THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 292nd meeting
at 9:00 a.m. on 23 May 2018
at Clifford Chance LLP, 10 Upper Bank Street, London E14 5JJ

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1. **Welcome and apologies**

Attending: David Pudge, Adam Bogdanor, Murray Cox, Lucy Fergusson, Kevin Hart, Simon Jay, Victoria Kershaw (alternate), Antonia Kirby (alternate), Vanessa Knapp, Chris Pearson, Richard Spedding, Patrick Speller, Richard Ufland, Liz Wall, Martin Webster, Victoria Younghusband and Kath Roberts (Secretary).

Apologies: Robert Boyle, Chris Horton, Stephen Mathews, Nicholas Holmes and Rob Stirling (alternate).

2. **Approval of minutes**

The Chairman reported that the draft minutes of the meeting held on 28 March 2018 were circulated to members for comment on 14 May 2018. Members were asked to provide comments to the Secretary.

3. **Matters arising**

3.1 Changes to application to make a residential address unavailable for public inspection by an individual. The Committee noted that on 25 April 2018, the Companies (Disclosure of Address) (Amendment) Regulations 2018 were made. The meeting noted that the regulations are the same as the draft regulations published on 22 February 2018 and came into force on 26 April 2018

3.2 BEIS consultation on national security and infrastructure investment review. The Committee noted that the two statutory instruments amending the share of supply and turnover tests in the Enterprise Act 2002 were made on 14 May 2018 and will come into force on 11 June 2018. It was noted that these thresholds are being amended for businesses in the military, dual-use (military and civilian), computing hardware and quantum technology sectors and that the share of supply test is being amended so that it will be met where the target enterprise has a 25% or more share of supply of goods or services in the UK before the merger pursuant to the Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018. It was also noted that an Explanatory Note has been published. The meeting observed that as the UK turnover threshold is being reduced from £70 million to £1 million under the Enterprise Act 2002 (Turnover Test) (Amendment) Order 2018 this is likely to increase the number of transactions which are subject to the regime.

3.3 FCA statement on Brexit. The Committee noted that on 28 March 2018, the FCA published a statement on the agreement reached on the terms of the implementation period that will apply following the UK's withdrawal from the European Union.

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It was also noted that the Government had published in draft the Financial Regulator's Powers (Technical Standards) (Amendment etc.) (EU Exit) Regulations 2018. It was noted that the Regulations delegate certain powers of the Treasury to the FCA, the PRA, the Bank of England and the Payment Systems Regulator to enable such regulators to remove deficiencies in the various technical standards for which the respective regulators have authority and which are identified in the Schedule to the Regulations.

3.4 Latest FCA Liaison Group Meeting. The Chairman reported on the discussions from the FCA Liaison Group Meeting held on 22 May 2018.

4. **Discussions**

4.1 BEIS consultation on insolvency and corporate governance. It was noted that Murray Cox, who is leading the preparation of a response to this consultation, had circulated a draft response to the working group for comment on 22 May 2018. Following an initial round of comments from the working group, it was agreed that the response would be shared with the wider Committee. It was noted that the Law Society CLC and the CLLS Insolvency Law Committee were both submitting responses to the consultation. Murray reported that whilst the working group's response picked up on themes covered by those two committees, it was focussed more specifically on the corporate law related aspects of the proposals.

4.2 European Commission proposes new company law to help companies move across borders and find online solutions. The Committee noted that on 25 April 2018, the European Commission issued a press release stating that it was proposing new company law to:

(a) make it easier for companies to merge, divide or transfer their registered seat from one Member State to another without having to go through liquidation and losing their legal personality. The meeting noted that this follows the ECJ's ruling in Polbud (C0106/16) in October 2017, where the ECJ clarified that, based on the principle of freedom of establishment, the Member State of departure must allow for cross-border conversions. Despite this ruling, there is currently no formal procedure for cross-border conversions. The proposed new laws aim to remedy this situation; and

(b) enable companies to register, file and update their data in business registers fully online (proposal on the use of digital tools and processes in company law.

It was noted that a fact sheet with FAQs on the proposed new company law had been published.

Vanessa Knapp noted that the digital tools consultation was unlikely to have a significant impact for the UK as the UK already allows online incorporation. However, there were some issues that should be looked at, in particular the proposals that would allow a registrar in one member state to request information from another member state about whether a proposed director had been disqualified from acting as a director in that member state. Vanessa noted that not all registries currently keep this information and would need to put procedures in place to ensure they could provide it on request.

It was noted that an email was circulated to the Committee on 9 May 2018 seeking volunteers for a working group to respond to these proposals and that the consultations close on 9 July 2018.

4.3 Position of preference shareholders. The Committee noted that on 8 May 2018, the Chairman received an email from BEIS requesting the Committee's views on whether the Companies Act 2006 should be amended to provide greater protection for the position of preference shareholders. It was noted that, in its email, BEIS stated that following Aviva's announcement (see item 5.4(b) for further details), it has received a number of representations alleging that there is a "loophole" in section 641 of the Companies Act 2006 because it does not adequately protect the rights of shareholders of a particular class (e.g. preference shareholders), if the ordinary shareholders can pass a special resolution (confirmed by the court) to reduce a company's share capital by cancelling, for instance, the preference shares. The Chairman reported that BEIS is seeking the Committee's views on whether section 641 represents a valuable combination of flexibility with necessary safeguards to ensure shareholders are treated fairly, or whether it needs to consider reform to provide more certainty for preference shareholders. The meeting noted that there is also a House of Lords decision in *House of Fraser Plc v ACGE Investments Ltd*[1] where these issues were considered.

The Committee discussed the concerns raised in the email from BEIS.

4.4 Offeree directors' irrevocable commitments. The Committee noted that on 8 May 2018, the Chair of the Joint Takeovers Working Party received an email from Charlie Crawshay at the Takeover Panel Executive on the application of Rule 21.2 of the Takeover Code to irrevocable undertakings given by directors of the offeree company. It was noted that the Executive had asked for its position to be explained to the members of the Committee. As such, the Chairman reported that the email stated that in a number of recent directors' undertakings, the Executive has seen a commitment by the director not to make any statement or take any action which might prevent any of the conditions to the offer from being satisfied or fulfilled or which might otherwise delay or frustrate or be prejudicial to the success of the offer and that the Executive considered this provision to be offensive to Rule 21.2 on the basis that, albeit that it may be stated that the commitment is given by the director in his/her capacity as a shareholder, in practice the commitment may have the effect of restricting his/her actions as a director.

[1] [1987] AC 387

4.5 Takeover Panel's views on post-Brexit shared jurisdiction provisions. The Chairman reported that he and Chris Pearson had met with the Panel recently to discuss this issue.

4.6 Brexit. The Chairman led the Committee in a discussion on how it might approach the review of the SIs to be published by HMT and BEIS in the coming months.

4.7 Independent review of the Financial Reporting Council (FRC). The Committee noted that on 17 April 2018, BEIS announced the launch of an independent review of the FRC. It was noted that the review will be led by Sir John Kingman and will assess the FRC's governance, impact and powers to help ensure it is fit for the future. The meeting noted that BEIS has published terms of reference for the review, which will include a public consultation and that the review is due to be completed by the end of 2018.

It was noted that review was likely to raise the possibility of the FRC being given powers to deal with directors who do not have accountancy qualifications in the same manner that the FRC can currently sanction individuals who are qualified accountants. The Committee agreed to keep a watching brief on this item and to decide whether to prepare a response once the call for evidence had been published.

4.8 Draft regulations prohibiting restrictions on assignment of receivables. The Chairman reported that in April 2018, BEIS had circulated a revised version of the regulations and that there had been a call amongst the working group members to discuss the updated draft.

The Chairman reported that a revised mark-up of the regulations and a note explaining the rationale for the comments would be sent to BEIS in the week commencing 21 May 2018 and that the date from which the regulations would apply was dependent on when the draft regulations were finalised. However, the working group intended to suggest to BEIS that the regulations should apply to contracts entered into three months after the regulations are made in order to allow time for companies to prepare for their adoption.

4.9 Joint Working Group draft notes on guarantees and intra-group loans in light of the position reflected in the ICAEW TECH 02/17. Liz Wall reported that both papers had been sent to the ICAEW who did not see any merit in meeting to discuss them again and that the ICAEW did not intend to change TECH 02/17.

The intention is to publish the papers on the Law Society and CLLS websites in the week commencing 4 June 2018. It was agreed that the working group should be ready to respond to any press interest in the papers.

4.10 Tailored Review of the Law Commission. The Committee noted that the Ministry of Justice is undertaking a Tailored Review of the Law Commission which would examine the Law Commission's efficiency, effectiveness, accountability and governance arrangements in a fair and transparent way to ensure that the body presents value for money in contributing to government or departmental priorities. The Chairman reported that the CLLS had been invited to contribute to the review process by completing a questionnaire and returning it by 31 May 2018. The Committee agreed that it would be a good opportunity to raise with the Law

Commission how it prioritises those areas of law that it intends to review and to ask whether there is scope to review any specific areas of company law. The Chairman agreed to flag these issues in his response on behalf of the Committee.

5. Recent developments

5.1 Company Law

(a) Companies House business plan for 2018 to 2019. The Committee noted that on 5 April 2018, Companies House published its business plan for 2018 to 2019. It was noted that the business plan set out what action Companies House proposed to take to improve the PSC register information at Companies House, including contacting companies where they believe that the PSC register requirements have been misunderstood and pursuing companies that have not provided PSC information in their confirmation statement. It was also noted that Companies House intended to work with BEIS: (i) to implement the ban on corporate directors; (ii) on potential changes to limited partnership law to address concerns about the possible misuse of limited partnerships for fraudulent activities (see item 5.8(a)); and (iii) on the development of a register of beneficial owners of overseas companies that own property in the UK or enter into contracts with the government).

(b) European Commission consultation on minimum requirements in the transmission of information for the exercise of shareholders rights. The Committee noted that on 12 April 2018, the European Commission launched a consultation on minimum requirements with regard to shareholder identification, the transmission of information and facilitation of the exercise of shareholders rights under the Shareholder Rights Directive. It was noted that the Law Society CLC and CLLS CLC had submitted a joint response on 9 May 2018.

Vanessa Knapp reported that it remained uncertain as to whether these changes would apply to the UK, given they will not come into force pre-March 2019. However, on the basis that the outcome of the consultation would set the standards for Europe, UK registrars may find themselves having to adopt the proposed template for communication and, as such, it was important to seek to ensure the proposals were workable.

5.2 Corporate Governance

(a) Revised QCA Corporate Governance Code. The Committee noted that on 25 April 2018, the QCA announced that it has published a revised Corporate Governance Code. The meeting noted that the announcement stated that the revision of the QCA Code was especially timely and relevant given that from 28 September 2018 all AIM companies will be required to apply a recognised corporate governance code and explain how they do so.

5.3 Reporting and Disclosure

(a) Updated PERG guidance on good practice reporting by portfolio companies. The Committee noted that on 26 April 2018, the Private Equity Reporting

Group published an updated version of its guidance on good practice reporting by portfolio companies.

5.4 **Equity Capital Markets**

(a) LSE consultation on changes to the AIM Rules for Nomads. The Committee noted that on 26 April 2018, the LSE published AIM Notice 51, which contains the LSE's consultation on proposed changes to the AIM Rules for Nominated Advisers, following the Discussion Paper – AIM Rules Review published on 11 July 2017. It was noted that the LSE was proposing changes to the Rules to provide more detail and clarity in relation to its supervisory powers and considerations in relation to the eligibility (and continuing eligibility) of firms as nominated advisers. It was noted that a mark-up of the AIM Rules for Nominated Advisers had been published and that the consultation closed on 25 May 2018. The meeting noted that a call of the Joint Listing and Prospectus Rules Working Group had been arranged to discuss this consultation on 22 May 2018.

(b) FCA letter to CEOs on irredeemable preference shares. The Committee noted that on 19 April 2018, the FCA wrote a letter to CEOs to inform them that the FCA was reviewing the market for certain fixed income shares, particularly those that are described as being perpetual or irredeemable. The Chairman reported that, as discussed at item 4.3 above, this follows Aviva plc's announcement that it was able to cancel certain irredeemable shares at or close to par value through a reduction of capital under the Companies Act 2006, which affected the market for and price of those irredeemable shares. It was noted that Aviva had subsequently announced that it did not intend to cancel those shares and had agreed to pay compensation to certain of the preference shareholders who had sold shares and had been adversely affected by the market movement caused by its earlier announcement.

(c) ESMA proposes simplifications to the format and content of prospectuses. The Committee noted that on 3 April 2018, ESMA announced that it had published its final report on the technical advice under the Prospectus Regulation. The meeting noted that the technical advice covered the areas of format and content of a prospectus, the EU growth prospectus and the scrutiny and approval of a prospectus.

(d) ESMA published updated Q&A on prospectuses. The Committee noted that on 28 March 2018, ESMA published an updated version of its Q&A on prospectuses. It was noted this version included a new Q&A on profit forecasts, which provided clarification on how to identify profit forecasts in the context of prospectuses by explaining the definition in the Prospectus Regulation No 809/2004 and by providing examples on what may or may not constitute a profit forecast.

5.5 **MAR**

(a) FCA consultation: Proposed guidance on financial crime systems and controls: insider dealing and market manipulation. The Committee noted that on 27 March 2018, the FCA launched a consultation on changes to the Financial

Crime Guide. It was noted that the FCA was proposing to add a chapter on insider dealing and market manipulation. It was noted the consultation closes on 28 June 2018.

5.6 **Accounting**

(a) IOSCO consultation report on good practices to assist audit committees in supporting audit quality. The Committee noted that on 24 April 2018, the IOSCO issued a press release stating that it had published a consultation report on good practices for audit committees in supporting audit quality, which is intended to assist audit committees of issuers of listed securities in promoting and supporting audit quality. The meeting noted that the consultation closes on 24 July 2018.

5.7 **Takeovers**

(a) Mr King makes a Rule 9 mandatory offer. The Committee noted that on 29 March 2018, Laird Investments (Proprietary) Limited announced that it is making a mandatory cash offer under Rule 9 of the Takeover Code to acquire shares in Rangers International Football Club plc. The meeting noted Mr King is a director of Laird and a beneficiary of the trust that is the ultimate owner of Laird and that the offer followed an unsuccessful appeal by Mr King, where the Court of Session granted an order requiring Mr King to make a Rule 9 mandatory offer - see item 5.9(a) for the opinion of the Inner House of the Court of Session. The Committee noted that the offer was likely to be largely academic as the offer price was below the current market price.

(b) Takeover Panel statement on application of chain principle to Disney's acquisition of Fox. The Committee noted that on 12 April 2018, the Takeover Panel published Panel Statement 2018/4 in which the Panel Executive confirmed that, following the completion of the acquisition by The Walt Disney Company of Twenty-First Century Fox Inc., Disney would be required to make a Rule 9 mandatory bid for Sky plc pursuant to the chain principle set out in Note 8 on Rule 9.1 of the Takeover Code as a result of Fox's stake of approximately 39% in Sky.

5.8 **Miscellaneous**

(a) BEIS consultation on the reform of limited partnership law. The Committee noted that on 30 April 2018, BEIS published a consultation on the reform of limited partnership law, which sets out a number of proposals aimed at improving the regulatory regime governing limited partnerships and to prevent their misuse. It was noted that the consultation closes on 23 July 2018. The meeting also noted that on 29 April 2018, BEIS issued a press release, which stated that BEIS has evidence that Scottish limited partnerships (SLPs) have been exploited in complex money laundering schemes, including one which involved using over 100 SLPs to move up to $80 billion out of Russia.

(b) Fifth Anti-Money Laundering Directive. The Committee noted that on 19 April 2018, the European Parliament adopted, with amendments, the European Commission's proposal for a directive to amend the Fourth Anti-Money

Laundering Directive. It was noted that the proposal will become the Fifth Anti-Money Laundering Directive and that the Council of the EU announced that it has adopted the proposed directive on 14 May 2018. The meeting noted that amendments have been made to Article 30, which has been implemented in the UK through the PSC register regime.

5.9 **Cases**

(a) The Panel on Takeovers and Mergers v David Cunningham King [2018] CSIH 30. The Committee noted that the Inner House of the Court of Session upheld the decision of the Outer Court and granted the order sought by the Panel under section 955 Companies Act 2006 requiring Mr King to make a mandatory offer pursuant to Rule 9 of the Takeover Code for all the shares in Rangers International Football Club plc not already controlled by him or his concert parties.

It was noted that the Inner House agreed with the Outer House that the Court has the discretion to refuse to grant an order to secure compliance with a requirement of the Panel, however, such instances would be rare. The Committee noted that the decision stated that the most obvious case where enforcement might be refused is where material changes in circumstances have occurred subsequent to the last decision by the Hearings Committee and the Takeover Appeal Board - for example, the offeror might have become insolvent or an offer by a third party for the relevant shares might have been made.

(b) In the matter of Old Mutual plc [2018] EWHC 873 (Ch). The Committee noted that the High Court considered an application by Old Mutual plc under section 896 Companies Act 2006 pursuant to which Old Mutual plc was seeking reassurances from the High Court in relation to its proposal for an intra-group reorganisation, which involved two schemes of arrangement (one to demerge a wholly-owned subsidiary and the other to insert a new holding company), including that proposed reductions of capital would not be barred by section 641(2A) of the Companies Act 2006. It was noted that the Court held that the two schemes could be considered separately as each served a separate and very real commercial purpose and that, accordingly, section 641(2A) would not be infringed.

(c) In the matter of Stellar Diamonds plc (2018). The Committee noted that this case involved a scheme of arrangement that was sanctioned to enable the acquisition of the share capital of Stellar Diamonds Plc by Newfield Resources Ltd. The Committee noted that the High Court was of the view that, notwithstanding the low turnout at the single scheme meeting (reflecting the fact that a significant number of shareholders had only very small shareholdings or were located overseas), there was no reason to suggest that those who had attended the meeting and voted for the scheme had done so other than with the view to promote class interests. It was also noted that the 21 day notice period given for notice of the scheme meeting had been the shortest that could have been allowed to ensure the documents reached shareholders, especially those outside the UK, in sufficient time to allow for the return of proxy forms and the court advised proponents of schemes to

consider carefully the period required to dispatch scheme documents to overseas shareholders.

(d) Richard Toone & Kevin Murphy v Dean Robbins & Richard Robbins [2018] EWHC 569 (Ch). The Committee noted that this case involved liquidators contesting a number of payments made by a company to its directors said to be by way of remuneration or dividends. The High Court held that: (a) non-compliance with an article which required that any decision taken by a sole member must be recorded in writing and entered in to the company's minute book, did not invalidate a decision taken by the sole shareholder to approve the remuneration of the directors; (b) the burden of proof is on directors to explain any uncategorised payments made to themselves by the company; and (c) unlawful dividends could not be re-characterised as instalments of salary, the unjust enrichment of the company at the expense of the directors who had provided services to the company could not be used as a defence and the dividends could not be said to have been approved by the sole shareholder (citing *Progress Property* - a distribution described as a dividend but actually paid out of capital is unlawful, however technical the error and however well-meaning the directors who paid it).

(e) Instant Access Properties Limited (in liquidation) v Rosser [2018] EWHC 756 (Ch). The Committee noted that the High Court had to consider whether certain individuals were *de facto* directors or shadow directors. It was noted that the High Court held that whether a person is a *de facto* director or a shadow director depends upon the specific facts of each case and there does not appear to be a clear legal test (the decision contains some commentary on the relevant case law). It was further noted that the High Court also had to consider whether a shadow director owes fiduciary duties to a company and, if so, which duties apply: broadly, this is a highly fact-sensitive question but Mr Justice Morgan considered that: (i) it is usually helpful to ask whether the individual has expressly or impliedly (from the circumstances) undertaken or assumed a position of trust and confidence or whether there is a legitimate expectation that he will not use his position in a way adverse to the interests of the company; and (ii) a court can hold that a person owed some of the usual fiduciary duties, but not all of them, or hold that the specific fiduciary duty owed is a qualified form of the general fiduciary duty. The Committee noted that it was common ground between the claimant and the defendants that a *de facto* director owes the same fiduciary duties to a company as a *de jure* director.

(f) LRH Services Ltd (in liquidation) v (1) Raymond Trew (2) Jason Brewer (3) Derek O'Neill [2018] EWHC 600 (Ch). The Committee noted that the High Court held that a solvency statement for a reduction of share capital was invalid. The meeting noted that the Court determined that the director who gave the solvency statement did not properly hold the opinions in the statement because: (i) he had not properly considered the company's liabilities for the purposes of forming the opinions; and (ii) insofar as he assumed that any liabilities would be met by other group companies, the solvency statement was made on the basis of the wrong test because the resources of such companies were not assets to which the company was entitled. The meeting

noted that, in light of the above, the High Court held that the share capital reduction and the subsequent dividend were unlawful.

The Committee noted that the judgment refers to the case of *BAT Industrial Plc v Sequana* [2016] EWHC 1686 (Ch) being under appeal and that this was the only other reported case on reductions of capital by way of solvency statement.

(g) Rock Advertising Limited v MWB Business Exchange Centres Limited [2018] UKSC 24. The Committee noted that the Supreme Court held that a term in a contractual licence that provided that the licence could not be varied except in writing and signed on behalf of the parties was legally effective and therefore, an oral variation of the contract was invalid. It was noted that Lord Sumption (with whom Lady Hale, Lord Wilson and Lord Lloyd-Jones agreed) held that in his opinion the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation.

7 August 2018