THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 284th meeting
at 9:00 a.m. on Wednesday, 29 March 2017
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); Mark Austin; Robert Boyle; Lucy Fergusson; Michael Hatchard; Nicholas Holmes; Chris Horton; Simon Jay; Vanessa Knapp; Stephen Mathews; Andrew Pearson; Chris Pearson; David Pudge; Richard Spedding; Patrick Speller; Keith Stella; Martin Webster and Victoria Younghusband.

Apologies: Mark Bardell.

2. Approval of minutes

The minutes for the meetings of the Committee in November 2016 and January 2017 were approved.

3. Matters arising

3.1 Re Dee Valley Group plc [2017] EWCH 184 (Ch). The Committee noted that the High Court was asked to consider the validity of splitting shareholdings for the purpose of defeating the "majority in number" test in a scheme of arrangement used to effect a takeover. On 8 February 2017, the High Court held that the votes of shareholders who had acquired their share from a person splitting his holding with the sole purpose of defeating the scheme were invalid and were rightly discounted as the relevant shareholders could not have been voting in the interests of the class.

The Committee discussed the following issues in relation to the decision in Dee Valley:

- The Chairman expressed the view that the decision was questionable in light of the rule of law as the judge had ignored the clear requirements of the Companies Act 2006 which makes the majority in number test a necessary condition for the scheme to come before the court for approval. That condition was clearly designed to ensure that shareholders with a minority of shares nevertheless had a voice before their property was expropriated. The Chairman noted that the cases on which the judge relied for the proposition that members must vote in the best interests of the class as a whole were cases where the majority was imposing its will on the minority. The decision appeared to expand that principle to one of

general application to shareholders. Coupled with the broad view taken of the discretion of the Chairman to exclude votes there may be undesirable uncertainty (and dispute) regarding the outcome of shareholder meetings.

- The Chairman also noted that the Companies Act 2006 referred to "members" and did not differentiate between members according to how they had acquired their shares. Richard Spedding mentioned that the origins of the test had been discussed during the trial and that he understood that the test had originally only applied to creditors' schemes. At that time either the debt was not traded or else the record date was no later than the date the scheme announced. As such, creditors did not acquire the debt after the scheme was announced and so there was no opportunity to influence the result of the scheme.

- The Committee noted that there had been a lot of questions from clients, particularly hedge funds, about how the test set out in Dee Valley would apply. Hedge funds, for example, may take positions in shares where they may be perceived to be voting against the interests of the class. Could a shareholder who purchased shares after a transaction was announced in order to profit from its successful conclusion be precluded from voting on the basis that they were not taking into account the interests of all shareholders (or of the company)?

- The Committee also noted that it was not clear what arrangements were legitimate and which would be regarded as manipulation. How would the court proceed if employees or other stakeholders bought one share each well in advance of a takeover (rather than buying them or receiving them as a gift once a takeover is announced)?

- The Committee agreed a paper should be prepared that would consider the desirability of retaining the majority in number test and what modifications might be appropriate in light of the decision. The Chairman agreed to produce a draft.

3.2 FRC announces review of UK Corporate Governance Code. The Committee noted that on 16 February 2017, the FRC announced plans to carry out a fundamental review of the UK Corporate Governance Code.

3.3 Response to Green Paper on Corporate Governance Reform. The Committee noted that on 17 February 2017, the Committee had responded to the Green Paper on Corporate Governance Reform.

3.4 Policy Statement on Changes to DTR 2.5 (Delaying Disclosure of Inside Information). The Committee noted that on 24 February 2017, the FCA published Policy Statement PS17/2 summarising feedback received on its consultation paper CP16/38 setting out its changes to DTR 2.5.

3.5 Disclosure Guidance and Transparency Rules Sourcebook (Delayed Disclosure) Instrument. The Committee noted that on 24 February 2017, the FCA published the Disclosure Guidance, which implements the changes outlined in Policy Statement PS17/2.

3.6 FCA Consults on Availability of Information in the IPO Process. The Committee noted that on 1 March 2017, the FCA published Consultation Paper CP17/5 on reforming the availability of information in the UK equity IPO process.

Mark Austin commented on the market abuse issues raised in the consultation paper. He noted that the consultation states that market participants do not routinely consider whether disclosing information in an analyst presentation is in accordance with Article 10(1) of MAR i.e they do not routinely assess whether the condition that disclosure made in the 'normal exercise of employment, a profession or duties' is satisfied. The consultation asks whether disclosure in an analyst presentation is in accordance with MAR and why the grounds for delaying under Article 17 have been met or alternatively why the information in an analyst's presentation is not "inside information" as per Article 7 of MAR.

Mark Austin mentioned that in ECJ case of Grøngaard and Bang (C-384/02) ECR-I 9939, which was also mentioned in the Hannam decision, it was said in relation to the predecessor of Article 10(1) of MAR that the disclosure of such information is justified only if it is strictly necessary for the exercise of an employment, profession or duty and complies with the principle of proportionality.

3.7 Fourth Money Laundering Directive. The Committee noted that on 15 March 2017, HM Treasury published a further consultation on the transposition of the Fourth Money Laundering Directive together with draft Money Laundering, Terrorist Financing and Transfer of Funds Regulations 2017.

3.8 Limited partnership reform. Victoria Younghusband reported that the Legislative Reform (Limited Partnership) Order 2015 was due to come into force in April. Victoria noted that some law firms had responded separately to the consultation on Scottish limited partnerships and that the main point from those responses had been that a Scottish limited partnership is a legitimate means of having a legal personality.

4. Discussions

4.1 FCA Discussion Paper on Effectiveness of UK Primary Markets. The Committee noted that on 14 February 2017, the FCA published DP 17/2 seeking views on whether the current boundary between standard and premium listing categories is appropriate; the effectiveness of the UK's primary equity markets in providing capital for growth; and whether there is a role for a new wholesale bond multilateral trading facility in the UK.

4.2 FCA Consultation Paper: Changes to the Listing Rules. The Committee noted that on 14 February 2017, the FCA published CP 17/4 proposing various changes to the Listing Rules. The FCA also proposes to introduce new Technical Notes on these changes; amendments to existing Technical Notes; and proposes to delete its existing Technical Note on reverse takeovers.

4.3 MiFID II product governance rules and capital markets. The Committee discussed the MiFID II product governance rules and capital markets.

4.4 Brexit. The Committee noted that it would be helpful if, as far as possible, the legislative exercise could be confined to making sure that the legislation continued to work rather than trying to make policy changes. Brexit is too big an exercise to introduce additional policy matters.

The Committee noted that European legislation often came into force on a particular day and into effect on another day. Care would be required when the Great Repeal Bill was drafted to ensure this point was dealt with.

5. Recent developments

5.1 Corporate Governance

The Committee noted that on 19 January 2017, the Investor Forum published its 2015-2016 Review on collective engagement on strategic matters between investors and company boards.

The Committee noted that on 22 February 2017, ICSA published a report on untangling UK corporate governance, including whether the UK corporate governance framework is still fit for purpose.

5.2 Reporting and Disclosure

The Committee noted that on 28 January 2017, the Government Equalities Office and the Advisory, Conciliation and Arbitration Service published draft guidance to help large businesses abide by the proposed new Equality Act 2010 (Gender Pay Gap Information) Regulations 2017.

The Committee noted that on 31 January 2017, BEIS published guidance for companies and LLPs reporting on payment practices and performance under the proposed Reporting on Payment Practices and Performance Regulations 2017.

The Committee noted that on 6 February, the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 and Explanatory Memorandum were published.

The Committee noted that on 7 February 2017, the FRC published updated notes on best practice to help audit committees to conduct an audit tender.

The Committee noted that on 8 February 2017, the Investment Association published guidelines on audit tenders, setting out the expectations of its members when companies tender their audits.

The Committee noted that on 2 March 2017, the Private Equity Reporting Group published an updated version of the Guidelines on Improving Transparency and Disclosure – Good practice reporting by portfolio companies.

The Committee noted that on 20 March 2017, the Reporting on Payment Practices and Performance Regulations 2017 and the Limited Liability Partnerships (Reporting on Payment Practices and Performance) Regulations 2017 were published.

The Committee noted that on 16 March 2017, the Financial Reporting Lab announced its risk and viability reporting lab project. The project will explore how companies can develop effective principal risk reporting and viability statement reporting to meet the needs of investors. The project will commence in May 2017, with the output expected to be published in time to be helpful for December 2017 year-end Annual Reports.

The Committee noted that on 28 March 2017, the FCA announced that Tesco plc and Tesco Stores Limited had agreed that they had committed market abuse in relation to a trading update published on 29 August 2014, which gave a false or misleading impression about the value of publicly traded Tesco shares and bonds. Tesco has agreed to pay compensation to investors who purchased Tesco shares and bonds on or after 29 August 2014 and who still held those securities when the statement was corrected on 22 September 2014.

The Committee noted that the final notice from the FCA does not explain what it means for a company to “know” something. The notice states that there is no suggestion that the board of Tesco plc knew or could reasonably have been expected to know that the relevant information was fake or misleading but that there was knowledge at a sufficiently high level, but below the level at the Tesco plc board, for such knowledge to constitute the knowledge of Tesco plc within specific context of, and for the purposes of, market abuse.

The Committee noted that it was not clear whether there was a distinction between the market abuse standard and criminal standards in relation to “knowledge”. There is nothing in the relevant legislation about what “known” means in the content of market abuse.

The Committee also discussed the fact that the deferred prosecution agreement with Tesco was not final as it had not been approved by the court and yet it formed part of the rationale for the FCA’s final notice.

Vanessa Knapp commented that there had been a separation of the parent and the subsidiary and that Tesco Stores Limited knew that the information it gave to Tesco plc was false or misleading. Yet the subsidiary and the parent were found responsible for the market abuse offence.

5.3 **Public M&A**

The Committee noted that the Takeover Appeal Board has published its decision to dismiss an appeal submitted by Mr. David King against the Hearings Committee’s ruling that he acted in concert with three other individuals in the acquisition of shares in Rangers International Football Club Plc, and that he must therefore announce an offer for the remaining shares pursuant to Rule 9 of the Takeover Code.

5.4 **Equity Capital Markets**

The Committee noted that on 24 January 2017, the Economic Secretary to the Treasury issued a written statement indicating the Government will not opt in to Article 31(1) of the proposed new Prospectus Regulation, requiring Member States to ensure information can be shared between competent authorities across the EU, where criminal sanctions for breaches of the Regulation have been imposed.

The Committee noted that on 27 January 2017, ESMA published an updated version of its Q&A on MAR, regarding the rules to calculate the price of options granted for free to managers/employees for the purpose of disclosing managers' transactions under Article 19 of MAR; and the rules applying to investment recommendations relating to multiple issuers.

The Committee noted that on 27 January 2017, ESMA published a new Q&A on the implementation of its Guidelines for listed issuers when presenting Alternative Performance Measures ("APMs") in prospectuses and publicly available documents containing regulated information.

The Committee noted that on 3 February 2017, ESMA published a two part guide to national rules across the EEA on major holdings notifications under the Transparency Directive.

The Committee noted that on 28 February 2017, the European Commission made a request to ESMA for technical advice on possible delegated acts under the proposed new Prospectus Regulation, which will replace the Prospectus Directive.

The Committee noted that on 3 March 2017, the FCA published its Quarterly Consultation Paper No.16 (CP17/6) proposing minor changes to the Listing Rules and Prospectus Rules. The FCA also intends to update the definitions of "ESMA Prospectus Questions and Answers" and the "UK Corporate Governance Code".

The Committee noted that on 14 March 2017, the European Parliament adopted, with amendments, the European Commission's proposals to amend the Shareholder Rights Directive.

The Committee noted that on 21 March 2017, the European Commission published a consultation on the operation of the European Supervisory Authorities, including ESMA.

5.5 **Cases**

The Committee noted the following cases:

Re: iTouch Ltd [2016] EWHC 3448 (Ch). The High Court considered whether the specification of a past date as the effective date of a proposed cross-border merger by absorption of a wholly-owned subsidiary, specified in the draft terms put before the competent authorities, meant there had been a failure to comply with the Companies (Cross-Border Mergers) Regulations 2007.

Akers and Ors v Samba Financial Group [2017] UKSC 6. The Supreme Court has ruled that section 127 of the Insolvency Act 1986 did not apply to a transfer of shares by the registered owner, although they were transferred after the commencement of the winding up of their beneficial owner.

Re: Formenta Limited (unreported). The High Court approved a reverse cross-border merger under the Companies (Cross-Border Mergers) Regulations 2007 (SI 2007/2974) for the first time. No transcript of the judgement is available.

Dickinson v NAL Realisations (Staffordshire) Ltd [2017] EWCH 28 (Ch). The High Court considered whether certain transactions entered into by a company with one of its directors had been adequately authorised, whether they contravened the Companies Act 2006, whether they entailed breaches of duty on his and his co-directors' parts, and whether they were transactions defrauding creditors under the Insolvency Act 1986. Two co-directors were found to be in breach of duty on the basis that they had abrogated their responsibilities to the managing director. However, these breaches were found not to have caused any loss to the company, and the claims were dismissed.

Okpabi & Ords v Royal Dutch Shell Plc & Anor [2017] EWCH 89 (TCC). The High Court considered the circumstances in which a parent company could be liable in tort for the acts or omissions of its subsidiary. The claimants sought damages from Royal Dutch Shell plc (RDS), the ultimate holding company of the Shell Group, and its operating subsidiary, Shell Petroleum Development Company of Nigeria Ltd (SPDC) as a result of ongoing pollution and environmental damage caused by oil spills. Fraser J concluded it was not reasonably arguable there was a duty of care upon RDS for the acts and/or omissions of SPDC and the claims against both RDS and SPDC would fail.

Camera di Commercio Industria Artigianato e Agricoltura de Lecce v Salvatore Manni, Case C-398/15. The ECJ has qualified the right to be forgotten and ruled that it does not apply to personal data in a companies' register. In this case, public disclosure requirements took precedence over the protection of personal data in the interests of promoting legal certainty and protecting third parties in relation to limited liabilities companies, since their assets are the only safeguards available to third parties.

Bhullar v Bhullar & Ors [2017] EWHC 407 (Ch). The High Court ruled that a director had acted in breach of his fiduciary duty to the companies in question in respect of certain payments made from the companies to another company, and that the Duomatic principle had not been engaged so as to excuse it. The Court held the most appropriate remedy, in circumstances where some of the money paid out had been repaid, would be for the repayment of the money that remained outstanding, with interest.

5.6 **Other**

The Committee noted that on 2 March 2017, the OTS published a Progress Report on its simplification review of residual stamp duty on shares.

The Committee noted that on 20 March 2017, the Business, Energy and Industrial Strategy Committee announced that it had launched an inquiry, from start-up to scale-

up: support for growing businesses, to investigate how to help UK start-ups and potential high-growth small businesses overcome hurdles to become "scale-ups".

6. Any other business

Committee composition. The Chairman noted that Keith Stella was retiring from the Committee. The Chairman thanked Keith on behalf of the Committee.

Virtual meetings. The Committee noted that section 360A of the Companies Act 2006 was introduced as part of the implementation of the Shareholder Rights Directive to make clear that electronic meetings can take place, without prejudicing the general law on meetings and voting. The model articles for public companies have a provision (Art 29(4)) stating that in determining attendance at a general meeting it is immaterial whether any two or more members are attending it are in the same place as each other. Some of the registrars are suggesting to companies the use of a platform to enable a virtual only meeting, as done by Jimmy Choo plc last year.

There are references in the Companies Act 2006 to notices which set out the place of the meeting. Lucy Fergusson said that she thought that these should be read by analogy to mean a reference to the website address where the virtual meeting could be accessed.

The Committee discussed the default common law position that the place of the meeting is where the chair is situated or where the chair directs but the Committee thought that this could be dealt with through the articles.

The Committee also discussed how materials could be made available at the meeting provisionally concluding that this could be done through the website.

The Chairman commented that as a practical matter he was not clear how real time questioning would work in a virtual meeting. He also commented that the chair may have less control over a virtual meeting as people may be more willing to ask questions and the “silent majority” may have less influence in an online setting.

Stephen Matthews noted that it is easier to encourage people to log on to a meeting than to attend in person and this may create difficulties where people wish to ask difficult questions or disrupt the meeting. There could also be issues where the technology failed and the chair of the meeting was not aware of this. This could also lead to disputes about whether the failure of the technology was the fault of the member or the company.

The Committee agreed to revisit the issue at the next meeting.