THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 282nd meeting
at 9:00 a.m. on Tuesday, 22 November 2016
at Slaughter and May, One Bunhill Row, EC1Y 8YY
(Tel: 020 7600 1200; Fax: 020 7090 5000)

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1. Welcome and apologies

Attending: William Underhill (Chairman); Emma Wilson (Secretary); John Adebiyi (alternate for Michael Hatchard); Mark Austin; Lucy Fergusson; Nicholas Holmes; Chris Horton; Simon Jay; Antonia Kirkby (alternate for Mark Bardell); Vanessa Knapp; Stephen Mathews; Chris Pearson; David Pudge; Richard Spedding; Patrick Speller; Keith Stella; Martin Webster and Victoria Younghusband.

Apologies: Mark Bardell, Michael Hatchard and Andrew Pearson.

2. Approval of minutes

The Committee considered the draft minutes from July 2016 and September 2016. Both sets of the draft minutes were approved subject to one change to the September 2016 minutes.

3. Matters arising

3.1 ESMA guidelines on commodity derivatives under MAR. The Committee noted that on 30 September 2016, ESMA issued final guidelines clarifying one element of the definition of inside information in relation to commodity derivatives under MAR.

3.2 ESMA updates Q&A on MAR. The Committee noted that on 26 October 2016, ESMA published an updated version of its Q&A on MAR.

3.3 Q&As on MAR. The Committee noted that on 28 October 2016, the updated MAR Q&A and Takeovers Q&A were published by the Joint Working Parties of the CLLS and the Law Society for MAR and Takeovers.

3.4 BEIS paper on the transposition of Article 30 of the Fourth Anti-Money Laundering Directive. On 3 November 2016, BEIS published a discussion paper on the transposition of Article 30 of the Fourth Anti-Money Laundering Directive ("**Fourth AMLD**") relating to the beneficial ownership of corporate and other legal entities.

The Chairman noted that the discussion paper set out a sensible approach to the transposition of the Fourth AMLD. It was noted that the paper included an illustrative list

of entities, such as building societies, which are not currently within the scope of the PSC regime but where it is recognised that although they are structured in such a way as to permit a beneficial owner, in practice, there will almost never be one. The consultation also includes a category of incorporated entities which are not in scope as they are structured in a way that means that they cannot legitimately have a beneficial owner.

It was noted that the consultation paper suggested that the beneficial ownership details should be amended by a legal entity within six months of any change. The Committee thought this was a sensible timeframe.

The Chairman noted that AIM companies are currently excluded from the PSC regime. The consultation paper, however, asks for views on whether AIM companies should become subject to the beneficial ownership rules under the Fourth AMLD and the costs implications of this for companies. The Chairman noted that the Committee had responded to the BIS Consultation Paper on the Register of People with Significant Control in July 2015 which had queried whether AIM companies should be subject to the PSC regime. In the response, the argument that companies bound by disclosure and transparency rules broadly similar to DTR 5 should be exempt from the beneficial ownership requirements had been put forward.

The Chairman suggested that if the Committee thought of any further legal arguments why AIM companies should not be subject to the revised beneficial ownership regime (which had not been presented to BIS before) it would be useful to respond to the discussion paper.

3.5 Commons Inquiry on Corporate Governance. The Chairman reported that on 27 October 2016, the CLLS had responded to the corporate governance inquiry.

The CLLS had been invited to give evidence to the BIS Select Committee on 23 November 2016 and as Liz Wall, who had been instrumental in preparing the response, would attend. Vanessa Knapp would also attend in a personal capacity.

It was noted that the Secretary of State still has powers to investigate companies under s.432(2) Companies Act 1985. It was also noted that generally, the rules on wrongful trading and disqualification of directors were available for enforcement of directors' duties.

The Chairman expressed the view that the current regime of directors' duties worked well and that it provided directors with protection from those shareholders who were only interested in their own short term interests from legal claims.

The Committee discussed the potential issues stemming from an independent authority reviewing the decisions of directors. The following issues were noted:

- It would be a significant change in the law if directors were required to act in accordance with an objective standard (imposed with the benefit of hindsight) rather than in good faith when making commercial decisions. It was noted that it is

possible for different people to have different views about particular decisions, all of which are reached in good faith.

- Would such a body be given powers to reverse the decisions of directors? If so, an independent reviewer would take time to come to a decision. This could create uncertainty and some decisions are not capable of reversal. In those circumstances, it was queried what the redress would be.

The Chairman noted that company law is structured so that shareholders have control over the board and that how the company operates (whether ethically or not) is thus ultimately controlled by the shareholders. It is not clear, therefore, that the points that the corporate governance inquiry is designed to address can be dealt with in the corporate governance context without changing the structure of company law. If the structure were changed, there could be unintended consequences. For example, if the actions of directors are overseen by a separate body, how would the ability of shareholders to ratify decisions of the board work? This is not to say that good governance should not be encouraged, but rather that such questions do not necessarily fall within the governance realm.

The Chairman also noted that if changes were made to directors' duties (or other corporate governance measures), these would only apply to companies incorporated in the UK and there would be many other companies operating in the UK which are incorporated elsewhere. It was noted, however, that some private companies and PE funds were having to explain that they operated in accordance with the principles of good corporate governance to attract investors. The response by the CBI to the corporate governance inquiry also acknowledged that companies should be prepared to demonstrate how they engage with good corporate governance.

The Chairman noted that the FRC had said that the UK Corporate Governance Code could deal with some of the issues raised by the corporate governance inquiry (including for private companies) and that this could be an attractive proposed solution for Government.

There was a discussion around advisers' fees being made public. The Committee questioned how helpful this would be as the scope of due diligence is not standard but rather agreed between the company and its advisers. It was also acknowledged that the price gives no guidance about the standard to which the due diligence is carried out. The type and scope of the report will also vary from industry to industry.

The view was also expressed that advisers' fees constituted private information and there was no reason to require disclosure of it unless there was a compelling reason with an obvious social benefit. The comparison with the disclosure of takeover fees was not helpful as that is a useful disclosure for shareholders when assessing a bid.

4. Discussions

4.1 Brexit. There was a brief discussion of the decision in *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768. The process of amending a bill in Parliament in the context of a bill to authorise an article 50 notice was also discussed.

5. Recent developments

5.1 Company Law

The Committee noted that on 25 October 2016, HM Treasury published a consultation paper on proposed changes to Part 23 of the Companies Act 2006 relating to the definition of distributable profits for long-term life insurance businesses following the implementation of the Solvency 2 Directive on 1 January 2016. It was noted that the Committee did not propose to respond to this consultation but would rather leave it to the CLLS Financial Services Committee to do so should they wish.

5.2 Corporate Governance

The Committee noted that on 31 October 2016, the Investment Association wrote to chairmen of remuneration committees of FTSE 350 companies setting out significant changes in its principles of remuneration.

The Committee noted that on 14 November 2016, the FRC published its assessment of signatories' reporting against the Stewardship Code, which categorises asset managers in three tiers and other signatories to the Code in two tiers based on the quality of their Code statements.

5.3 Reporting and Disclosure

The Committee noted that on 11 October 2016, the FRC issued guidance to assist listed companies in preparing their annual reports. The report sets out key issues on which companies should focus and advises that Brexit-related risks and uncertainties for businesses should be assessed based on a broad range of factors.

The Committee noted that on 21 October 2016, the FRC published its Corporate Reporting Annual Review for 2015/2016 based on a review of 192 annual and interim reports and accounts. The FRC also published the technical findings of the Conduct Committee's Financial Reporting Review Panel 2015-16.

The Committee noted that on 31 October 2016, the FRC published a report following its review of certain aspects of companies' tax reporting.

The Committee noted that on 7 November 2016, the draft Companies, Partnerships and Groups (Accounts and Non-Financial Reporting) Regulations 2016 were published and laid before Parliament.

The Committee noted that on 9 November 2016, BEIS published its response to the consultation on the implementation of Directive 2014/95/EU amending the Accounting Directive (2013/34/EU) as regards the disclosure of non-financial and diversity information.

The Committee noted that on 9 November 2016, the Hampton-Alexander Review published a report on improving the gender balance in the leadership of FTSE companies. The report provides a progress report on women on boards of the FTSE 350 as at 1 October 2016. It was noted that there was a push to try to improve gender balance in leadership positions as well as on the boards of FTSE 350 companies. It was noted that most women on boards were currently non-executive directors. The Parker Report on ethnic diversity on boards was also noted. It was noted that both reports have good toolkits and questions for directors to ask to help boards deliver on the recommendations of the reports.

The Committee noted that on 16 November 2016, the Investment Association published new guidelines setting out the expectations of institutional investors in relation to viability statements. The Chairman noted in particular the following issues in the report:

- That the IA thinks that the general timeframe of three to five years in assessing a company's viability is too short. Businesses which have longer term plans should set them out in the viability statement.

- The results of any stress tests should be published.

There is a tension between what may be useful to investors, for example, companies disclosing medium or long term issues with solvency and what is useful to companies, where early disclosure of problems may in some circumstances exacerbate them. It was noted that in some situations the choice may not be whether the problems are dealt with sooner or later or in public or private but whether they are dealt with at all.

The Committee noted that on 17 November 2016, the IA issued a statement setting out its views on interim management statements and calling for companies to cease quarterly reporting. The Chairman expressed the view that it is not clear why short termism is necessarily linked to quarterly reporting and so whether getting rid of quarterly reports would help deal with this issue.

5.4 Equity Capital Markets

The Committee noted that on 27 September 2016, the FCA published Market Watch Issue 51, which includes observations from the FCA's recent review of the market abuse systems and controls in place at market maker firms; and a market-wide communication providing an update on payment for order flow. It was noted some asset managers had assumed that where there was a "stop notice" and trading was prevented, that it was possible to discuss inside information.

The Committee noted that on 18 October 2016, the FCA published the final findings of its investment and corporate banking market study. The FCA also published a

Consultation Paper (CP 16/31) relating to the prohibition of restrictive contractual clauses in investment and corporate banking engagement letters and contracts where these clauses cover future corporate finance services carried out from an establishment in the UK. It was noted that there was to be a call the following week between members of the Capital Markets Joint Working Party to consider whether or not to reply to this consultation.

There was a discussion of whether the consultation would capture clauses where there was a further level of engagement, for example, "if you use us on particular kind of deal, the fee will be £x". There was also a discussion of whether future services which are arguably part of a prior transaction will be captured. For example, where there is a lock-in on an IPO, would an agreement for the relevant bank to sell such shares be caught?

There was also a point raised about the geographical scope as the proposed provisions only apply to agreements for relevant services carried out by establishments in the UK.

The Committee noted that on 26 October 2016, the FCA launched a consultation on its "mission", with a foreword by its chief executive, Andrew Bailey, which is intended to inform the FCA's future strategy.

The Committee noted that on 27 October 2016, the FRC published a report on Business Model Reporting which confirms the importance of business model disclosure to investors. The Chairman noted that this was an interesting report and that it seemed that what the FRC would like is a "mini-prospectus".

The Committee noted that on 18 October 2016, The FCA published an updated version of Occasional Paper 15 on the factors that influence IPO allocations. Although this now includes further analysis to ensure the robustness of the findings, the findings themselves are unchanged.

The Committee noted that on 4 November 2016, the FCA published Handbook Notice No 38, which sets out its response to feedback received on its Quarterly Consultation Paper No 13 (CP16/17) and contains the Disclosure Guidance and Transparency Rules Sourcebook (Miscellaneous Amendments) Instrument 2016/70.

5.5 Accounting

The Committee noted that on 4 October 2016, the FRC published for consultation a revised version of its Conduct Committee's operating procedures for reviewing company reports and accounts.

5.6 Cases

The Committee noted the following cases:

Braid Group (Holdings) Limited [2016] CSIH 68. In this Scottish case, the Court of Session considered whether in an unfair prejudice claim, the court has discretion to fix

the price of a share purchase order at the amount set out in the “bad leaver” provisions in the articles and whether those provisions amounted to a penalty clause.

Re BW Estates Ltd, Ranhawa & Ors v Turpin & Anor [2016] EWHC 2156 (Ch). The applicants argued unsuccessfully that the appointment of an administrator to the company, BW Estates, was invalid due to the decision having been taken by the sole de jure director, in contravention of the articles of association which stipulated a quorum of two directors for a meeting. The court decided that on the basis of the Duomatic principle, there had effectively been a variation or departure from the company’s articles, either in the broad sense of the shareholder with voting rights having consented to a sole director managing the company’s affairs for some time or in the narrow sense that the appointment of administrators was carried out with the knowledge and consent of that shareholder.

Hosking v Marathon Asset Management LLP [2016] EWHC 2418 (Ch). The High Court, has confirmed that a partnership profit share can be forfeited for breach of the fiduciary duty owed by a partner to a partnership as agent.

Home Retail Group Plc [2016] EWHC 2072 (Ch). The case involved a request for confirmation that a cancellation scheme would not be barred by s.641(2A) Companies Act 2006 on the ground that the exception in s.641(2B) applied. Mr Justice Newey considered whether the Ramsay principle would prevent the s.641(2B) exception from being applied literally and concluded that it would not bite on a cancellation scheme which is part of a real world transaction having a clear commercial and business purpose. It was noted that the decision in Home Retail Group was sensible and that people had received similar advice from Counsel that the provision was not meant to stop substantively justifiable schemes.

Rush Hair Ltd v Gibson-Forbes and another [2016] EWHC 2589 (QB). The High Court considered whether a non-solicitation and a non-employment covenant given by an individual seller of a hairdressing business in a share purchase agreement were enforceable. The Court held that the seller had breached both covenants, rejecting the purchaser’s submissions that the seller had used a newly-incorporated company as a device to get round the covenants, giving the covenants an expansive interpretation, and ultimately concluding that the covenants were enforceable since they went no further than was reasonably necessary to protect a legitimate business interest.

Easynet Global Services Limited [2016] EWHC 2681 (Ch). The High Court held that the proposed transaction, to merge a number of UK companies and a Dutch company into a UK transferee company, was not the kind of transaction which the Cross-Border Mergers Regulations and the Cross-Border Mergers Directive were enacted to facilitate. The only purpose of including the Dutch company (which was dormant, had never traded and had no appreciable assets) in the transaction was to bring it within the scope of the CBM Regulations, and therefore the inclusion of the Dutch company in the transaction was simply a "device".

Article 50 High Court ruling. On 3rd November 2016, the High Court handed down its judgment in the challenge to the UK Government’s ability to trigger Article 50 of the

Treaty on European Union, and so start the process of withdrawal from the EU. Finding for the claimants in a unanimous judgment, Lord Thomas CJ, Sir Terence Etherton MR and Sales LJ ruled that the government did not have power under the Crown's prerogative to give notice pursuant to Article 50 without the prior authorisation of Parliament.

Gamatronic (UK) Ltd v Hamilton [2016] EWHC 2225 (QB). The case involved a claim that the Defendants had acted in breach of the fiduciary duties, as set out in the Companies Act 2006, that they owed to Gamatronic UK by secretly being involved in the establishment and activities of, and by acquiring a beneficial interest in, a new competing business. The court held that if all preparatory steps were prohibited, a director's personal freedom to compete after leaving would be seriously curtailed.

5.7 Miscellaneous

The Committee noted that the UK's Independent Anti-Slavery Commissioner, Kevin Hyland OBE, has published his first annual report, which covers progress made in the last year in the fight against modern slavery, and sets out priorities for 2017.

The Committee noted that on 3 November 2016, the Office of Tax Simplification (OTS) published its final report on proposals for introducing look-through taxation for certain small companies, following a consultation published in July 2016, and its final report on its proposals for introducing a Sole Enterprise with Protected Assets (SEPA) model.

The Committee noted that on 13 October 2016, HMRC published a summary of responses to its consultation on tackling tax evasion, published on 17 April 2016. Updated draft guidance on the offence has also been published, which will be finalised once the legislation has completed the Parliamentary process.