

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

**Minutes for the meeting held at 12.45 pm on 12 July 2023**

**Simmons & Simmons LLP, Citypoint, 1 Ropemaker Street, EC2Y 9SS and also by Teams**

**Present:** Sarah Smith (Baker & McKenzie LLP) (Chair) – in person  
Emily Barry (Hebert Smith Freehills LLP), as alternate for Jake Jackaman in person  
Matthew Cottis (Hogan Lovells International LLP ), as alternate for Penny Angell – in person  
Matt Dunn (Clifford Chance LLP) – in person  
Mark Evans (Travers Smith LLP) – by Teams  
Edward Fife (Slaughter and May) – by Teams  
Emma Giddings (Norton Rose Fulbright LLP) – by Teams  
Flora McLean (Freshfields Bruckhaus Deringer LLP) – in person  
Simon Roberts (Allen & Overy LLP) – by Teams  
Nigel Ward (Ashurst LLP) – by Teams

**Attending:** Natalie Butchart (Baker McKenzie LLP) (Secretary) – in person  
Colin Passmore, Chair, CLLS – by Teams  
Matthew Rous, CEO, CLLS – in person  
Kevin Hart, Legal Policy Analyst, CLLS – by Teams  
Simon Fraser, Simmons & Simmons LLP (as host) – in person

**1. APOLOGIES FOR ABSENCE AND WELCOME TO NEW COMMITTEE MEMBERS AND CLLS MEMBERS**

**1.1 Apologies for absence**

The Chair opened the meeting and reported that apologies had been received from James Bresslaw (Simmons & Simmons LLP), David Ereira (Paul Hastings (Europe) LLP), Jeremy Stokeld (Linklaters LLP), Nick Swiss (Eversheds Sutherland (International) LLP) and Presley Warner (Sullivan & Cromwell LLP).

**1.2 Alternate and guest attendees**

The Chair welcomed Colin Passmore, Matthew Rous and Kevin Hart of the CLLS, each attending the meeting as guests. Colin Passmore gave a brief introduction, thanking the Committee for its work.

**1.3 Welcome to new committee members**

The Chair welcomed new committee members Matt Dunn (Clifford Chance LLP) and Jake Jackaman (Herbert Smith Freehills LLP).

**2. DIGITAL ASSETS**

It was reported that the Law Commission has issued its Final Report on Digital Assets, including law reform recommendations to Government, published 28 June 2023, together with a Summary of the Report. It was noted how the Final Report contains recommendations for certain statutory law reforms (including supporting measures) and conclusions as to how

English common law might develop in response to identified issues arising out of the transfer, custody and use as collateral of, and wrongful interference with, crypto-tokens and other "third category things".

It was noted that the Law Commission had cited the Committee's response to the consultation on a significant number of occasions in its Final Report and particularly endorsed the Committee's paper on "Financial collateral: A proposal for its 'provision' in respect of proposed changes to the FCARs.

The Committee discussed its continuing concerns with respect to the Law Commission's proposals for a 'relative' legal title concept separate to ownership based on factual control, with four specific potential concerning consequences being identified as requiring further analysis. Consideration was given to how these remaining concerns might be appropriately expressed to the Law Commission.

The Committee also considered putting forwards a Committee member to represent the Committee on any panel(s) that the Government might create in response to the Law Commissions proposals for expert panels to be established to consult on specific issues identified in the Final Report.

*Postscript: Mark Evans, Dorothy Livingston and Sarah Smith have since held discussions with an academic who holds similar concerns, which he is considering publishing in an academic journal.*

3. **FINANCIAL SERVICES AND MARKETS ACT – IMPLEMENTATION OF THE CENTRAL COUNTERPARTIES (CCP) RESOLUTION REGIME, CCP RESOLUTION LIAISON PANEL**

It was reported that on 1 June 2023 H.M. Treasury (HMT) contacted the Chair and the Chair of the CLLS Insolvency Law Committee, to request that a representative from the CLLS join the CCP Resolution Liaison Panel that is being formed to advise HMT on the effect of the expansion of the CCP resolution regime under the Financial Services and Markets Act 2023, which received Royal Assent on 29 June 2023.

Peter Hughes (Travers Smith LLP) was nominated to represent the CLLS on the CCP Resolution Liaison Panel and attended the first meeting of the Panel on 28 June 2023.

It was reported that the Panel discussed the draft CCP Resolution implementation note summarising the policy HMT intends to adopt in four pieces of legislation proposed to be put in place to implement the expanded CPP resolution regime under Schedule 11 to the Financial Services and Markets Act 2023. The current expected timing for these Statutory Instruments is for them to be implemented before the end of 2023.

4. **PROSPECTUS REGIME**

It was reported to the Committee that a revised fatal flaw draft S.I., seeking to address the concerns raised with respect to the definition of "relevant securities" in the Financial Services and Markets Act 2000 (The Public Offers and Admissions to Trading) Regulations 2023, had been published on 11 July 2023.

The sub-committee working group for this matter will reflect on the draft and consider if there are any fatal flaws it wishes to highlight.

Further consideration was also given to whether the Committee should provide a formal response to the FCA on its Engagement Paper 4 as part of its "engagement and dialogue" process with respect to the proposed new regime for public offers and admissions to trading on UK public markets.

5. **NATIONAL SECURITY AND INVESTMENT ACT 2021**

There was nothing new to report on the National Security and Investment Act 2021.

The Committee were reminded that efforts to clarify uncertainties arising from the Act had been held up by changes in Government and that most recently responsibility for the Act had

been transferred to the Cabinet Office Minister. Further renewed efforts to achieve a more sensible approach based on the Committee's proposals would commence in September led by the Committee working group on the Act.

## 6. **LIBOR CESSATION AND RFR TRANSITION**

It was confirmed to the Committee that the USD LIBOR panel for the publication of the remaining representative USD LIBOR tenors ended on 30 June 2023 and that the publication of 1, 3 and 6 month synthetic USD LIBOR settings would continue until 30 September 2024.

It was reported that the EURO RFR Working Group had issued guidance (4 May 2023) for corporate lending products on implementing the recommendations on EURIBOR fallback trigger events and €STR-based EURIBOR fallback rates. It was noted that although a shift to €STR-based rates is perhaps inevitable it is not anticipated that this shift is imminent.

It was also reported that on 3 July 2023, IOSCO had published a "Statement on Alternatives to USD Libor", in which it announced its conclusion to its "Review of Alternatives to USD Libor", which assessed the extent to which four benchmarks developed as potential substitutes for USD LIBOR – two credit-sensitive rates (CSRs) and two Term SOFR rates – have implemented IOSCO's 2013 Principles for Financial Benchmarks. It was noted that this publication was probably of most interest for the US domestic market.

It was also noted that although the review found Term SOFR rates fell short of SOFR and "IOSCO believes that the Term SOFR rates are suitable for limited use only"; the market, both in the US and across EMEA, has readily taken to using the rate in practice. However, the market is yet to settle on a clear and consistent approach to fallbacks in respect of Term SOFR and there remains a mismatch risk with hedging arrangements that are not permitted to reference Term SOFR.

## 7. **ESG**

It was reported that Emma Giddings had attended the first meeting of the CLLS ESG Committee. It was noted that given the breadth of ESG legislation, the CLLS ESG Committee will act as a central repository for all ESG consultations and other matters and will coordinate and partner with other CLLS Committees in reviewing draft regulation and guidance as necessary. To the extent that the CLLS ESG Committee is asked to participate in consultations involving the work of the Financial Law Committee, Emma will bring that to the attention of our members for input.

It was also reported that there had been some discussion regarding the recent Law Society Guidance entitled, "The Impact of Climate Change on Solicitors". As a follow up to this, the CLLS ESG Committee has been asked to participate in a consultation regarding proposed training materials on climate change guidance.

## 8. **ELECTRONIC TRADE DOCUMENTS BILL**

It was reported that there had been no recent movement in the Bill's progress and it remained in the Final Stages of the Commons process.

*Postscript: the Bill received Royal Assent on 20 July 2023 and came into force on 20 September 2023.*

## 9. **ELECTRONIC SIGNATURES**

It was reported that it is now clear from the Retained EU Law (Revocation and Reform) Act 2023 that the eIDAS Regulation is not one of the 600 pieces of retained EU law that will be repealed at the end of 2023.

## 10. **SECURITY: MOVEABLE TRANSACTIONS (SCOTLAND) ACT 2023**

It was reported that the Bill received Royal Assent on 13 June 2023. However, various pieces of Westminster legislation still need to be passed before the new regime can be brought into the force and the new Registers begin to be used.

It was noted that there is a remaining concern relating to dematerialised securities and ensuring alignment and consistency in approach across jurisdictions. It appears that the intention is to address this issue in secondary legislation to be passed by the Westminster Parliament.

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

It was noted that, following the recent failure of several banks, the Financial Stability Board was now involved in discussions on aligning the ring-fencing and resolution regimes.

It is anticipated that these recent events and developments will slow or limit the reform process in the UK as any final decision is likely to have to wait until the international consultations and reports resulting from the recent bank failures have concluded.

12. **BREXIT**

It was reported to the Committee that the Retained EU Law (Revocation and Reform) Bill received Royal Assent on 29 June 2023, so is now the Retained EU Law (Revocation and Reform) Act 2023.

It was noted that it is now clear that the Rome 1 and Rome 2 Regulations and the eIDAS Regulation on electronic signatures will not be repealed under this Act and that most financial services legislation is now dealt with in the Financial Services and Markets Act 2023, which also received Royal Assent on 29 June 2023.

It was also noted that there had been no further progress on the UK's application to re-join the Lugano Convention.

13. **ANY OTHER BUSINESS AND CLOSE**

*In re Nasmyth Group Limited* [\[2023\] EWHC 696 \(Ch\)](#)

*Re Great Annual Savings Co Ltd* [\[2023\] EWHC 1141 \(Ch\)](#)

*Prezzo Investco Limited* [\[2023\] EWHC 1679 \(Ch\)](#)

It was noted that the above three cases all concerned applications for court sanction of Part 26A restructuring plans with each being the subject of strong opposition from HMRC due to the potential for HMRC to be 'crammed down', as indeed it was in the Prezzo Investment Limited case. This is an interesting series of cases and further developments in this area should be watched.

*Astra Asset Management UK Limited v. Odin Automotive S.à r.l.* [\[2023\] EWHC 1465 \(Comm\)](#)

It was noted that the decision in this case found that the wording of a 'best efforts' mandate letter sufficiently protected the arranger and entitled it to receive an agreed break fee from the prospective borrower when agreement on the terms of the proposed financing failed to be reached and the prospective borrower declined to proceed with the financing.

*Fortenova Grupa D.D. v. LLC Shushary Holding and others* [\[2023\] EWHC 1165 \(Ch\)](#)

It was noted that this case related to issues arising due to a bank in a finance arrangement being subject to sanctions. The court held that failure to pay interest owed to a sanctioned bank did not constitute a 'failure to pay' and, consequently, there was no liability for default interest.

*Philipp v. Barclays Bank UK PLC* [\[2023\] UKSC 25](#)

It was reported that the Supreme Court had handed down its judgment in this case, which considers the Quincecare duty, on the morning of this meeting.

This was a much talked about case due to the potential of the final decision to widen the scope of the, so-called, Quincecare duty owed by banks to their customers.

In brief it was noted that Barclays Bank's customer Mrs Philipp brought a case against Barclays in relation to an authorised push payment fraud with the central question being whether the Quincecare duty has any application in a case where the relevant payment instruction was issued to the bank by the customer herself and not an agent.

The High Court found in favour of Barclays, i.e. that the scope of the Quincecare duty *did not* extend to the circumstances where the instruction came directly from the customer, but Mrs. Philip was successful in her appeal to the Court of Appeal. Barclays appealed this decision to the UKSC.

The UKSC unanimously allowed the appeal, holding that Barclays **did not** owe the alleged duty to Mrs Philipp. The UKSC therefore restores the order of the High Court judge granting summary judgment to Barclays (but varies it to permit Mrs Philipp to maintain an alternative claim based on the bank's alleged failure to act promptly to try to recall the payments after the fraud was discovered).

The Committee will watch for any further proceedings in the High Court on the basis of the alternate claim.

14. **NEXT MEETING**

14.1 The Committee was reminded that the next meeting is due to be held at 12:45 pm on 11 October 2023 at the offices of Sullivan & Cromwell LLP.

14.2 There being no further business, the meeting closed.