

**ITY OF LONDON LAW SOCIETY COMMERCIAL LAW COMMITTEE
(THE "COMMITTEE")**

MINUTES of the Committee meeting held by video and telephone at 9.00 am on 25 March 2021

Present:

Mr Oliver Bray, RPC (Chairman) ("**OB**")

Mr Rohan Massey, Ropes & Gray (Secretary) ("**RBM***")

Mr Kevin Hart, City of London Law Society ("**KH**")

Mr Andrew Crawford, Devonshires ("**AC**")

Mr Richard Shaw, Bryan Cave Leighton Paisner ("**RS**")

Mr Stephen Sidkin, Fox Williams ("**SS**")

Mr Jonathan Davey, Addleshaw Goddard ("**JD**")

Ms Julia Hemmings, Baker & McKenzie ("**JH**")

Mr Richard Marke, Bates Wells ("**RM**")

Ms Jo Farmer, Lewis Silkin ("**JF**")

Mr Andrew Shindler, Locke Lord ("**AS**")

Ms Megan Paul, CRS ("**MP**")

Ms Emma Keeling, Allen & Overy ("**EK**")

Apologies:

Mr Mark Dewar, DLA Piper ("**MD**")

Ms Jane Finlayson-Brown, Allen & Overy ("**JFB**")

Mr Anthony Woolich, HFW ("**AW**")

1. **Welcome from the Chair**

The Chairman gave a short introduction and welcome to the Committee.

2. **Minutes of Last Meeting**

2.1 SS queried whether the Committee had received anything on 6.8 covering the 'Action Points'.

2.2 RBM confirmed that he has not received anything on the Action Points and posed the question to KH. KH reported that this will be addressed in this meeting at Section 5.

3. **Apologies**

Apologies from the individuals identified above had been received.

4. Committee Membership and update on Richard Brown / Ben Chivers

- 4.1 OB stated that we have a potential new joiner in Richard Brown or Ben Chivers. OB thanked RBM for forwarding their CVs to the Committee. OB mentioned that we did send out adverts for membership.
- 4.2 KH stated that he had not heard anything back regarding the advertisement but felt that Richard Brown would make a fine member of the Committee.
- 4.3 RM confirmed that he knows both Richard Brown and Ben Chivers well and asked if we need to select between the two of them.
- 4.4 OB noted that Richard Brown would be the main member coming forward with Ben Chivers as a substitute.
- 4.5 RBM stated that it is important to have substitutes, so long as they meet the necessary qualification and experience, as it helps us reach quorate numbers and attendance at these Committee meetings.
- 4.6 KH confirmed that having more people on the Committee would help create a larger more varied sub-group to assist with the upcoming task for the Law Commission submissions.
- 4.7 OB queried the size of the Committee, asking KH if we have 18 members and how that sits in comparison to other Committees.
- 4.8 KH said that our Committee size is good, the smallest sized committee has 12 members and the largest has 30. A size of 30 works for the environmental and planning committee to balance the views for those who are more environmental and those who are planning. KH believes that the current number is good, but if we need to get more members, we can reach out and get more members.
- 4.9 KH confirmed that something which came up in the chair's meeting was increasing diversity and inclusions across all of the committees with the CLLS representing a 21st century profession.
- 4.10 OB agreed on this point and is in favour of having a push towards diversity, more brains on the Committee would be good especially with the current workload, in addition to having Richard Brown.
- 4.11 OB confirmed to KH that they will have a separate chat on this point.

5. Law Commission call for topics for Reform

- 5.1 KH reported on the meeting with the CLLS and the Law Commission.
- 5.2 KH stated that the Law Commission usually put fourteen or fifteen projects to the Government every four or five years and then pursue only the four or five for which there is serious Departmental support. This time they had had over 100 meetings within the Commission, with Ministers, the senior judiciary, City institutions and other stakeholders and would undertake a public consultation probably in April, from which they expected many thousands of suggestions. From all of that they would distil their projects to put to Government.
- 5.3 KH confirmed that during his meeting with senior officials at the Law Commission (which included Dorothy Livingston, Warren Gordon, Ed Sparrow and David Hobart) five (5) key themes were discussed, some of which are being rolled in from the 13th Programme of Law Reform and others being picked up in the 14th.
- 5.4 These five (5) key themes included:

- AI/digitalisation.
- Post-covid recovery/resilience of regulation and law.
- Environment.
- Post-Brexit tidying up of statutes.
- Codification/simplification of the law

5.5 KH noted that the subjects the Law Commission are looking at included:

- Arbitration:
 - The UK was seen as having an excellent arbitration regime but it is 25 years old and needed modernising in some areas to keep up with more modern regimes, such as Singapore and Holland which were challenging the UK's position. The topics that they believed needed improvement were: what is arbitral, summary judgments, appeals and the use of emails.
- Deeds:
 - The need for physical witnesses and the law of consideration.
- Protecting creditors:
 - Wrongful payment of dividends.
- Modernisation of Trust Law.
- Environment.
- Leasehold reform
- Private international law:
 - The status of digital assets where the Law Commission wanted the UK to be an international leader.

5.6 KH reported that the CLLS suggested:

- (a) If the Law Commission were going to make recommendations in relation to digital assets, they needed to be bold. The assumption should be that the jurisdiction for trials should be that of the plaintiff, which would be known rather than that of the defendant or asset which would be unknown or arbitrary.
- (b) In relation to amending the law/regulations on signatures, which had started during COVID, the situation was complicated by the range of Departments responsible for the relevant legislation including: Companies Acts, Land Registry, Electronic Communications, wills, marriages etc.
- (c) Consumers and SMEs needed to be considered, possibly in the context of electronic fraud, and an improvement on the current law to encourage prompt payment of bills to SMEs.
- (d) The 1954 and 1995 Landlord and Tenant Acts needed attention. Why should an assignment by a tenant of a lease to a guarantor be void? Remedies for breach of covenant needed to be considered. Was security of tenure the right starting point in the current economic climate? The balance was weighted in favour of the tenant, which needed reviewing, as did the impact on sub-leases of the grant of relief from forfeiture of a head lease where the law was inconsistent.
- (e) Previous suggestions set out in reports from the Law Commissions should be enacted.

5.7 KH confirmed that following the meeting, the Law Commission had published its thoughts on a number of themes and ideas which they thought could feature in the 14th Programme of Reform. The areas which they were considering included:

- Arbitration Act 1996 and trust law arbitration

- Automated decision-making
- Commercial Leasehold
- Conflict of laws and emerging technology
- Contempt of Court
- Data sharing and information law
- Deeds and variation of contracts
- Family law
- Home Buying
- Justice in the digital age
- Legal Protection for our Environment
- Ownerless land
- Peer to peer sales
- Product liability and emerging technology
- Review of Appeal Powers in the Criminal Courts
- Technological Advances and Procedural Efficiency in the Criminal Courts
- The Search, Production and Seizure of Electronic Material
- The UK statute book

5.8 The links to the proposed areas of reforms are available at:

<https://www.lawcom.gov.uk/14th-programme/> ; and

<https://www.lawcom.gov.uk/14th-programme-kite-flying-document/>

5.9 KH stated that it would be for the Commercial law committee in particular and the CLLS specialist committees in general to consider which they wished to adopt and action.

5.10 KH confirmed that the closing date for submissions on the areas listed above is the 31 July 2021. KH feels that this is an opportunity this Committee should really pick up on, often a complaint the Committee make to government departments is that they are consulted at the very end and this is chance to get in early and be part of the decision making process.

5.11 OB thanked KH for reporting back to the Committee and suggested the following areas to the Committee as the most relevant for discussion:

- (a) Automated decision-making
- (b) Conflict of laws and emerging technology
- (c) Data sharing and information law
- (d) Peer to peer sales

(e) Product liability and emerging technology

- 5.12 OB started the discussions on ‘product liability and emerging technology’ and the four EU directives: (i) Omnibus Directive, (ii) Directive on Representative Actions, (iii) Digital Content Directive and (iv) Sale of Goods Directive (collectively the “**Directives**”).
- 5.13 AS stated that following Brexit the UK does not necessarily need to follow these Directives, we can look at them and decide how close we want to be with them as we are not bound. OB confirmed this point but felt that we should consider these Directives and how they impact our clients.
- 5.14 On the Directives, OB noted that he has not seen much commentary on them. Possible Brexit effect, but it may be an opportunity to enter the fray and give some feedback on the Directives to the Law Commission.
- 5.15 KH noted that in terms of ‘product liability’, if the EU has models that we can adopt, that can form part of our response to the Law Commission, so long as these models are made compatible with English law. RM stated ‘Product liability and emerging technology’ was the most interesting topic.
- 5.16 KH commented that the ‘data sharing and information law’ is something which is best left to the data committee, but of course that committee and this Committee can overlap. RM agreed.
- 5.17 SS confirmed RM’s view. In terms of the issue of prioritisation, SS believes that the Committee should focus on the four Directives first before they consider other matters.
- 5.18 In terms of ‘automated decision-making’, KH queried whether a legal framework should be developed to increase the automation of public decision-making. With ‘conflict of laws and emerging technology’, KH confirmed that the key question here is what are the jurisdictional challenges presented by emerging technologies.
- 5.19 JH stated that a key question that we should look into is the digital platform economy and penalties.
- 5.20 OB noted that we are entering into a world of GDPR levels of fines for consumer breaches. It is also likely that GDPR style class actions (as seen in the British Airways case) may also become more commonplace.
- 5.21 AS posed a question to KH asking if he had seen anything in relation to online harms as AS believes this should be considered by this Committee.
- 5.22 EK noted that we should keep an eye on online harms as the trend of following EU competition law is being expanded and maximum fines can be around 10% of turnover.
- 5.23 KH confirmed that there is nothing specifically related to online harms, but peer-to-peer sales online is something which is being looked at by the Law Commission and justice in the digital age. KH further noted that the Law Commission is looking at the issues in relation to the Horizon computer system and the sub-post office fraud claims, but it is predominantly the justice piece on the subject of online harms.
- 5.24 RM commented on the subject of fines that the Penrose report provides some commentary on this issue.
- 5.25 AS stated that the government had commented that less than 3% of private organisations will be effected by online harms although 3% is still quite a lot.

- 5.26 MP asked if there are any discussions around the social enterprise platforms that are arising, as these seem to be dealing with peer-to-peer sales a lot, and asked KH if he had seen any commentary around that.
- 5.27 KH confirmed that he had not seen any commentary on this, however if it is something that needs to be looked at the Committee can respond on this area.
- 5.28 OB asked KH for the timing on these submissions. KH confirmed that the submissions deadline is **31 July 2021**. KH suggested that the Committee review the links above (see 5.8) and establish sub-groups within the Committee to put forward suggestions as to which points the Committee wants to respond to and then prepare a draft submission. KH recommended that these sub-groups should be set up via email following this meeting.
- 5.29 JF asked KH what the Law Commission will do with any report submitted by the Committee. KH confirmed that the Law Commission will use the report to frame how they will draft the legislation. KH noted that this draft will take some time but believes that it is better for this Committee to get in early at this stage rather than later down the line.
- 5.30 OB noted that product liability and emerging technologies is a slice of the bigger consumer picture. OB would prefer the Committee taking a segment, such as looking at rights in respect of digital products, as opposed to the broader context raised early in this call.
- 5.31 KH confirmed that this is a route to consider as the Law Commission will have more of an effect in a specific area than broad topics.
- 5.32 OB stated that he would like this Committee to angle towards products liability as a topic to look into.
- 5.33 AS said that if we set up sub-committees, he is happy to put his hand up for one of the sub-committees and look into another topic.
- 5.34 KH confirmed that we can set up sub-committees to cover all topics or limit our responses to 2/3 topics. This Committee must consider that in 5 years time when this regulation is coming in, what will this Committee be most concerned with and wish that they had got in and dealt with when they were able to make proposals to the Law Commission. This is how he believes the Committee should choose the topics.
- 5.35 KH noted that he would like email exchanges confirming the topics the Committee would like to pick during the first full week of April after Easter.
- 5.36 OB asked the Committee is anyone had a PSL with capacity. EK noted that, as a PSL, could be able to look into a topic the Committee considered. JF also offered to get a PSL to help looking into topics.
- 5.37 OB thanked EK and JF, confirming with RBM to follow up to the Committee with an email on these topics.
6. **Post-Brexit Issues**
- 6.1 SS noted to the Committee that if they have not already done so, they should take a look at the Northern Ireland protocol and its impact on trade between Great Britain and Northern Ireland. SS confirmed that if you have an interest in cross-border trade, you should read the Northern Ireland protocol.
- 6.2 RBM made a comment on behalf of MD who wondered if the Committee had any interest in doing a deeper dive into the Trade Corporation Agreement and its impacts.
- 6.3 AS confirmed that there is definitely interest and that he has looked at some of the most relevant pages for his practice, but he believes it would be a valuable piece of work.

6.4 RBM stated that he would table this for discussion at the next meeting.

7. **COVID-19 Issues Update**

7.1 No Committee members expressed a need for an independent discussion of COVID-19. KH briefly noted the vox pop-type survey which is being conducted.

8. **Seminar 2021 - Follow-up on Speakers**

8.1 OB noted that the Seminar was not held in 2020, but that this could be forgiven given the circumstances.

9. **Interesting cases and/or practice points**

9.1 *Official Receiver v Batmanghelidjh and others* [2021] EWHC 175 (Ch): Although the case concerned disqualification proceedings, the Judge provides useful insights into the duties of directors of charitable companies.

10. **AOB**

10.1 AS queried whether sub-committees for the Law Commission topics will be set up by email. OB and KH confirmed this.

10.2 KH confirmed he would forward the Law Commission topics onto the Committee via email.

10.3 No other business was raised to the Committee.

The next Committee meeting date was confirmed by RBM to be 24 June 2021 at 9.00am.