CITY OF LONDON LAW SOCIETY

INSURANCE LAW COMMITTEE

Minutes of the meeting that took place at the office of Hogan Lovells International LLP, Atlantic House, Holborn Viaduct, London EC1A 2FG on Tuesday 3 March 2015 from 17:00 to 18:15.

Present:

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

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

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

Christopher Foster – Herbert Smith Freehills LLP ("**CF**")

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

Francis Mackie – Weightmans LLP ("**FM**")

Martin Mankabady – Clyde & Co LLP ("**MMankabady**")

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

Michael Mendelowitz ("**MMendelowitz**")

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

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

Jonathan Teacher ("**JT**")

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

In attendance:

George Belcher – Reynolds Porter Chamberlain LLP ("**GB**") (alternate for David Webster)

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

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1. **Apologies for absence**

   Apologies were received from Simon Brooks (Eversheds LLP), Beth Dobson (Slaughter and May), Nigel Frudd (Minories Law) ("**NF**"), Simon Garrett (CMS Cameron McKenna LLP) ("**SG**"), Philip Hill (Clifford Chance LLP) and David Webster (Reynolds Porter Chamberlain LLP).

2. **Approval of minutes**

RS asked the Committee to send him any comments on the draft minutes of the meeting of 2 December 2014 by the end of the week. Subject to incorporating any such changes, the minutes were approved.

3. **Continuing discussion topics**

(a) Update on the Insurance Act 2015 (RS)

3.1 RS explained that, during the Parliamentary process, the section regarding terms not relevant to the actual loss had been reintroduced into the Insurance Act 2015 (the "**Act**") as section 11 and that a minor change had been made to the knowledge provisions in section 4(5).

3.2 RS considered that section 11, which referred to a term which defined the risk as a whole, was difficult to interpret. Although he considered that an exclusion might be able to define the risk as a whole, he questioned how another term could do so. CF considered that all warranties defined the risk as a whole. MMendelowitz raised two examples. He considered that:

(a) a warranty of seaworthiness defined the risk as a whole, whereas an exclusion regarding warzones related only to a specific risk; and

(b) a warranty about how a building was constructed defined the risk as a whole.

MMendelowitz believed that there might be litigation on this issue.

3.3 RS explained that the LMA and IUA were working on guidance on the Act and that AIRMIC was drafting a clause which could be used by parties to give immediate effect to the Act. RS believed that insurers did not want the Act forced on them immediately, as a lot of preparation was needed, such as enabling underwriters to access information held by TPAs and MGAs. CJ suggested that insurers that were ready and able to comply with the Act would use AIRMIC's clause in order to gain a competitive advantage.

3.4 TO noted that the market had discussed "packing" the insuring clause so that it contained everything that would have been elsewhere in the policy. RS stated that, in his experience, this had also been done in reinsurance contracts. CF wondered whether it would be easier simply to contract out of the Act, rather than trying to find ways round it. CJ agreed that it seemed relatively straightforward to contract out. However, MMendelowitz considered that no-one would want to be seen to be contracting out of the Act. DW also noted that most insurers did not rely on a breach of warranty to avoid liability anyway, so section 11 may have limited impact in practice.

3.5 RS asked whether the Committee had an interest in inviting Stephen Lewis to the next meeting to discuss preparation for the implementation of the Act. The Committee agreed that this was a good idea and that RS should contact Stephen Lewis, Kees van der Klugt (LMA) and Chris Jones (IUA) and invite them to the Committee's next meeting.

3.6 RS asked whether the Committee had any other comments on the Act or on the preparations for it.

3.7 TO questioned the difference between sections of the Marine Insurance Act 1906 being "omitted", as stated in section 22 of the Act, and these sections being "repealed", as stated in the explanatory notes to the Act. RS stated that David Hertzell had said that "omitted" meant that the section still

existed at common law from an evidential point of view. MMendelowitz noted that the Act referred to other rules being "abolished", so agreed that there was a difference between "omitted" and "abolished". HC considered that the "omitted" sections would continue to exist but in a modified form, although she was unsure of the circumstances in which the modified sections would be relevant.

3.8 TO wondered what a judge would do where a party breached the duty of utmost good faith but the remedy of avoidance was not available, and wondered whether the duty could be regarded as an implied term of the contract. MMendelowitz expected that someone would run an argument like this at some stage.

3.9 TO also noted that section 6(2) and the explanatory notes preserved the common law rules regarding fraud, and therefore preserved the *Hampshire Land* rule[1]. TO noted that the *Hampshire Land* rule also extended to circumstances where fraud was not involved, so wondered whether section 6(2) and the explanatory notes would cut across the use of the *Hampshire Land* rule in a non-fraud context.

(b) Update on European Insurance Contract Law reform (JP)

3.10 JP stated that there had been no developments since December's meeting.

(c) Update on the PRA's transposition of Solvency II (WR)

3.11 WR gave a brief update on the transposition of Solvency II. He explained that the PRA's final rules were due to be released in the next few weeks. MMankabady asked whether the PRA had provided any guidance, or made decisions, on the equivalence of other regulatory regimes. WR stated that no decisions had yet been taken, even for jurisdictions such as New York.

(d) FCA's market study on the sale of general insurance add-on products

3.12 The Committee had no comments on this consultation.

(e) FCA's market study on the retirement income market

3.13 TO explained that the market study's focus was on improving consumer choice. One of the proposed remedies was for a company to provide quotes from other companies when offering a consumer a quote. TO considered that this was a good proposal and was commendable.

(f) The Supreme Court judgment in *International Energy Group Limited v Zurich Insurance plc*

3.14 CF explained that the case related to employers' liability coverage and indivisible diseases, in this case mesothelioma. CF explained that a further hearing had taken place in January before seven Justices of the Supreme Court. CF believed that the Court had some sympathy for insurers, and anticipated that the law would be changed, but had no news on when the judgment would be published.

3.15 CF explained that the current position was that an employer who had exposed an employee to asbestos would be treated as having caused 100% of the employee's illness. This allowed the insured to claim under whichever year of cover he wished, and to leave all employers/insurers who had exposed him to asbestos to apportion responsibility for his illness between themselves. CF

[1] The rule in *Re Hampshire Land Co (No 2)* [1896] 2 Ch 743

noted that an employee who was uninsured in a year may be able to seek a contribution from his employer.

3.16 CF also stated that the Court of Appeal had found that an employee would not have a separate cause of action simply as a result of being exposed to the risk of mesothelioma; the mesothelioma itself was the damage and the basis of the employee's cause of action against his employer.

(g) The judgment in the first instance hearing involving Travelers and Godiva

3.17 DW explained that Godiva was a judgment creditor which was suing Travelers but that the parties had settled before the case could be heard. As a result, the argument between the Law Society and insurers on the aggregation clause had been left unresolved. DW noted that, technically, the proceedings had been stayed, so there could in theory be future developments.

4. **New issues for discussion**

(a) FCA review of the management of conflicts of interest by intermediaries (SG)

4.1 SG was unable to attend the meeting, so this item was postponed to June's meeting.

4.2 MMankabady noted that one of the FCA's concerns was about brokers that had both integrated models and MGAs. The concern was that a broker would use whichever route gave it the best result, regardless of which insurer was selected and the effect on the policyholder. TO explained that sometimes brokers went to underwriters after quoting the premium to the insured, so the broker would effectively be telling the underwriter what price it had to give.

4.3 HC stated that there was also an issue regarding overriders and that, although it would still be possible to pay them, more attention was needed. MMankabady considered that the biggest risk was in the SME market. As top-end risks were bespoke and low-end risks were commoditised, brokers might cut corners to make up for the lack of overriders.

(b) FCA action on mis-sold PPI (NF)

4.4 NF was unable to attend the meeting, so this item was postponed to June's meeting.

(c) FCA consultation on its approach to independent non-executive directors

4.5 MB stated that she had looked at this consultation and considered that it seemed sensible from an insurer's perspective. RS asked whether the consultation was something that the Committee could respond to. MB did not think that it was, unless the Committee wanted to challenge the scope of the proposed regime. MB did not think that this should be challenged.

4.6 JT explained that there was an ongoing obligation to ensure that non-executive directors and senior managers were fit and proper. JT said that, whilst companies would assess a person's fitness and propriety when taking him/her on, insurers will need to consider if the relevant employment contracts or letters of appointment actually provided for the employee's or director's consent for checks (such as CRB) to be carried out on an ongoing basis. JT considered that overall the proposed regime was a good development but that firms would need to consider how they amended existing and new employment contracts/letters of appointment to deal with the new requirements. RS agreed that the letters of appointment of independent non-executive directors may need to be reviewed and amended, as they were often very brief.

4.7 GB raised a question regarding the new approved persons functions. He wondered what the position would be of a non-executive director of a company (A) where a member of the senior management of A's parent company exercised influence over A, so needed to be approved for his role in relation to A. RS noted that, in practice, CEOs of holding companies were often the effective decision takers in relation to subsidiary companies. GB explained that, under the proposed regime, anyone in A's parent company who exercised influence over A would need to be approved to carry out their role in relation to A.

5. **Monitoring of sector developments**

(a) PRA update on Part VII transfers

5.1 RS stated that there were a lot of Part VII transfers in the pipeline, driven by Solvency II coming into effect. He thought that the regulators seemed to have a negative stance towards schemes of arrangement, and for a run-off firm a sale could be seen as a fire sale, so a Part VII transfer was the main option. RS considered that the PRA's update gave rise to a potential problem for firms that had progressed their plans to carry out a transfer but may now be unable to do so, due to the PRA's backlog in processing them.

5.2 JT observed that the PRA's letter dated 21 January 2015 was published against a background of some instances of supervisors apparently over-promising to firms on timetables which sometimes appeared not to take account of the overall capacity of the regulator as a whole.

5.3 RS noted that a lot of experienced people had left the PRA recently. JT stated that some of the new people that had been brought in had a more commercial background.

(b) Minor PRA consultations and supervisory statement relating to Solvency II

5.4 The Committee had no comments on these consultations or the supervisory statement.

(c) FCA findings of thematic review of annuities sales practice

5.5 RS expected there to be further developments on this topic. He did not consider that the Committee had sufficient experience to discuss the review.

6. **Committee membership**

(a) Robert Carr has ceased to be a member of the Committee

6.1 RS explained that Robert Carr had been working from Bristol, so had felt that he could not continue as a member of the Committee.

6.2 RS reminded the Committee of the membership rule: that membership would automatically cease if a member missed a year of meetings.

(b) Duncan Barber/Victoria Sander proposed as Tim Scott's replacement

6.3 RS explained that Tim Scott had returned to the PRA. RS had contacted Duncan Barber and Victoria Sander of Linklaters and invited one of them to apply to join the Committee, and was awaiting a response.

7. **Any other business**

7.1 TO noted that in the recent Hong Kong Court of Final Appeal case of *Moulin Global Eyecare Trading Limited (in liquidation) v The Commissioner of Inland Revenue* FACV 5/2013, Lord Walker had discussed *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39 and said that he would have changed his mind if he could have heard it again. Lord Walker had also referred to the *Hampshire Land* rule and stated that it had been misunderstood. TO agreed to prepare a brief summary of the *Hampshire Land* rule for the next meeting.

7.2 There being no other business, RS thanked HC for hosting the meeting and declared the meeting closed.