

**CITY OF LONDON LAW SOCIETY (“CLLS”) COMMERCIAL LAW COMMITTEE
(THE “COMMITTEE”)**

Minutes of the Committee Meeting held at 1pm on 14 September 2023 at the offices of Addleshaw
Goddard, Milton Gate, 60 Chiswell Street, London EC1Y 4AG and hosted by Jonathan Davey

Present:

- Mr. Oliver Bray, RPC (“**OB**”) (Chairman)
- Mr. Rohan Massey, Ropes & Gray (Secretary) (“**RBM**”)
- Mr. Stephen Sidkin, Fox Williams (“**SS**”)
- Mr. Kevin Hart, City of London Law Society (“**KH**”)
- Mr. Richard Marke, Bates Wells (“**RM**”)
- Mr. Jonathan Davey, Addleshaw Goddard (“**JD**”)
- Mr. Jeremy Sivyver, Bishop & Sewell (“**JS**”) (Zoom)
- Ms. Megan Paul, CRS (“**MP**”) (Zoom)
- Mr. Richard Shaw, Bryan Cave Leighton Paisner (“**RS**”) (Zoom)

In attendance: Ms. Robyn Bond, Ropes & Gray (Minutes)

Apologies:

- Ms. Jane Finlayson-Brown, Allen & Overy
- Mr. Richard Brown, Travers Smith
- Ms. Julia Hemmings, Baker McKenzie
- Ms. Helen Brown, Baker McKenzie
- Mr. Anthony Woolich, HFW
- Mr. Mark Dewar, DLA Piper
- Ms. Jo Farmer, Lewis Silkin

1. Welcome from the Chair (OB)

1.1 OB gave a short introduction and welcome.

2. Minutes of last full meeting (June 2022) (RBM)

2.1 Minutes of previous meeting amended with the error of RM vs RBM corrected.

3. Apologies (RBM)

- 3.1 Apologies from the individuals identified above have been received.
- 3.2 RBM encouraged in-person attendance where possible.

4. CLLS update (KH)

- 4.1 KH commented that Colin Passmore (CLLS Chair) may join in a future meeting. He has suggested an individual member of the main CLLS committee also be seconded onto each specialist committee. Colin wants to increase the knowledge flow going between the main committee and specialist committees. This process is underway, KH will be sending names of individuals in due course. The change is about communication flow, not earwiggling.
- 4.2 A new AI specialist committee is being set up, looking at all things to do with AI. It is likely to be quite big. There is ongoing discussion as to whether it should be inward-facing on the legal profession or more broad (clients, etc.). The advert for recruitment is coming out next week, with the goal for the new AI committee to be in place in mid-late October, ahead of the Bletchley Park AI Safety Summit (1 and 2 November 2023). There is a chairperson in mind. For this committee, it will be associates appointed, as they are far more in touch with technical pieces in this space. Law firms are going to be asked to also consider non-lawyer technology colleagues too, adding to the committee's technical know-how in this space and to have a broader spread of committee members. When the advert comes out, OB will send it around and asks that the committee encourage appropriate people to apply. It will be on the website; go to committees and go to each law firm's main contact to ensure it is distributed as far as possible.
- 4.3 In light of looking at AI, the IP Law Committee, which has been suspended, is going to be revived. Committee members should let OB know if anyone appropriate in their firm might be interested. Once a new chair to the IP Law Committee is appointed, a new, wider committee will be advertised for. This might be a longer-term process and go into the new year.
- 4.4 Karen Anderson (Regulatory Law Committee) and Gavin Foggo (Litigation Committee), have stood down from their CLLS Committee roles with. Hannah Meakin (Norton Rose Fulbright) and Lois Horne (Macfarlanes), respectively, are replacing them.
- 4.5 Dates for meetings next year to be discussed at the next meeting.
- 4.6 A new date for the diary: 8 November 2023 Rule of Law panel discussion by CLLS at Gray's Inn. They are encouraging associates, trainees or other junior lawyers to come along. Please distribute this information to teams.
- 4.7 KH said that Colin Passmore has a meeting with the Lord Chancellor next week. If a couple of issues of importance/influence, send info to KH. Half-hour meeting, and KH is briefing him before. The idea is to put forward developments in commercial law.

4.8 KH doesn't need a formal report right now, he does quarterly updates to the main CLLS committee. This will start breaking down to monthly summaries, so they understand monthly work. What currently is being considered and what is coming up in the next few months is what they are trying to look at. If it's talked about and decided that it will not be picked up, that's fine. Big push to increase communications across the CLLS.

4.9 No one noted anything to raise at Colin's Lord Chancellor's meeting.

5. LinkedIn page (OB)

5.1 OB noted progress has been made. OB caught up with RM. No one between meetings came forward with associates to recommend/feed commercial case law publications. The two already lined up are: Eleanor Harley and Richard Offord. Meeting is organized and between these two (with RPC and Travers's content), there's enough material to get going. Idea is that it is not dominated by these two firms. It should be law firm-wide, with everyone from the committee feeding in their articles. The tile format discussed last time was presented, with branding and format shown, which can then just link through to existing pages (i.e. each firm's website).

5.2 In addition to the aforementioned, (i) Lucinda Bailey was put forward by JD; (ii) Laura Hobbs put forward by RM; and (iii) Rachel Bell put forward by MP.

5.3 OB asked if everyone is ready to move forward? Preference would be not to have it reviewed formally by the committee, just the relevant partner double-checking each tile/post to check it's right (it will be a brief review and not a heavy lift). Easy enough to aim for one per week.

5.4 KH and OB to discuss whether KH attends meeting with associates. One option is a main committee meeting with the associates once the group is formally together.

5.5 KH said the aim is to roll-out specialist committee sub-committee pages on the main CLLS page. This process will be beginning to kick off.

5.6 Goal with LinkedIn page is to organize a rota and put a post out soon.

6. Commercial Committee Seminar Update (OB/JD)

6.1 We have the materials, just need the date. Once we start activating LinkedIn page in a couple of weeks, we can use this page to promote the event.

6.2 Mid-November is the target date. On a Tuesday, Wednesday or Thursday. 7/8 November - not available (Gray's Inn); 16 November - JD can't do. JD and Mark Dewar to discuss. OB looking at Tuesday-Thursday free for RPC's appropriate room in November. OB to confirm.

6.3 Aiming for 6 pm start time. One-hour session, plus drinks.

6.4 Next committee meeting is 16 November, it's an evening event with drinks at Fox Williams.

6.5 TBD is how we broadcast through CLLS and through LinkedIn. We should also get in all associate diaries.

7. Interesting cases and/or practice points (JD/ALL)

7.1 JD discussed the following cases:

- Topalsson GmbH v Rolls-Royce Motor Cars Ltd [2023] EWHC 1765 TCC (12 July 2023)
 - **Outcome:** The Court held that the defendant (Rolls-Royce) had validly terminated a software agreement with the claimant (Topalsson) and awarded damages in Rolls-Royce's favour.
 - **Case details:** Rolls-Royce engaged Topalsson to design, build, implement and maintain digital visualisation software to replace the current system, improving the customer's experience when configuring a car. Throughout the project, delays occurred, which both parties blame each other for. Rolls-Royce claimed there was misrepresentation regarding experience and expertise, with the project understaffed. Topalsson stated Roll-Royce imposed a methodology that was not appropriate for the works and expanded the scope. The first termination notice was rejected (Topalsson deemed it ineffective), the second termination notice was ultimately successful, purporting to terminate at common law or alternatively under the Agreement on the grounds that further milestone dates had not been met.
 - **Interesting points flagged by JD:**
 - i. Rolls-Royce sought to justify termination on the basis of Topalsson 1) in breach of the contract, had used sub-contractors; and 2) in breach of confidentiality, had put data on the cloud. Court said no on facts, not repudiatory. The cloud solution was reputable and secure on the basis of evidence. On the facts, using subcontractors, was not a sufficient ground for termination.
 - ii. Another case that looks at caps on liability, too, with Rolls-Royce claiming damages flowing from the alleged repudiatory breach, claiming losses of €20 million for software replacement costs, lost profits, and other related damages. Both parties agreed that under the Agreement the contractual claims were capped at €5 million.
 - iii. Remember to allow for common law rights to terminate. Use the kitchen sink!
- EE Limited v Virgin Mobile Telecoms Limited [2023] EWHC 1989 TCC (31 July 2023)
 - **Outcome:** The Court found that a clause excluding claims for 'anticipated profits' prevented the claimant (EE) from bringing a claim for revenue lost as a result of the defendant's (Virgin Mobile) alleged breach of contract.

- **Case details:** Virgin Mobile entered into an agreement with EE to exclusively use EE's mobile network infrastructure to provide its customers with mobile services. The parties subsequently amended this agreement to permit Virgin Mobile to source 5G services from alternative suppliers. Following unsuccessful negotiations with EE for 5G services, Virgin Mobile migrated its customers to Vodafone's mobile network. EE argued that this migration breached the exclusivity clause in the agreement as Virgin Mobile had migrated non-5G customers (and added new non-5G customers) to Vodafone's network. EE claimed £24.6 million in damages for loss of revenue in relation to these non-5G customers. Virgin Mobile denied that it had breached the exclusivity clause and argued that, in any event, EE could not bring its claim due to a contractual exclusion of claims for 'anticipated profits'. Virgin Mobile applied for strike out and/or reverse summary judgment on this basis. The High Court granted Virgin Mobile's application for summary judgment and dismissed EE's claim.
- **Interesting points flagged by JD:**
 - i. Issue about what "loss of profit" means and what is excluded in that wording. Virgin diverted customers, EE claim for loss was regarding "charges unlawfully avoided", not a loss of profit. EE's attempt to argue not for loss of profit failed though.
 - ii. Interpretation of exclusion clauses: first of all, beware of references of older cases (pre-Goodlife case law), it's not that reliable. When you boil **these** cases down, it's an interpretation of a particular clause in a particular factual context.

SS added that France has recently introduced a new law designed to try and level the negotiation power between suppliers and retailers of Fast-Moving Consumer Goods products. The French courts can essentially rewrite contracts between parties.

The Procurement Bill also came back yesterday, discussing human trafficking – but no big issues left.

8. AOB
None.

Next meeting