be used to remove this potential (but significant) disadvantage and provide continuity of FSCS compensation. This can be achieved by the FSCS participating in the scheme of arrangement, acting in effect as an insurer of last resort to provide continuing compensation to any third parties who might become eligible for protection at some time in the future.

…. Schedule 1 requires the valuation of the policy to be determined on such actuarial principles and assumptions in regard to all relevant factors as the court shall direct. In practice, this would involve the administrators applying to court for an order approving an actuarially based estimation methodology. Depending on the complexity of the business, one or more methodologies may need to be developed, explained to and approved by the court before being applied to policy valuation. It is unlikely that a "one size fits all" approach to valuation of general insurance policies would be appropriate.

…. we think it is a sensible approach to review the current rules and legislation as they apply to the administration of an insolvent insurance company so as to ensure that liquidation offers no significant perceived advantages over administration. In principle, extending the Insurers (Winding Up) Rules 2001 the ("Winding Up Rules") to an administration is likely to be of more practical use in the case of a life insurance company. There is a long established practice of schemes of arrangement being used by insolvent non-life insurance companies as an alternative to liquidation/winding up.

Administrators of non life insurance companies are likely to continue using such schemes even if the Winding Up Rules are applied to a company in administration. A scheme of arrangement under the Companies Acts allows claims to be admitted and dividends paid to policyholders, whilst facilitating the payment of compensation by the Financial Services Compensation Scheme ("FSCS") and the continuance of that compensation for unknown latent claims in a way which the Winding Up Rules appear not to allow. However, we think that the terms of the proposed amendments to the objectives of the administration fail to recognise the issues and priorities with which an administrator has to deal and more fundamentally, the rationale for the administration process itself. If such amendments are to be fair and/or acceptable, they require further thought and refinement. There are, for example, obvious issues to be considered before imposing a duty to assist the FSCS, in terms of the extent of that duty; how the duty would be discharged in practice and what effect compliance with that duty may have on the overall cost and conduct of the administration and upon different stakeholder interests. The question of who would bear the cost of providing the resource and assistance needs to be considered.

Some potential advantages and disadvantages of applying the Winding Up Rules are considered below. It should be noted that these comments may apply equally to the case of administration or liquidation.

… The basis for applying the Winding Up Rules to an administration appears to be that administration currently offers less protection for policyholders than liquidation because there are no rules as to how liabilities under a policy should be valued in an administration and thus a lack of clarity on how to deal with such a contract upon an insurer's default.

The Insolvency Law Committee also responded to the Insolvency Service's Consultation/Call for evidence "Improving the transparency of, and confidence in, pre-packaged sales in administrations". (See http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/Pre-pack%20consultation%2031march%2010.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=826&lID=0 for the response.)

The consultation paper stated *inter alia* that:

This document invites your views on how the transparency of, and confidence in, pre-packaged sales can be improved. A pre-pack is a deal for the sale of an insolvent company's business, or assets, which is put in place before the company goes into formal insolvency, usually administration. The sale is then executed immediately following the appointment of the office-holder, usually an administrator.

We have drafted various options for consideration, which are set out below, and would require varying degrees of legislative change. In addition to receiving views on these options, we would very much be interested in receiving views on other ways of achieving the aim of improving transparency and confidence in pre-pack sales.

The options that we have identified are:

1. No change. All options will be considered against the alternative of making no regulatory change. Some changes to the Insolvency Rules 1986 that will come into force on 6th April may incentivise insolvency practitioners to provide fuller details of their pre-appointment work when involved with pre-pack sales.

2. Giving statutory force to the disclosure requirements currently in Statement of Insolvency Practice (SIP) 16 (Pre-packaged sales in administrations), and providing penalties for non-compliance.

3. Following a pre-pack administration, restrict exit to compulsory liquidation, so as to achieve automatic scrutiny of the directors' and administrators' actions by the Official Receiver.

4. Require different insolvency practitioners to undertake pre and postadministration appointment work.

5. Require the approval of the court or creditors, or both, for the approval for all pre-pack business sales to connected parties.

….Overview
Pre-packs, when used appropriately, are a useful and valuable tool for preserving economic value and saving jobs. … Despite the potential benefits of pre-packs there has been considerable concern amongst creditors, business and the public about their use. Much of the concern is voiced by unsecured creditors who perceive the procedure as not transparent, given that negotiations for the sale take place before the company goes into administration and usually without overt marketing of the assets. Unsecured creditors also have concerns about their inability to have any influence on the process before the sale takes place, and that sales, particularly to the same management team, may be at an under-value. Concerns have also been voiced by business, particularly competitors of prepacked businesses, that the purchaser obtains a competitive advantage, having 'dumped debts' and consequently reducing their costs. There are also concerns that the economic benefits of pre-packs may be short lived, and that jobs saved in the failed company may be at the cost of jobs lost elsewhere in the economy through the effect on formerly solvent companies who consequently suffer bad debts.

A Statement of Insolvency Practice (SIP16) was introduced in January 2009 in order to increase the transparency of, and confidence in, the pre-pack procedure. The Insolvency Service has been monitoring insolvency practitioners' compliance with SIP16 since it was introduced. Our monitoring has shown that despite the issuance of further guidance as to how insolvency practitioners should comply with SIP16, overall compliance rates did not improve during 2009. Our second report published in March 2010 (http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/sip16/Report%20on%20the%20Operation%20of%20Statement%20of%20Insolvency%20Practice%2016,%20July%20-%20December%202009.pdf) shows that for the final six months of 2009 more than a third of SIP16 disclosure statements issued by insolvency practitioners were not fully compliant.

Views are now being invited on whether to strengthen the regulatory regime surrounding the use of pre-packs.

Detail
SIP16 is a professional standard that has been approved by the Joint Insolvency Committee and adopted by each of the authorising bodies. The purpose of SIPs is to set out basic principles and essential procedures with which insolvency practitioners are required to comply.

The Committee responded to the detailed specific questions in the consultation paper.

1.2 Insurance Law Committee

The Insurance Law Committee also responded to the strengthening the consultation on strengthening the administration regime for insurers. (See http://www.citysolicitors.org.uk/FileServer.aspx?oID=814&lID=0 for the response.) In their response the Committee stated, *inter alia*:

Introduction

The Government's proposals seek to refine the administration regime for insurers, primarily with the objective of ensuring continuity of payments and protection for policyholders should an insurer go into administration. The underlying aim of the proposals, which is emphasised throughout the consultation, is to preserve continuity of treatment of policyholders, particularly in the case of life insurers.

For some time, insolvencies in the life and non-life sectors have been dealt with along different lines. This note will first make some general observations on the development of the insolvency regime for insurance companies and then comment on the specific consultation questions raised in the Treasury paper.

The development of the insolvency regime for insurance companies

Before administration became available to insurance companies in 2002, insurance companies in financial difficulty had only two options - go into liquidation or enter into a scheme of arrangement. It has long been generally recognised that it is by far preferable for an insurer in financial difficulties to endeavour to continue the business wherever possible than to cease the business and attempt to place a value on policyholders' unexpired claims and pay them out a dividend as part of an insolvency process. This is why, historically, schemes of arrangement were the preferred insolvency process within the insurance industry, particularly for general insurers.

Many of the earliest schemes of arrangement, in the 19th century, concerned life companies in liquidation. However the scheme process was resurrected as a tool for dealing with general insurer insolvencies in the late 1980s, and most, if not all, insolvencies in the general sector since then have used, or in the more recent cases are expected to use, the scheme process in order to make payments to creditors.

As companies negotiating a scheme of arrangement had no right to a moratorium on hostile action by creditors, the practice in the 1980s and 1990s was to apply to the court for the appointment of a provisional liquidator, so as to bring about a moratorium. With the moratorium in place, the company was free to explore the possibility of putting a scheme of arrangement in place after any preliminary issues had been resolved. Distributions to creditors were in all cases under the umbrella of a scheme of arrangement.

Extension of administration to insurance companies

Since the administration procedure was extended to insurance companies by the Financial Services and Markets Act 2000 (Administration Orders Relating to Insurers) Order 2002 (AORI Order), there have been only two insolvencies, both involving general insurers, in which administration was used. This may suggest that people are still fighting shy of administration as a means of resolving the financial problems of an insurance company, or it may mean that fewer general insurers have experienced extreme financial difficulties.

The problem in arranging a rescue of a general insurer is that it is rarely possible, particularly in the early days of an insolvency, to estimate what the ultimate total liabilities will be. In relation to the Barings crisis, the Governor of the Bank of England remarked that when somebody knows what the bill is, it is likely that somebody can be found to pick it up, but where nobody can tell what the bill will be, this is not possible. This remains true of insolvent general insurers. The rules of the game are different for life companies where actuarial techniques make it possible to estimate the total liabilities with much greater certainty than in non-life cases. Therefore, it may well be possible to organise a rescue or a takeover.

In a general insurer insolvency, the best that can be hoped for is to maximise both the realisation of the remaining assets (of which the largest is likely to be reinsurances to which claims that have not yet been settled will give rise) and the consequential return to creditors at the end of the day. If the business is not in run-of when insolvency occurs and is profitable or has a value, it is likely that the right to renewals will be sold.

Although administration is an attractive option because of the statutory moratorium, it is likely that distributions in insolvencies of general insurers will continue to be dealt with under a scheme of arrangement. The reason for this is that although paragraph 65 of Schedule B1 to the Insolvency Act 1986 contains a power for the administrator to make a distribution to a creditor, with the permission of the Court, it is generally considered that this does not extend to making a series of distributions to creditors generally. In a normal case an initial payment percentage will be set, once the scheme is in operation, and this will be increased over the years as the ultimate total of the liabilities becomes clearer and further assets (mainly reinsurance recoveries) are realised out of which to make payments to creditors.

For life companies, because, as mentioned above, there is a higher possibility of organising a rescue or takeover, in most cases policyholders' best interests will be served by keeping the business going in run-off rather than putting it into liquidation or administration and attempting to value policyholders' claims and pay them a lump sum, which will rarely be adequate to purchase a replacement policy. In such cases, keeping continuing contracts in place will be key. This will involve continuing to receive payments of premiums and to pay out under policies which were already in payment or subsequently mature for payment.

The comments which follow are all made in the context of the foregoing.

Commentary on Treasury Consultation

It may be useful for the provisions relating to the valuation of claims in a winding up to be permitted to be used in the administration of insurers. We expect that in practice administrators are already heavily guided by the claims quantification under the Insurers (Winding Up) Rules 2001 (Winding Up Rules). This is because, under paragraph 8(2) of the AORI Order, "any payments to a creditor...must not exceed, in aggregate, the amount which the administrator reasonably considers that the creditor would be entitled to receive on a distribution of the insurer's assets in a winding up".

However, we do not think that application of the valuation rules should be compulsory in the case of general insurer insolvencies. As mentioned above, it is likely that a scheme of arrangement will continue to be the insolvency process of choice for general insurers. What happens under the scheme will be governed by the provisions of the scheme. In our opinion it is undesirable for the hands of those promoting the scheme to be tied in this respect.

In most cases administration of a general insurer will come to an end when the scheme of arrangement becomes effective. In some cases it may be more appropriate for administration to continue, to deal with certain matters, primarily pursuing claims against third parties, outside the scheme, using Insolvency Act powers.

It has been suggested that, in line with the spirit of paragraph 8(2) of the AORI Order, any new regulations adopted following the consultation should clarify that policyholders' claims rank, in an administration, before claims of ordinary unsecured creditors. We would not object to this, provided that it is not mandatory, but is capable of being varied by the terms of a scheme of arrangement. It seems preferable to preserve flexibility. In any case, those promoting the scheme would be aware that policyholders have priority in a liquidation, and in all likelihood, this would have to be given some recognition in designing the scheme.

It has also been suggested that the law should be amended to support the orderly run-off of an insurance business in financial difficulties to a greater extent than it does at present. For example, in the Winding Up Rules, where a general insurance policy is expressed to run from one definite date to another or may be terminated by any of the parties with effect from a definite date, the liquidator is required to attribute a value to liabilities under such policy equal to such proportion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which that premium was paid. This provision was criticised for being prejudicial to policyholders, especially in the situation where the risk or cost has increased since the policyholder took out the policy, such that there is little prospect of the policyholder obtaining the same cover for the balance of the period, using the pro-rated premium. Nevertheless we consider that this is simply one of the unavoidable consequences of the insurer's insolvency.

Where there are current policies, we believe that it Is important that, like a liquidator, the administrator of a general insurance company should have the ability to terminate current policies, giving rise to the right to a return of the portion of the premium attributable to the unexpired period of the policy, whether or not the contract so provides, if the administrator considers that this would be in the best interests of creditors as a whole. We believe these conditions will temper the potential for policyholders to be prejudiced in the manner highlighted above.

We agree that, whether or not a scheme of arrangement will be, or is likely to be, proposed in a non-life insurance administration, the administrator should be under an obligation to render assistance to the FSCS.

The Insurance Law Committee also responded to The Law Commission and The Scottish Law Commission's consultation on insurance contract law ("Issues Paper 6: Damages for Late Payment and the Insurer's Duty of Good Faith") (See http://www.lawcom.gov.uk/docs/late_payment_issues.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=829&lID=0 for the response.)

The consultation paper stated:

S.1 In this Issues Paper we consider whether a policyholder should be entitled to damages where the insurer has refused to pay a valid insurance claim, or has paid only after considerable delay…

. S.2 …in Scotland (and in most other common law jurisdictions) damages are payable, provided that the loss is considered foreseeable at the time the contract is made.

S.3 This Issues Paper sets out our preliminary thinking. Its purpose is to promote discussion before we formulate our proposals.

… S.15 We tentatively conclude that the insurer's primary obligation should be to pay valid claims. If the insurer fails in this obligation, then normal contract principles should apply.
… In Part 4 we consider how far an insurer's unjustified delay o unreasonable refusal to pay a claim may be a breach of its duty of good faith.

S.30 We make four criticisms of the current law of England and Wales:
(1) *The law lacks principle*. The idea that the insurer's primary obligation is to prevent a loss occurring is a fiction which ignores commercial reality.
(2) *The law appears unfair*. The law of England and Wales gives the impression of being biased against the interests of policyholders.
(3) *The law appears to reward inefficiency and dishonesty*. The law does not support efficient and well-run insurers.
(4) *The law leads to injustice*. Although the FOS mitigates the injustice of the law for consumers and some small businesses, it cannot help medium businesses; provide damages of over £100,000; or deal with disputed oral evidence.

THE OPTIONS FOR REFORM

S.31 In Part 9, we identify two broad approaches to reform. The first would be to amend section 17 of the Marine Insurance Act 1906, so as to provide policyholders with damages where an insurer has acted in bad faith. The second would be to reverse the decision in *Sprung*, so as to make an insurer liable for a failure to pay a valid claim within a reasonable time.

The Committee's report stated *inter alia*

(A) The Issues Paper seems to include three separate topics:

(1) Should there be reform of S.17 Marine Insurance Act 1906 to permit an award of damages for breach of the duty of good faith?

(2) Should the decision in Sprung be reversed?

(3) Should late payment of claims be categorised as potentially a breach of the duty of good faith such as to entitle an insured to an award of damages not limited to interest?

(B) The approach which underpins the remarks and suggestions set out below in response to Part 10 of Issues Paper 6 is threefold:

(1) the 'singling out' of insurers from insured and other commercial entities for special/different treatment ought properly to be avoided;

(2) England in general, and London in particular, has attractions to insurers as a place to carry on business and the reasons for that are a mixture of the relative certainty perceived to exist under English insurance law and

(3) the perceived fairness of English insurance law and the expertise available to deal with disputes.

(C) Dealing briefly with the first point: an insurer in England is a commercial entity, offering a product for sale, and is, in principle, no different from many other commercial entities doing likewise. In a contract for the supply of goods or services the party with the obligation to pay is not susceptible to a claim for damages in the event of late payment beyond an award of interest. If one assumes that a sum payable under a policy of insurance is, or is no different from, a simple debt, then whilst we agree that an insurer should be liable in damages, other than interest, for late payment the same should be said of any other creditor. In so far as that is not achieved by the decision in *Sempra Metals –v- IRC* then it should be the subject of legislation

(D) As to the second point it is a matter that needs to be borne in mind when framing the scope and content of new legislation; the creation of obligations which are uncertain and which depend upon judicial or other construction before they can be fully understood and/or applied is a recipe for litigation and has little to commend it.

…. 10.11 The reforms as contemplated by the Issue Paper offer no benefit to insurers: they are, almost entirely, 'anti-insurer' in character. Our impression is that those reforms will increase claims costs which will inevitably mean a rise in premiums. If one wants to achieve a nil increase in premium from today's levels then the answer can only be to do nothing.

1.3 Land Law Committee

The Land Law Committee responded to the Land Registry e_conveyancing Consultation (Secondary Legislation Part 3). (See http://www1.landregistry.gov.uk/assets/library/documents/Etransfers_consultation_doc_C3.pdf] for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=811&lID=0 for the response.)

The Land Registry Press release (see http://www.landreg.gov.uk/about_us/pressoffice/notices/default.asp?article_id=20601) regarding the consultation stated, in part:

> The proposed new land registration rules would prescribe an electronic transfer as an additional kind of electronic disposition of registered land in England and Wales. Existing rules made in 2008 provide for the creation of standalone electronic legal charges (usually remortgages). The new rules would also revoke the 2008 rules and allow for both standalone electronic legal charges and electronic charges accompanying a transfer. There is already provision for electronic discharges.

Subject to the outcome of the proposals and the advice and assistance of the Rule Committee, it is anticipated that the new rules would come into force during 2011.

Furthermore, the consultation paper stated:

… the use of the new services will be entirely voluntary, (and so non-users will not incur costs nor derive direct benefits),…

… Executive summary

This consultation paper presents for discussion the proposed Land Registration (Electronic Conveyancing) Rules 2011. The rules are required to introduce the facility to use e-transfers and extend the use of e-charges. .

… 3.1 Conveyancers will be able to create an e-transfer, which can be submitted, initially, through the Land Registry's portal. In due course it will also be possible to use the new Business Gateway service to submit documents.

3.2 At the start of the new service there will be limitations, imposed by the secondary legislation, on the form and content of the e-transfer.…

...Section 4

An explanation of how e-transfers and e-charges will operate

4.1 Introduction

The existing provisions for "stand alone" e-charges will continue. Unfortunately, we believe because of market conditions, there has been low take-up of the service. However, we also know from speaking to practitioners and their clients who have used the system that the system of electronic signing is not particularly user-friendly for the citizen. While the security of the system and protection against fraudulent misuse is our primary consideration we believe it is possible to improve the way the signing process is presented to the citizen and we are currently making changes that will make the process more attractive.…

… we had explained our intention to allow either citizen signing or signing by the conveyancer on behalf of their client, and our proposals were set out in the consultation paper. However, strong doubts were expressed by several consultees on the legality of our suggestions on the use of collective delegation by trustees under section 11 of the Trustee Act 2000. As a result, we amended the Land Registration (Electronic Conveyancing) Rules 2008 to permit signing by the borrower only.…

…In discussions with practitioners and others we now believe that at least some views have changed, and we therefore propose to include provisions in the new rules that will allow practitioners and their clients to choose how a document is signed, either by the parties themselves or by their practitioner as their duly authorised agents.…

… Land Registry is under an obligation to ensure that a Stamp Duty Land Tax (SDLT) return has been made before completing an application for registration. We have been working with colleagues from HM Revenue and Customs (HMRC) to devise a simple method of ensuring this happens. Our original idea was for the electronic SDLT return to be forwarded to Land Registry with the electronic application for registration. Land Registry would then forward the return to the Stamp Office.

However it now appears unlikely that our IT systems will have the required compatibility in place for 2011, so we therefore propose to include in our system a facility whereby practitioners can attach a copy of the electronic acknowledgement from the Stamp Office to the Land Registry application.…

…Land Registry will allow the same firm to act for the transferors and the transferees.…

…some practitioners are concerned about signing on behalf of clients, and we acknowledge the views expressed in our earlier consultation responses. However, other practitioners have indicated that they feel that conveyancers signing on behalf of their clients would be their preferred option. Where a conveyancer intends to act as a signatory, there will also be the option to name a deputy for the reasons stated above.

…There will also be a completion protocol to confirm the steps to be taken by conveyancers at the completion stage.

Land Registry has been in discussion with the Law Society to ensure that a Code for Completion suitable for electronic transfers will be in place.…

The Committee responded to a number of detailed questions in the consultation paper and stated *inter alia* that:

Q9. Do you have any views on proposals relating to the operation of the e-transfer/charge? (See section 4.)

The proposal envisages that once a signature has been applied to an e-document there can be no further edit to the e-document without invalidating the e-signature. We feel strongly that the Land Registry should allow an e-signature to be reapplied to a document once any agreed amendments have been made. It is not clear whether the Land Registry is proposing to allow further amendments once all e-signatures have been applied but the e-transfer [is] not yet completed. In our view the system should allow for amendments to be made to an e-transfer at any time up to completion; if appropriate any e-signature that has already been made should be reapplied before completion. Late amendments to documents are common, and if this is not allowed then (we assume) that the only alternative would be to abandon the e-transfer and to create a new one from scratch. We assume that this would also envisage having to re-create all other documents bundled with it (for example e-charges, e-AP1s) which would be extremely inconvenient in practice. Although we would not expect e-transfers to be amended at this late stage (bearing in mind that typically the form of transfer is agreed at exchange or dictated by the terms of the contract), one reason for having to make a late change would be to reflect the fact that a party had decided to arrange for their solicitor to e-sign rather than to do it themselves (or vice versa), and this has to be stated on the transfer itself.

… We see the use of the e-transfer (and associated e-documents) as being an additional amount of work beyond current conveyancing practice and envisage that solicitors may take the view that it is easier to carry on with their current practice rather than to adopt the form of e-transfer suggested. Has the Land Registry addressed how it might persuade solicitors that this is something that they should adopt? What are the real practical benefits of the new system for solicitors?

2. The consultation assumes that only two firms of solicitors will be involved, and that the transferee's solicitor will always be acting for the mortgagee. While this is often the case in residential conveyancing, it is not always the case (some mortgagees like to have a separate firm representing them) and in more complicated or commercial transactions it is usual to have a separate firm acting. Can the system allow this?

3. Even if the answer to question 2 above is no, we envisage that if e-conveyancing is going to become more widespread in the future then at some point the system must allow a number of different firms of solicitors to be involved, and clearly all must be able to look at all or parts of the e-bundle to the extent that they concern their client. It should not be difficult to create an electronic system of gateways so that certain firms of solicitors can be given access (acting for certain of the parties) to some of the documents in the system. This is already envisaged by the acknowledgement that under the current proposal a transferor will not be able to see or know of the existence of a charge by the transferee.

4. The consultation assumes that the lender's solicitors will notify the registrar of completion of any e-charge (if not coupled with the e-transfer). If the solicitor is also acting for the buyer this is fine. If the system were to allow two firms to be acting separately for buyer and lender then in our view either should be allowed to notify the registrar of completion.

5. At present the system only envisages two parties (the two firms of solicitors) actually being able to access the e-transfer on the system. Is there any reason why the parties themselves (the transferee and the transferor) should not be able to have

access to look at the documents on the system if they think it is appropriate? It may be that for the sort of very straight forward transaction that is currently envisaged it is unusual for the transferee and the transferor to be involved in the drafting and negotiation process, but they would expect to see the document and have an opportunity to read it when they sign it (and where solicitors sign documents on behalf of their clients they require their clients to read and approve the document before it is signed). At what stage under the current proposals will a transferee or transferor be able to review the e-transfer?

6. Following on from this, we envisage that if the system were to be used for a slightly more complicated transaction there may be other parties apart from the transferor and the transferee and the mortgagee and their respective solicitors who might have an interest in reviewing the e-documents. For example if the transferor were trustees, the underlying beneficiary may have an interest in approving documents. If the transferee were a joint venture then two parties and possibly two firms of solicitors might be involved. We appreciate that this may not be possible under the current proposals, but it would be necessary if this were to be expanded in the future.

7. The proposals do not appear to envisage attaching an e-DS1 to an e-transfer at the point of completion. Is there any reason why this should not be allowed under the system? Although it is common in residential conveyancing for discharges to be dealt with some time after completion, this causes problems in practice and with more complicated transactions (and commercial transactions) it is normal to require a DS1 to be handed over on completion together with the completed transfer, and we think that it would be helpful if this could be incorporated now.

8. We assume that if additional provisions are to be included in a charge (under paragraph 2(2) of Schedule 2) they will have to be typed into the e-charge on each transaction. Will it be possible to upload in electronic format an extract from a word or pdf document? While we do not necessarily envisage that this is being necessary for the sort of very basic transfer and charge forms that are being used at present, if the system is to be more widely used in the future this would be necessary.

1.4. Planning & Environmental Law Committee

The Planning & Environmental Law Committee also recently responded to the DCLG consultation “New Policy Document for Planning Obligations: Consultation” (see http://www.communities.gov.uk/publications/planningandbuilding/planningobligationsconsultation for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=827&lID=0 for the response)

As the summary to the consultation paper states:

> This consultation seeks views from consultees on a new policy document on the use of planning obligations.
>
> The Government announced that it would consult on a new policy document for planning obligations in the December 2009 Pre-Budget Report. A new policy document is required in light of the introduction of the Community Infrastructure Levy (CIL) and reforms to planning obligations brought about by Final CIL Regulations 2010 which will come into force on 6 April 2010.
>
> In its final form, this policy document is intended to replace the Government's current policy contained in *Circular 5/05: Planning Obligations*, and form an annex to the new Development Management Planning Policy Statement on which the Government launched a consultation on 21 December 2009. In the meantime, the policy in *Circular 5/05* continues to apply.

In its response, the Committee stated that, *inter alia*:

> We welcome the opportunity to respond to this Consultation.

> We note that it was formulated under the aegis of the previous Administration with the objective of clarifying the purpose of planning obligations in light of the CIL (the Community Infrastructure Levy).
>
> It remains unclear whether the current Administration will continue the CIL in the form proposed to date or at all.
>
> The following Response pre-supposes the continuance of CIL in its current form and should be read in conjunction with the CLLS consultation response to CLG's July 2009 Consultation on "Detailed Proposals and Draft Regulations for the Introduction of the Community Infrastructure Levy" which also sought views on a number of issues related to planning obligations.

The response also set out a number of specific factors to be considered, and responded to the specific questions in the consultation paper.

1.5 Regulatory Law Committee

The Regulatory Law Committee responded to FSA CP 10/9 "Enhancing the Client Assets Sourcebook" (See http://www.fsa.gov.uk/pages/Library/Policy/CP/2010/10_09.shtml for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=830&lID=0 for the response.)

The consultation paper stated *inter alia*:

> **Background**
> 1.1 The purpose of this Consultation Paper (CP) is to seek views on our proposals for enhancing the Client Assets Sourcebook (CASS).
>
> 1.2 The financial crisis has been well documented and we will not analyse it further in this paper. We have taken into account the issues highlighted by a number of insolvency appointments, including Lehman Brothers International (Europe) (LBIE).
>
> The focus of this paper is to consider proposals which will protect clients and consider market stability, in the event of a firm's insolvency.
>
> 1.3 During the past eighteen months we have observed a number of areas in which the CASS regime can be strengthened. We have engaged in pre-consultation with firms, trade associations, accounting firms and legal experts, through a combination of meetings, surveys and round-table discussions. We have also had the benefit of participating in HM Treasury's (the Treasury) working groups, the views of which provided the basis for the publication of two CPs considering effective resolution arrangements for investment banks.1
> 1.4 The Treasury has outlined a comprehensive package of proposals which considered legislative, regulatory and market-led solutions to address client money and assets, markets and investment firm resolution issues. This paper considers seven of the client money and assets proposals2 addressing:
> • increased re-hypothecation disclosure and transparency in the prime brokerage community;
> • enhanced client money and asset protection; and
> • increased CASS oversight.

As the response to the consultation paper stated:

> We set out below our responses to a number of the specific consultation questions. We note however that the CP is to be followed later this year by two further consultation papers and its proposals are subject to concurrent discussions between the FSA and the European Commission and that as a result, our current views may be modified and we may need to write again accordingly. As the FSA will see, we have a number of comments on the proposals. We understand the underlying concerns arising out of the post-Lehman difficulties with obtaining release of client assets. We agree that if solutions can be found that would speed up or simplify the process then

they should be seriously considered, but there are other important factors that need to be taken into account. These include the fact that arrangements for holding securities and settling transactions will frequently involve complex operational and cross-jurisdictional issues, and that it is important that the measures do not lead to an increase in systemic risk because they prevent providers of core market services from properly protecting their own exposures to clients.
1
Chapter 2 of the CP: Increasing re-hypothecation disclosure and transparency in the prime brokerage community

General observations

We are concerned by FSA's suggestion at paragraph 2.2 of the CP that it will consider whether the proposals in this chapter should apply "to other market participants who enter into rights of use arrangements to ensure there is a level playing field in the market". This is worrying if it results in extra obligations for a much wider range of services than just prime brokerage. Conversely, we note that the additional client money and lien restrictions in Chapter 3 of the CP are proposed for all UK authorised firms and not just prime brokers. In light of this difference, we would ask FSA to confirm the intended scope of its proposals.

The Committee also responded to the part of FSA CP10/10: Quarterly consultation No.24 regarding Proposed changes to the controllers regime in the Supervision manual (SUP). (See http://www.fsa.gov.uk/pages/Library/Policy/CP/2010/10_10.shtml for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=822&lID=0 for the response.) The consultation paper stated, *inter alia*:

10.2 It is highly desirable for both firms and us to have as much clarity as possible regarding the controllers' regime. We believe that following implementation of the Directive there is one issue on which guidance is needed. This relates to acting in concert and deemed voting power.

10.3 Specifically we would like to clarify when shares or voting power should be aggregated for the purpose of determining whether, as a result of this aggregation, someone who decides to acquire or increase control needs to give notice to us in writing before making the acquisition.

10.4 We have therefore drafted Handbook guidance for the benefit of all controllers and potential controllers. This describes our proposed approach to acting in concert and deemed voting power. It outlines our position on these issues with illustrative examples in question and answer format.

10.5 Although the EU Level 3 Committees have provided some guidance on the phrase 'acting in concert', this guidance (the L3 guidance) is not intended to be comprehensive or to define the scope of who needs to notify the competent authorities. The draft guidance we have outlined in this consultation is not intended to replace the L3 guidance, but to supplement it.

...10.9… By providing this guidance, we expect the role of those acting in concert to be more clearly defined. This will allow greater clarity concerning when to disclose relationships to us, which may otherwise undermine market confidence.

The Committee's response stated *inter alia* that:

….1.4 This response has been prepared by the Society's Standing Committee on Company Law and the Regulatory Committee of the City of London Law Society. This response is supported by the Law Reform Committee of the General Council of the Bar.

1.5 This document uses the FSA's numbering for ease of reference. In addition to commenting on the proposed changes to Chapter 11 of the Supervision Manual, we are also raising a number of issues in relation to Part XII Financial Services and

Markets Act 2000 (FSMA) which could usefully be addressed when a legislative opportunity arises. These issues are set out in Section 4.

2. SUMMARY OF KEY COMMENTS

2.1 Our principal comments are as follows:

(a) given its context in the various directives amended by the Acquisitions Directive and the purpose of the “qualifying holdings” provisions in those directives and the controller regime more generally, we are firmly of the view that the “acting in concert” wording is designed to capture situations where two or more persons act together in their acquisition of, and the ongoing exercise of rights relating to, an interest in a financial services firm. Each acquirer is attributed with the shares or voting power held by the other because of their continuing relationship with each other. It follows from this that an agreement should have three key elements if the parties to it are to be treated as “acting in concert” for the purposes of Part XII FSMA:
    (i) the contemplated acquisition of shares or voting power;
    (ii) the imposition of restrictions on the parties to the agreement in relation to the exercise generally (rather than on specific issues) of the voting power, or the rights attaching to shares, held by them (including those so acquired); and
    (iii) (iii) an ongoing or durable nature.

    In this regard, the approach in the answer to Question 5 in the proposed guidance is helpful, since it recognises the second and third elements above. However, we strongly disagree with the FSA’s approach in the proposed guidance in relation to the first element above. The concept of “acting in concert” is not relevant in a situation where parties who already hold relevant shares or voting power simply come together to act in relation to their respective holdings. The question in this situation is whether the parties have made an agreement within section 422(5)(a)(i) FSMA (a Common Policy Agreement) rather than whether they are acting in concert.

(b) for the reasons indicated above, we also strongly disagree with the FSA’s approach to the analysis of “acting in concert” in another key respect. In section 178 FSMA, the expression “acting in concert” is not designed to catch situations where two or more persons come together solely to acquire ownership but (following that acquisition) make ownership and voting decisions separately.s In a number of places (for instance, the answer to Question 14), the guidance incorrectly focuses on matters which are not relevant, such as the manner of acquisition and the arrangements relating to that acquisition. Instead, the guidance needs to concentrate (as in the answer to Question 5) on the proposed ongoing relationship between the parties following an acquisition;

(c) we do not believe that parties to restrictions on the transfer of shares are acting in concert merely by being party to such restrictions. As indicated above, “acting in concert” implies an agreement to act together in the ongoing exercise of rights relating to an interest in a financial services firm - i.e. an ongoing ‘control’ arrangement.

…2.3 We believe that the FSA's approach is out of line with the approach taken in other European jurisdictions…

…2.4 As indicated above, we disagree with some key aspects of the analysis in the paper and do not believe it to be consistent with the Acquisitions Directive. In any event we consider that the FSA should have conducted a cost benefit analysis since we believe that, if the FSA maintains the view expressed under Question 14, then there will be a material new burden and firms and the FSA will face significant additional costs, compared with the position which would arise under the approach which we believe to be correct. Firms and their advisers will have to consider a significant number of people as potential controllers, with the attendant need for advice and completion of forms (which themselves are complex). There will be more questions to the change of control team and a significant amount of processing required. We think the FSA should have taken more steps to understand the likely impact of its proposals, on the FSA as well as on firms. The members of our

Committees, based on their experience of transactions, consider the amount of work (and related cost) that will be required will be considerable.

…3.12 As a matter of law, the "acting in concert" concept must be interpreted and applied in a manner consistent with the Acquisitions Directive. The directive is a maximum harmonisation directive

The Committee also responded to FSA CP10/11: "Implementing aspects of the Financial Services Act 2010" See http://www.fsa.gov.uk/pages/Library/Policy/CP/2010/10_11.shtml for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=831&lID=0 for the response.)

As the consultation paper stated:

1 Overview
Financial Services Authority 3
1.1 This Consultation Paper (CP) sets out our proposals on the use of some of our new powers and duties arising from the Financial Services Act 2010 (the Act).
1.2 The Act received Royal Assent on 8 April 2010. It contains a broad range of measures affecting the way in which the Treasury, the Bank of England and the FSA work together. It alters our statutory framework by amending the Financial Services and Markets Act 2000 (FSMA). The Act alters our powers and duties by giving us:

- a new regulatory objective to contribute to UK financial stability;
- a duty to establish a new consumer financial education body (our public
- awareness objective is expected to be removed subsequently);
- an extension of our powers to write general rules and to alter firms' regulatory
- permissions so that they can be used to meet each of our regulatory objectives;
- enhanced powers to control short selling;
- a power to make consumer redress scheme rules (which is to be commenced at a date not yet known);
- a number of new disciplinary powers (the Act also affects the use of our existing enforcement powers);
- a new power to gather information that is relevant to financial stability;
- a duty to make rules in relation to remuneration; and
- a duty to make rules in relation to Recovery and Resolution Plans.

The Regulatory Law Committee responded to the following questions in the consultation paper:

Q7 Do you have any comments about our proposed policy for the suspension power?

Q8 Do you have any comments about our proposed policy for the non-approved persons penalty power?

Q10-Q12 Financial stability information – gathering power

Robert Leeder
Policy & Committees Coordinator
CLLS