CITY OF LONDON LAW SOCIETY

LITIGATION COMMITTEE

MINUTES OF MEETING

Committee Meeting	held at Freshfields Bruckhaus Deringer LLP
Date	11 January 2010, 4:00 pm

Present	**Firm**
Lindsay Marr (Chairman) (***LM***)	Freshfields Bruckhaus Deringer LLP
Simon James (***SJ***)	Clifford Chance LLP
Hardeep Nahal (***HN***)	Herbert Smith LLP
Nick Heaton (***NH***) (attending for Angela Dimsdale-Gill)	Lovells LLP
Duncan Black (***DB***)	Field Fisher Waterhouse LLP
Willie Manners (***WM***)	Macfarlanes LLP
Julie Herriott (***JH***) (attending for Stefan Paciorek)	Pinsent Masons LLP
Kevin Perry (***KP***)	Edwards Angell Palmer & Dodge UK LLP
Joanna Page (***JP***)	Allen & Overy LLP

In Attendance

Kitty Edwards	Freshfields Bruckhaus Deringer LLP
Tom Dye	Freshfields Bruckhaus Deringer LLP (minutes)

Apologies

Apologies were received from [Tom Coates, Gavin Foggo, Richard Foss, Tim Hardy, Rory McAlpine, Arundel McDougall, Philip Vaughan and Helen Jackson].

1. FINANCIAL SERVICES BILL

1.1 Draft Response to the Financial Services Bill - Introduction

The Committee discussed the amended draft that HN had prepared of the proposed submission to the House of Commons Public Bills Committee regarding the collective action and consumer redress proposals set out in clauses 18 to 26 of the Financial Services Bill (the ***Bill***).

LM said that he had spoken to Margaret Chamberlain of Travers Smith, chair of the CLLS Regulatory Law Committee. That Committee was meeting tomorrow to

discuss its submissions regarding the Bill. It was not yet known whether they would be commenting on the same areas, for example on clause 26 of the Bill which relates to consumer redress schemes, but from his discussion, LM thought unlikely that the Regulatory Law Committee would disagree with the general direction of the Litigation Committee's draft response.

The Committee identified that there were thee main areas of potential concern regarding clauses 18-26, specifically:

- that they depart from the approach in HM Treasury's White Paper on Reforming Financial Markets (the ***White Paper***) as to who will control access to collective actions;

- that too many substantive changes to the law have been left to regulations and court rules; and

- that the Bill puts financial services out of step with the proposed development of a proper framework for collective actions set out in the government's July 2009 response to the Civil Justice Council's December 2008 paper on collective actions.

As a general point it was felt that the collective action proposals for financial services looked rushed for a particular context and in the light of a political agenda.

1.2 Departure from the White Paper

It was noted that there is a tension between the Bill and the White Paper as to the role of "gatekeeper" for collective actions, in that the Bill does not appear to reflect the proposal in the White Paper that the FSA would decide when collective actions should be brought and nominate someone to pursue the action. There was a discussion as to which approach would be preferable. It was felt that the FSA might be a more inconsistent gatekeeper, subject to changing pressures on its regulatory agendas and priorities. The same concern also applied to clause 26. It was generally felt that the court was to be preferred as the gatekeeper. The Committee therefore agreed with the departure from the White Paper in this regard. The possibility of a two-stage gatekeeper involving the court and the FSA was raised. It was suggested that it would be preferable to have a single gatekeeper.

Further, it was considered that as a new area of law, collective actions would benefit from a uniform approach not just within the area of financial services but in the wider development of collective actions. This further indicated a preference for the court to act as the sole gatekeeper.

1.3 Threshold and Opt-In / Opt-Out Criteria

The Committee felt that, in addition to other matters about which the Bill was largely silent, the criteria for the making of collective proceedings orders and determining whether collective actions should be opt-in or opt-out ought to be set out in primary legislation.

1.4 Europe

In light of various European developments aimed at harmonisation in the field of financial services, it was felt that consideration should be given to ensuring that the UK remains in step with Europe on collective actions and does not disadvantage its financial services industry. The Committee did not have adequate information to hand to express a concluded view (for example, it was suggested that collective action mechanisms existed in Germany and that the Netherlands had a hybrid system whereby consumer bodies were able to pursue class actions which where made enforceable by the court), but it was a matter that should be raised for consideration.

1.5 Costs and Settlement

It was noted that it was not clear who was to be responsible for costs in collective actions. If the intention was that it should be the representative, the Committee felt that the court ought to be satisfied that the representative would be able to pay any costs if ordered to do so. This should be looked at during the certification stage.

The Committee queried whether costs and settlements in collective actions ought to be court-approved.

1.6 Meaning of "Financial Services Claim"

The Committee noted the breadth of the definition of "financial services claim" as drafted. The Committee queried whether the Treasury had intended to limit the collective actions to consumers, or whether the breadth of the definition was intentional. The Committee also discussed whether collective actions ought to be limited to consumers, and it was noted that this would deprive entities such as pension funds from participating and could cause problems for claims relating to financial products sold to both individuals and small businesses. It was also pointed out that limiting the availability of the collective actions to consumers could deprive defendants of the benefits of defending a single action, if non-consumers were required to bring separate actions relating to the same claim.

Nevertheless, consideration should be given to whether the definition of "financial services claim" should be tighter.

1.7 Regulations

The Committee acknowledged the areas of concern raised by SJ n his note circulated prior to the meeting, namely that: (i) there is no obligation on HM Treasury to consult before making regulations under the Bill; (ii) there is a clear overlap between the delegation of rule-making power to HM Treasury under clause 22 and to the Civil Procedure Rule Committee under clause 24; and (iii) HM Treasury is able to waive the limitation period in specific cases.

1.8 Other Issues with Collective Actions

It was noted that HN's draft response also covered the following areas: (i) the modification of limitation provisions; (ii) the regulation of damages; (iii) the need for

rules of court to be introduced; and (iv) whether or not the definition of "court" should include the County Court.

1.9 Consumer Redress

The Committee felt that the consumer redress provisions in clause 26 of the Bill were too skeletal, leaving too much uncontrolled rule-making power to the FSA.

It was noted that there was an argument that as the FSA is to control consumer redress schemes, it should also be the gatekeeper for collective actions. Alternatively, if, as suggested, the court is the gatekeeper for collective actions and threshold criteria are set out, then one suitable criterion might be whether the FSA has required the financial institution to put in place a consumer redress scheme under clause 26. The right of the FSA to be heard in relation to collective actions was also noted.

1.10 Next Steps

HN agreed to update the draft submissions to take account of the discussion and coordinate submitting these to the Public Bills Committee by the deadline on 14 January.

2. MINISTRY OF JUSTICE CONSULTATION ON THE CIVIL LAW REFORM BILL

2.1 Interest - General

By way of introduction it was noted that the Ministry of Justice's Civil Law Reform Bill Consultation (the ***Consultation***) made the following proposals regarding interest:

- to replace existing statutory provisions on the setting and rate of pre- and post-judgment interest with a single set of provisions setting out the court's general powers in relation to interest;
- to give the Lord Chancellor the power to specify the rate of interest payable pre-judgment in addition to post-judgment; and
- to permit both pre- and post-judgment interest to be either simple or compound.

The Committee considered that it was sensible to consolidate the existing provisions on interest, although it was pointed out that if there are to be exceptions brought in by secondary legislation the effectiveness of any consolidation will be diminished. It was noted that the court has discretion as to whether to award interest at all, for what period and on what amount, but that under the proposed reform this power was to be tied to a rate set by the Lord Chancellor. The court would still retain considerable flexibility because of its control of the other variables, regardless of how the rate was set.

It was queried how the proposals for compound interest would interact with the recovery of compound interest as a head of damages under *Sempra Metals Limited v HM Commissioners of Inland Revenue and another [2007] UKHL 34*.

Reference as made to the impact assessment relating to interest set out in the Consultation Paper, and it was suggested that the descriptions of the "problem under consideration" and the "policy objectives and intended effects" did not make clear why the proposed changes were felt to be necessary.

2.2 Interest – Compound Interest

It was felt that introducing the possibility of compound interest was generally to be welcomed, given the commercial reality that almost all borrowing is on a compound interest basis. Recognising this in statute would avoid the judicial sleight of hand required to achieve this under the *Sempra Metals* approach.

The Committee discussed whether there ought to be a presumption in favour of compound interest to reflect the commercial realities of borrowing. For pre-judgment interest, it was felt best to retain flexibility by leaving the matter to the court's discretion without a presumption (that in practice might prove difficult to displace). However, it was suggested that one area where a presumption in favour of compound interest may be suitable is following default judgment.

The Committee did not feel that introducing compound interest should be seen as a major step because the issue had been discussed in various contexts over the last decade, it reflected the commercial reality of borrowing, and parties were often receiving compound interest as a matter of contract in any case.

2.3 Interest – Roles of the Lord Chancellor and the Court

The competing merits of flexibility and certainty were considered. It was argued that if a choice were to be made between the two, it would be preferable to leave the whole issue of interest to the court, with a default rate of interest set by the Lord Chancellor to apply only if the court did not deal with the issue.

On the other hand, it may be simpler to set one rate for all cases, linked to base rate to take account of fluctuating economic circumstances. It was noted that both linking any rate of interest to a fluctuating base rate and allowing compound interest would increase the level of complexity in calculating the interest payable and the would diminish the court's ability to check such calculations.

If the Lord Chancellor was to set the rate, then it was agreed that the proposal that the rate-setting power should be exercised annually was a good one in order to ensure the rate was regularly reviewed.

2.4 Interest – Pre- and Post-Judgment Rates

There was a discussion as to whether the same arguments apply to both pre- and post-judgment interest. There were two strands to this discussion, the first being the practical difference between claiming pre- and post-judgment interest, and the second being the underlying rationales for each type of interest.

In relation to the practicalities of pleading post-judgment interest it was noted that presently parties never had to debate the question of the rate in court. Moving away

from a fixed rate would mean that this would have to be dealt with specifically in every judgment, and therefore discussed in every case. This added cost and uncertainty may not be welcome. On the other hand, in most cases there is argument over the rate of pre-judgment interest, so it might not add greatly to the burden to have to deal with arguments over post-judgment interest also.

In relation to the rationales for pre- and post-judgment interest, HN noted that there were two ways of viewing post-judgment interest, either: (i) as compensation for a period for which a party has been kept out of its money, which would be consistent with the rationale for pre-judgment interest; or (ii) as a sanction for delay in complying with a court order requiring payment.

If conceptually post-judgment interest is a sanction, then there is a strong argument for a set rate, as it might be thought inappropriate for the paying party to be negotiating over the rate at which they are to be penalised for what was in reality a failure to comply promptly with a court order (i.e. the order to pay the judgment sum). If, however, post-judgement interest is simply an extension of the pre-judgment approach of compensation for the period in which a party has been kept out of its money, then the better argument is that pre- and post-judgment should be treated the same.

It was pointed out that if the idea was to have a one-size-fits-all regime, there were strong arguments for a certain amount of pragmatism and simplicity, but that the Committee generally felt that one-size-fits-all was not always the best approach. In this respect, it was also noted that the County Court merited a different approach to that in the High Court.

It was noted that the position was further complicated by the possibility of appeals, but it was felt that in appeal situations provision could be made for the Court of Appeal to have the power to vary the rate of post-judgment interest if justice demanded this.

2.5 Interest – Conclusions

The Committee generally felt that there was a difference between pre- and post-judgment interest. The Lord Chancellor should not have the power to set pre-judgment interest, as this is designed to reflect the commercial consequences dependent on the facts of each case. This should be left to the court, with the power to award compound pre-judgment interest made explicit (although not a presumption).

In relation to post-judgment interest, the position was felt to be different, with a much stronger argument for certainty. Post-judgment, the losing party ought to pay its judgment debt, and the rate of post-judgment interest should be set high enough to encourage this. Two per cent above base rate was suggested as a potential rate, possibly specified also to be treated as compound. This could be set by the Lord Chancellor, and if so, should be done annually.

The Committee felt that these provisions should apply equally to interest on costs.

2.6 Other matters covered by the draft Bill.

It was noted that the Consultation and the draft Bill covered three other areas: (i) the distribution of estates, (ii) damages provisions relating principally to the Fatal Accidents Act 1976, and (iii) the appeal regime in barristers' disciplinary hearings. The Committee did not propose to comment on these areas except to note briefly in relation to (iii) that it was generally supportive of the proposals relating to barristers, as they were understood to be supported by both the Bar and the Judiciary and they would bring the barristers' regime in line with that applicable to solicitors.

2.7 Response to the Consultation

LM would prepare and circulate a draft response to the consultation questionnaire based on the discussion. The deadline for submission was Tuesday, 9 February 2010.

3. AMENDMENTS TO RULES FOR SERVICE IN CPR PART 6

3.1 The Civil Procedure (Amendment No 2) Rules 2009

SJ explained the effect of two changes made by the Civil Procedure (Amendment No 2) Rules 2009 (SI 3390/2009) to Part 6 of the CPR.

The first change was to CPR 6.7 and would allow the provision of a solicitor's address for service of a claim form anywhere in the EEA, at which service of the claim form "must" be effected. This has the potential to lead to great inconvenience, and it is not clear how it relates to contractually agreed methods of service.

The second change to CPR 6.23 will allow a solicitor acting for a party to give an address for service anywhere in the EEA at which every document in the course of proceedings will then have to be served. It is unclear how service is to be effected, other than that if permission is needed to serve the Claim Form out of the jurisdiction then permission will also be needed to serve other documents out of the jurisdiction. The need for permission could be inconvenient in itself, and this change could have the further inconveniences of establishing how to effect service in other jurisdictions, and achieving this.

3.2 EU Service Directive

The first issue considered was whether these changes were necessary in order to comply with the EU Service Directive (2006/123/EC). In particular, SJ noted that Recital 88 suggested not. It was generally agreed that if the changes were required by the Service Directive, then further consideration of them was required.

3.3 Potential Issues

While it was noted that, in relation to the second change discussed above, omnibus permission could often be obtained for the service of all documents out of the jurisdiction where necessary, there could still be considerable practical problems following the changes. In particular, the possible need to obtain translations and the

complications of service under the Hague Convention were raised. This could be used to tie up litigation.

The Committee discussed the fact that these changes appear to be aimed at the equal treatment of solicitors as service providers, but that the issue of service should ideally be viewed from the point of view of the litigants.

It was noted that the court could make alternative service orders, but that this would seem to defeat the purpose of the changes.

3.4 Possible Solutions

The Committee generally agreed that it had no objection to a the creation of a level playing field for service providers, but that this should not be done at the expense of the interests of parties to litigation.

The hope was expressed that the changes to Part 6 would prove not to be necessary under the Service Directive.

Other solutions suggested were to take the French approach and deem service to have occurred at a particular point within the jurisdiction, to make the ability to serve documents in other EEA states permissive rather than prescriptive, or to say that a party may provide an address in another EEA country only if it does not have an address in the UK. The latter possibility in particular would reflect the aim of the Brussels Regulation that a party should generally be sued where it is domiciled.

3.5 Next Steps

It was agreed that the next step was to confirm whether or not the changes were mandatory. If not, SJ pointed out that the Civil Procedure (Amendment No 2) Rules 2009 has already been made and were due to come into force on 6 April 2010, and that, therefore, if the Committee objected to the two changes to Part 6 discussed above it would mean asking for this to be reversed.

LM said that he had checked the previous submission the Committee made in response to the July 2007 Consultation Paper on the review of Part 6. The present concerns about the new changes to Part 6 of the CPR was consistent with the position the Committee had taken in response to the 2007 consultation, at which time the Committee had objected to a proposal to allow parties to specify any address in the EU for service or to provide up to three addresses for service on the basis that this would lead to confusion and complexity.

SJ agreed to draft a letter to the Master of the Rolls setting out the concerns and circulate it for comment.

4. OTHER BUSINESS

4.1 Judicial Diversity

LM reported that he had been sent in November a report that had been published on a conference had been held last March at Clifford Chance on the issue of judicial diversity. The purpose of the conference had been to have an open discussion of ideas for improvements rather than to formulate concrete proposals. The report summarised the ideas that had been discussed. LM would circulate the report to the Committee for information.

4.2 Barristers Dual-Capacity

JH drew the Committee's attention to the decision of the Bar Standards Board at the end of November to allow barristers to operate in a dual-capacity, which could ultimately lead to barristers operating as partnerships. The minutes were not yet available and no guidance on this had yet been published.

It was noted by several members of the Committee that this would impact on barristers' conflicts of interest positions. Apparently, the solicitors' rules were also being amended (it was understood that the CLLS Professional Rules and Regulations Committee was looking at that matter).

4.3 Jackson Report

It was noted that, although the Jackson Report was due to be published late this week on 14 January. The Committee would no doubt wish to consider the Report and any resulting proposals for reform. It was noted that the timing of any resulting action might be delayed by the forthcoming general election.