

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

MINUTES of the Committee meeting held in person and via Microsoft Teams at RPC, Tower Bridge House,
St Katharine's Way, London E1W 1AA at 1 pm on 24 March 2022

Present:

- Mr Oliver Bray, RPC ("**OB**") (Chairman)
- Mr Richard Marke, Bates Wells ("**RM**")
- Mr Jeremy Sivyver, Bishop & Sewell ("**JS**")
- Mr Jonathan Davey, Addleshaw Goddard ("**JD**")
- Ms Julia Hemmings, Baker & McKenzie ("**JH**")
- Mr Anthony Woolich, HFW ("**AW**")
- Mr Stephen Sidkin, Fox Williams ("**SS**")
- Ms Jo Farmer, Lewis Silkin ("**JF**")
- Mr Kevin Hart, City of London Law Society ("**KH**")
- Mr Richard Brown, Travers Smith ("**RB**")
- Mr Andrew Crawford, Devonshires ("**AC**")
- Mr Mark Dewar, DLA Piper ("**MD**")

Apologies:

- Mr Rohan Massey, Ropes & Gray (Secretary) ("**RBM***")
- Mr Richard Shaw, Bryan Cave Leighton Paisner ("**RS**")
- Ms Megan Paul, CRS ("**MP**")
- Ms Helen Brown, Baker McKenzie ("**HB**")
- Ms Emma Keeling, Allen & Overy ("**EK**")
- Ms Jaye Finlayson-Brown ("**JFB**")
- Mr Ed Sparrow, City of London Law Society ("**ES**")
- Mr David Hobart, City of London Law Society ("**DH**")

1. **Welcome from the Chair**

The Chair gave a short introduction and welcome.

2. **Minutes of last full meeting**

It was reported that the minutes of the last meeting had been prepared and approved.

3. **Apologies**

Apologies from the individuals identified above had been received.

4. **Update from the CLLS Committee Chairs' Meeting**

4.1 KH reported that the CLLS Committee Chairs' Meeting held at CMS had been attended by the new CEO, Matthew Rous, for the first time. He also reported that ES, the current Chair, signalled that he would like to move on after holding his position as Chair for two three-year terms. Further topics covered during the Committee Chairs' meeting included the post-Covid return to the office and the scrutiny of law firms in light of the war in Ukraine. KH also reported that CLLS had a new corporate member, Fox Williams. KH highlighted that there is a new ESG focus and the CLLS will be working closely with the Law Society.

4.2 KH also mentioned that a new ESG Committee was being set up. KH said if anyone has colleagues that would make a good Chair, they should let him know. KH said he will be drafting the specification and terms of reference for the ESG Committee. Once the ESG Committee is formed it will need to decide how outer facing it will be; whether it is looking at the ESG practices of clients or law firms. RM said he would provide some names. A specialist committee on arbitration is also being set up; the Committee should also let KH know if they have any colleagues they would like to suggest for the position of Chair of the Arbitration Committee.

4.3 OB highlighted that there was also talk of a Digital Law Committee and KH suggested that it is better that the CLLS Committee includes digital.

4.4 There are six vacancies on the CLLS Committee and elections will take place in the summer. The Committee holds the Main Committee, which is the executive, to account. KH said the roles would be for an initial period of three years with the possibility of an extension and if anyone is interested, they should let KH know.

4.5 The CLLS Committee and the Training Committee is developing a pilot programme on setting up LinkedIn pages. OB thanked KH for moving this forward and stated that he felt that LinkedIn was a great platform to broadcast the group's passion for commercial law. KH said he will work with PR company Project Associates to get the timeline on the LinkedIn page and to get the page running. SS queried whether it would be possible to start posting material on LinkedIn before the next Committee meeting on 23 June 2022, or at least before the summer holidays. KH flagged that the plan was for to move quickly and that progress would be assessed at the end of the year. OB suggested that a sub-committee of the Commercial Law Committee be formed to progress its own page and ideally consist of two or three people, including KH and RB. OB said he would be happy to join the sub-committee but does not want to slow down any progress. There was a discussion surrounding how to ensure sufficient diversity of content and to avoid repetition. OB suggested that the Chairs of the various specialist Committees take responsibility for their respective pages and that content could include aggregated case law commentary and discussions surrounding the latest developments.

4.6 KH said that the Training Committee had come up with some funding for social mobility students to help them get through university and that the funding will be going towards approximately 20 students from nonprivileged backgrounds.

5. **CLLS update and Arbitration Act Roundtable**

KH stated that he had sent information regarding the Arbitration Act Roundtable to Gavin Foggo at Fox Williams LLP and confirmed that Gavin would be dealing with this.

6. Update on Commercial Law Committee Seminar 2022

6.1 OB noted that AC and MP attended the Seminar, which was held at RPC on 17 March 2022. He said the Committee should be pleased that an idea they had had come to fruition with particular thanks to JF, MP, KH and RBM. Sixty people were confirmed and around forty attended. AC described the event as a well-organised success. He said a colleague he invited from Devonshires, but who had previously worked in-house, had made three points:

- the points made by in-house lawyers about understanding clients' businesses and knowing where their red lines were was critical;
- comments on fees and hourly rates was a red herring, which she felt was irrelevant; and
- it was really great to meet other lawyers in the same position and to hear them talk about themselves and the future.

6.2 OB encouraged the Committee to keep the momentum going and to start thinking about event number three, including the themes that would appeal to juniors. JD suggested that ESG could be a topic for the next event. AC asked whether this would be from a commercial law perspective and a discussion followed around the benefits of a more commercial law focused perspective, but not solely. In addition, JH suggested that the next event could also focus on new ways of working, such as flexible working etc. OB stated that this was touched on during the Seminar but could be discussed in a session of its own. He encouraged the Committee to think of further topic ideas ahead of the next meeting.

7. Interesting cases and/or practice points

The following cases were mentioned:

- *Provimi v Stour Bay* [2022] EWHC 218 (Comm) (4.2.22): The case related to incorporation of terms, which it was held was a question of fact and degree, and was a question of implication of terms. The Court held that the T&Cs in this case were incorporated, preferring to apply the 'obviousness' version of the test for implication of terms rather than the 'business necessity' version.
- *Nord Naphtha v New Stream* [2021] EWCA Civ 1829: Prepayment and force majeure: the question was whether a prepayment was to be returned where contract performance was affected by FM; held yes. The Court of Appeal said it would be "surprising" if a sale of goods contract did not require repayment in such circumstances.
- *Benkert v Paint Dispensing* [2022] CSOH 17: Scots case re limitation of liability and UCTA; B argued UCTA unreasonableness and that limitations on liability were not adequately brought to its attention so as to be incorporated in to the contract. Court held that S had successfully signposted and highlighted the relevant provisions and that a cap equal to the contract price was not generally considered by the Courts to be onerous or unusual.
- *Phoenix v Henley* [2021] EWHC 1573: Here the cause at issue failed the UCTA reasonableness test: it excluded liability where payment had not been made by the due date and the Court looked askance at the fact that this exclusion was "tucked away in the undergrowth" of the contract.
- *BONY Mellon v Cine UK* [2021] EWHC 1013: Covid-19 and tenancy; the Court rejected claims that Covid amounted to FM or frustration; the novel suggestion of a concept of temporary frustration was rejected: frustration ends a contract and this concept would clash with that principle. It was also queried whether an 18 month interruption in the context of what was a 15-year lease could give rise to (permanent) frustration.

In addition, the following developments were mentioned:

- The new International Data Transfer Agreement (IDTA)
- The extension of the Commercial Practices Directive to include advertorial, whether the supplier is a trader or not
- Omnibus Directive: restrictions on advertising with the word "free" if personal data is the form of payment
- European Commission guidance on price promotions, including rules on "was/now" pricing
- The Charities Act 2022
- The Gambling Commission Directive

8. **AOB**

9.

The next Committee meeting will be held in person on 23 June 2022 at Ropes & Gray at 1pm. JD queried whether it would be possible to move the meeting to 22 June 2022 to coincide with the Annual Summer Reception on 22 June 2022. KH said he would find out where the Reception was being held and would look into whether there was a venue nearby at which the meeting could be held.

Dates for 2022:

- 17 May – Inaugural Annual Lecture on Lugano
- 22 June – Annual Summer Reception and AGM
- 23 June – Committee Meeting at Ropes & Gray