

**CITY OF LONDON LAW SOCIETY
FINANCIAL LAW COMMITTEE**

**Minutes for the meeting held on 12 October 2022 at Linklaters LLP, One Silk Street, London,
EC2Y 8HQ also by Teams**

Present: Dorothy Livingston (Herbert Smith Freehills LLP) (Chair) – in person
Penny Angell (Hogan Lovells LLP) – in person
James Bresslaw (Simmons & Simmons LLP) - in person
Rob Davidson (Paul Hastings (Europe) LLP)– in person
Matt Dunn (Clifford Chance LLP) – in person
Mark Evans (Travers Smith LLP) – by Teams
Hamish Patrick (Shepherd and Wedderburn LLP) – by Teams
Simon Roberts (Allen Overy LLP) – by Teams
Sarah Smith (Baker & McKenzie LLP) – in person
Jeremy Stokeld (Linklaters LLP) – in person
Nick Swiss (Eversheds LLP) – by Teams
Matthew Tobin (Slaughter and May) – in person
Nigel Ward (Ashurst LLP) – by Teams
Presley Warner (Sullivan & Cromwell LLP) – in person

Attending: Rachael MacKay (Herbert Smith Freehills LLP) (Secretary) - in person

1. APOLOGIES FOR ABSENCE, MINUTES OF LAST MEETING AND MATTERS ARISING

1.1 Apologies for absence

The Chair opened the meeting and reported that apologies had been received from David Ereira (Paul Hastings (Europe) LLP), Charles Cochrane (Clifford Chance LLP), Edward Fife (Slaughter & May), Flora McLean (Freshfields Bruckhaus Deringer LLP) and Emma Giddings (Norton Rose Fulbright LLP).

1.2 Minutes of last meeting

The minutes of the last meeting held on 13 July 2022 have been previously circulated and were approved and are now on the website.

1.3 Alternate and guest attendees

The Chair welcomed Rob Davidson (attending for David Ereira), Matt Dunn (attending for Charles Cochrane) and Matthew Tobin (attending for Edward Fife). The Chair also welcomed Hamish Patrick as a guest attendee.

2. LIBOR CESSATION AND RFR TRANSITION

It was reported that on 29 September 2022 the FCA had announced its decision to end 1 and 6 month synthetic sterling LIBOR at the end of March 2023. The FCA was still considering other issues, mainly the timing for an orderly cessation of 3-month synthetic sterling LIBOR and whether there is a need for a synthetic USD LIBOR for non-US law contracts (given the availability of a legislative solution for US law governed contracts).

It was also noted that the LMA had today published an exposure draft of its multicurrency term and revolving facilities agreement incorporating Term SOFR.

3. COMPETITION: NATIONAL SECURITY AND INVESTMENT ACT 2021

As noted in the minutes for the meeting held in July, DBEIS had published guidance in July, which was later updated in response to submissions from the CLLS working party, in order to clarify some confusing terminology in the section on secured lending.

Ongoing discussions are centred on issues around enforcement of security, ways in which repapering could be avoided and ways in which generally the regime could be made less damaging to the prospects of failing businesses. The Chairs of the CLLS Insolvency, Company and Regulatory Committees are participating in these efforts.

Separately, the Association of Insolvency Lawyers ("AIL") is challenging the application of pre-clearance requirements to the appointment of a receiver or liquidator and, effectively, a compromise with creditors or scheme of arrangement which requires exercise of voting rights in the shares of the failing company by or on behalf of lenders and to liquidation, leaving administration as the only quick process in relation to a failing company.

These efforts had been held up by the recent changes in Government, but were now thought to be progressing.

4. **ECONOMIC CRIME (TRANSPARENCY AND ENFORCEMENT) ACT 2022 – PART 1 – REGISTER OF OVERSEAS ENTITIES WHICH OWN UK PROPERTY**

The Committee was reminded that the Economic Crime (Transparency and Enforcement) Act 2022 had commenced on 1 August 2022, with the land registry aspects coming into force on 5 September 2022.

The Act imposes new requirements on overseas entities (**OE**s) which own, acquire or sell an interest in UK real estate to be registered at Companies House. The registration process involves certain beneficial ownership information relating to an OE being independently verified by a "relevant person". Since the last meeting, it was noted that the Law Society had issued a statement on 29 July 2022 advising law firms to exercise caution if asked to verify beneficial ownership information in relation to an OE.

As noted at the last meeting, the LMA is known to be considering issues arising from a documentation perspective.

5. **SYNDICATED LOAN DISPUTE - PROTECTION OF AGENT – ERRONEOUS PAYMENT CLAUSE – REVLON (NEW YORK) DECISION REVERSED ON APPEAL**

The Committee was reminded of the New York court decision in *Revlon* in 2021 which had concluded that, as a matter of New York law, various lenders under a syndicated facility which had received an erroneous payment from the facility agent were not, in those particular circumstances, obliged to return that erroneous payment to the facility agent. The court said that if the recipient of the erroneous payment is a bona fide creditor without notice that the payment was a mistake, the transferor is better positioned to prevent the mistake than the transferee.

The case had concerned an unusual set of facts (including the financial distress of Revlon) and the decision was limited to the operation of the New York law of restitution based on those facts. Despite this, some concern had arisen in the European markets, resulting in the LMA swiftly publishing a form of "Erroneous payments clause" to protect the facility agent and which had been adopted by the market.

It was now reported that the US Court of Appeals had recently reversed the earlier decision. It had found that the recipients were not bona fide creditors and that they had constructive notice of the mistake because the debt was not yet owed and Revlon was not in a position to pay it. The court also noted that the market had reacted quickly to circumvent the earlier decision by incorporating into loan agreements erroneous payment provisions drafted by relevant trade bodies. It also suggested that these provisions should be retained to prevent future litigation. This later decision was welcomed as good news.

6. **ELECTRONIC SIGNATURES AND OTHER TECHNICAL DEVELOPMENTS**

6.1 **Electronic Signatures**

The updated draft of the CLLS/Law Society 2016 paper on electronic signatures had now been signed off by the CLLS Company Law Committee. The paper had previously been welcomed by the Law Society Company Law Committee although not formally approved. A

final draft would be circulated to this Committee, following which it was hoped that it would be published.

The Committee expressed its thanks to Nigel Ward for holding the pen on this marathon exercise.

It was also noted that the Government Sponsored Industry Working Group on Electronic Execution of Documents had recently held a consultation (now closed) on self-certification of digital signature methodology providers. The Committee did not respond but would keep a watching brief on developments.

AFTERNOTE: *This paper is now available on the CLLS website on the Financial Law and Company Law Committee pages.*

6.2 Digital assets

The Committee was reminded that there were two papers relating to digital assets which were currently out for consultation and being considered by the Committee:

UK Judicial Taskforce consultation published on 1 August 2022: The issuance and transfer of digital securities under English private law. (Follow up to Legal Statement on Status of Cryptoassets and Smart Contracts – November 2018.) The Committee's draft response (joint working party of Finance, Company and Regulatory and Insolvency CLLS Committees, with Mark Evans leading) was in circulation and would be submitted before the deadline of 31 October.

The Law Commission Consultation Paper (no 256) on Digital assets published 28 July 2022 – it was noted that this was a wide-ranging paper with proposals for recognition of a new form of personal property – a data object - on satisfaction of specified criteria:

- It is composed of data represented in an electronic medium;
- It exists independently of persons and the legal system;
- It is "rivalrous" (meaning use of it by one person or group of people necessarily prejudices the ability of others to make use of it at the same time)

The Chair had reconstituted the CLLS cross-party working party on this topic and was working on a draft response (deadline being 4 November). In addition, it was noted that some members of that working party were also participating in a number of round table discussions organised by the Law Commission.

AFTERNOTE: *Electronic Trade Documents Bill introduced into Parliament on 12 October 2022 and had its first reading in the House of Lords. The Bill proposes changes to the law to allow legal recognition of electronic versions of paper trade documents (eg bills of exchange and bills of lading).*

Law Commission: Press release (18 October 2022): Law Commission to review how private international law applies to digital assets and other emerging technology
<https://www.lawcom.gov.uk/law-commission-review-to-examine-how-private-international-law-can-apply-to-digital-assets-and-other-emerging-technology/>
and Project webpage: Digital Assets: Which Law, Which Court?
<https://www.lawcom.gov.uk/project/conflict-of-laws-and-emerging-technology/>

Consultation paper to be published in the second half of 2023.

The CLLS Submission to the UKJT and the Financial Law Committee's submission to the Law Commission are now available on the Committee's page of the CLLS website.

7. SECURITY: MOVEABLE TRANSACTIONS (SCOTLAND) BILL

Hamish Patrick kindly gave an overview of the Movable Transactions (Scotland) Bill which was introduced by the Scottish Parliament in May 2022. It proposes reforms to Scots law relating to the transfer of rights and security over moveable property, which aim to make the process more efficient, less expensive, less complicated and more up to date.

When in force, it will make two key changes to Scots law:

- the introduction of a new form of security that can be granted over Scottish moveable property, the statutory pledge, which will cover equipment and IP rights at the outset, and with a future intention to cover and enabling legislation in relation to shares; and
- the creation of two new searchable registers in Scotland – the Register of Assignations and the Register of Statutory Pledges.

The Committee was also reminded that there were still some issues relating to dematerialised securities, which had been raised with the Scottish Government. It was thought that the securities aspects will be dealt with by secondary legislation passed by the Westminster Parliament.

8. **ESG**

It was noted that the CLLS had proposed the setting up of a new cross-committee standing working group, but that this had yet to be formed. The Committee had registered its interest in participating.

9. **RING-FENCING AND PROPRIETARY TRADING INDEPENDENT TRADING REVIEW FINAL REPORT**

There was nothing new to report on this item.

10. **BREXIT**

It was noted that the Retained EU Law (Revocation and Reform) Bill had been published on 22 September 2022. Its basic aims are to end the supremacy of EU retained law and make it easier to amend EU retained law. Most financial law provisions are, however, dealt with by the Financial Services and Markets Bill, which allows more flexibility in relation to replacement of retained EU law important to the Financial Markets. It is to be noted that the law on electronic signatures may be affected by measures under the Revocation and Reform Bill. These Bills are still at an early stage and may yet be affected by changes in Government policy.

11. **ANY OTHER BUSINESS**

11.1 **Re: *Active Wear Ltd* [2022] EWHC 2340 (Ch) – sole directors**

Following the recent judgment in *Re Fore Fitness Investment Holdings Ltd, Hashmi v Lorimer-Wing* [2022] EWHC 191 (discussed at July's meeting) which had cast doubt on the ability of a company to act via a sole director in some situations, the *Active Wear* case was noted as another case concerning a sole director and the Companies Act 2006 private company model articles ("**2006 Act model articles**").

In *Active Wear*, the company had unamended 2006 Act model articles which therefore included Article 7(2), that permits a sole director to act where a company has only one director, and no other provision requiring the company to have more than one director, and Article 11(2), which sets the quorum for directors' meetings at two, but no other reference to quorum or a minimum number of directors. (In *Fore Fitness* the model articles had been amended). The judge indicated that he did not agree with the reasoning in *Fore Fitness* when upholding the decision of the sole director to appoint administrators, but felt able to distinguish the case on the basis that the 2006 Act model articles had been adopted by the company on incorporation and never amended, and there had only ever been one director.

Whilst the overall conclusion in *Active Wear* was welcome, the suggested qualification, regarding the fact that there had only ever been one director, appeared to limit its application in practice.

The Committee would consider what, if any, steps to seek to clarify the law.

11.2 ***Grant & Ors v FR Acquisitions Corporation (Europe) Ltd & Anor (Re Lehman Brothers International (Europe)) [2022] EWHC 2532 (Ch) – whether event of default "continuing"***

It was reported that in this case, the salient issue to be considered was whether certain events of default could be said to be "continuing" in the context of swap transactions entered into pursuant to ISDA master agreements, in view of the termination of the appointment of administrators of Lehman and surplus funds being available for distribution to creditors. It was found that they could not.

11.3 ***BTI 2014 LLC v Sequana SA and others [2022] UKSC 25 – directors duty to creditors***

It was noted that in this recent decision, the Supreme Court had confirmed the common law duty of directors to take account of, and give appropriate weight to, the interests of creditors in certain circumstances. Of particular note was the engagement of the duty when the directors know or ought to know that the company is bordering on insolvency, or an insolvent liquidation or administration is "probable".

12. **NEXT MEETING AND CLOSE**

12.1 The Committee was reminded that the next meeting is due be held on 11 January 2023 at the offices of Eversheds LLP.

12.2 There being no further business, the meeting closed.