THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 295th meeting
at 9.15 a.m. on 24th January 2019
at Clifford Chance LLP, 4 Coleman St, London EC2R 5JJ

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1. **Welcome and apologies**

Attending: David Pudge (Chairman), John Adebiyi, Mark Austin, Mark Bardell, Alexander Keepin (for Adam Bogdanor), Robert Boyle, Sam Bagot, Murray Cox, Lucy Fergusson, Caroline Chambers (for Nicholas Holmes), Chris Horton, Vanessa Knapp, Stephen Mathews, Chris Pearson, Patrick Sarch, Patrick Speller, Richard Ufland, Liz Wall (**LW**), Martin Webster, Victoria Younghusband (**VH**) and Kath Roberts (Secretary).

Guests: Robert Hodgkinson, Katerina Joannou of ICAEW for item 3.

Apologies: Adam Bogdanor, Nicholas Holmes, Kevin Hart and Richard Spedding.

2. **New Members**

The Chairman welcomed new members, Patrick Sarch of White & Case and Sam Bagot of Cleary Gottleib to the Committee.

3. **ICAEW consultation on draft guidance for preparers of prospective financial information**

The Chairman welcomed Robert Hodgkinson (**RH**) and Katerina Joannou (**KJ**) of the ICAEW who were attending the meeting to brief the Committee on the key aspects of the ICAEW's consultation on guidance for preparers of prospective financial information (**PFI**) which was published in December 2018.

RH reminded the Committee that the ICAEW first published PFI guidance in 2003, entitled *Prospective Financial Information: Guidance for Directors*. RH noted that the 2003 guidance is for preparers of PFI that is subject to capital markets regulation. In July 2017, the ICAEW published a consultation paper, developed by a working group set up by the ICAEW's Corporate Finance Faculty, which was intended to update the 2003 guidance and extend the scope of the updated framework to all PFI, whether internal (i.e. prepared for the internal use of an organisation only) or external (i.e. where, for example, it is to be published in the context of a capital markets transaction or, in circumstances where it will not be published, but is prepared for the use of a third party such as a provider of finance).

RH explained the draft guidance requires that PFI be prepared accordingly to four principles and that it should demonstrate four attributes. The attributes and principles are:

- relevant – PFI should be prepared on a "user needs" principle;
- reliable – because it is prepared on the basis that it is supported by a thorough business analysis;
- understandable – based on "reasonable disclosure principles" – intended to limit how tentative and speculative information can be. Accordingly, if PFI needs extensive disclosures and provisos, then it risks not being understandable; and
- comparable – in that it must be capable of subsequent validation by comparison with historical financial information. For example, if the PFI states that the transaction will realise savings of £x, will it be possible to determine if this has been achieved? KJ reported that, whilst the consultation period officially ends on 30 April 2019, the ICAEW would be flexible and would be willing to consider submissions and views received after this date.

The Chairman thanked RH and KJ for coming to the meeting and for sharing the thinking around the current consultation following which RH and KJ then left the meeting.

4. **Feedback from the FCA/CLLS Liaison Group meeting held on 9 January 2019**

VH provided a report to the Committee on the discussions at the Liaison Group meeting.

VH reported that, since the meeting, the FCA has been in touch to set up a further meeting and has proposed a date of 1 May. VH agreed to liaise with the Working Group and then revert to the FCA on this proposal.

5. **Matters arising**

5.1 CMA review of the statutory audit sector. The Committee noted that on 18 December 2018, the Competition and Markets Authority (**CMA**) announced the publication of an update paper on its market study into competition in the statutory audit market, which it launched in October 2018. It was noted that the CMA's paper identifies serious competition concerns in the audit sector and has made three key recommendations: (i) splitting the audit and advisory businesses at large accountancy firms, with separate management and accounts; (ii) regulatory oversight of the appointment of auditors; and (iii) a joint audit regime for FTSE 350 companies, with a "Big Four" firm and a "non-Big Four" firm working jointly on an audit. The Committee discussed the fact that splitting the generally less remunerative audit work from the generally more remunerative advisory work may well impact on the audit fees payable by an issuer. The Committee also noted concerns that have been raised, if the proposals on a joint audit regime are taken forward, about whether medium-sized firms have the resources to audit the accounts of the large number of large multinational companies with UK listings, notwithstanding that this approach has been adopted in countries such as France.

The Committee noted that the CMA consultation closed on 21 January 2019 and that it is expected that the CMA's final report and recommendations will follow later in 2019.

5.2 Independent review of the Financial Reporting Council (**FRC**). The Chairman reported that on 18 December 2018, Sir John Kingman published the final report of the independent review of the FRC. The Chairman reported that the report contains 83 recommendations in total, including recommendation that the FRC be replaced as soon as possible with an independent statutory regulator to be called the Audit, Reporting and Governance Authority (**ARGA**), which would be accountable to Parliament and have a new mandate, new clarity of mission, new leadership and new powers.

The Committee noted that the report also recommends that: (i) an effective enforcement regime should be developed in relation to directors of public interest entities to hold them to account for their duties to prepare and approve true and fair accounts and compliant corporate reports and that this regime should apply to a company's CEO, CFO, chair and audit committee chair; and (ii) an enforcement regime should apply to directors who are not a member of a professional accountancy body which should follow the principles of the audit enforcement procedure. The Committee noted that the report recommends that the regulator should set out the relevant requirements or statements of responsibilities in relation to auditing and corporate reporting in order that directors are individually accountable for their roles.

The Committee noted that Sir John Kingman had appeared in front of a Select Committee on 23 January 2019 where he had expressed his hope that the government and the FRC would press ahead with the implementation of those recommendations in the review that do not require primary legislation (he referred expressly to those recommendations in chapter 7 of his report that do not require legislation, including the appointment of a new FRC CEO and Board). The Committee noted that, given current pressures on Parliamentary time as a result of Brexit, the timeframe for taking forward those recommendations requiring primary legislation was inevitably very uncertain.

Finally, it was also noted that, alongside the review, Sir John Kingman had also published a letter to the Secretary of State in response to the request put to him to consider whether there is any case for change in the way in which audits are currently procured, and audit fees and scope are set, particularly for major companies of public interest.

5.3 FRC to examine the future of corporate reporting. The Committee noted that on 17 December 2018, the FRC announced the composition of an advisory group for its major project on the future of corporate reporting. The advisory group will provide input and advice to the FRC as it develops the project, which will lead to recommendations for changes to regulation and practice. It was noted that William Underhill, former Chairman of the Committee, was a member of the group. The Committee questioned whether the work of this advisory group would ultimately be subsumed by the new statutory regulator, the ARGA, which the Kingman Review had recommended be established.

5.4 European Single Electronic Format (**ESEF**). The Committee noted that on 17 December 2018, the European Commission published the final draft text of its delegated regulation with regard to regulatory technical standards on the specification of a single electronic reporting format, along with Annexes. It was noted that the regulation is in substantially the same form as the draft submitted by ESMA to the European Commission in December 2017. The Committee noted that the ESEF is the machine-readable format in which issuers with securities listed on regulated markets will, for financial years beginning on or after 1 January 2020, prepare annual financial reports.

5.5 BEIS consultation on the reform of limited partnership law. The Committee noted that on 10 December 2018, BEIS published the response to its consultation on the reform of limited partnership law. It was noted that the press release states that the measures will bring greater transparency and more stringent checks to those registering a limited partnership and that annual filing requirements will ensure Companies House has accurate information on all UK limited partnerships. The Committee noted that these measures have been put in place to address the abuse of Scottish limited partnerships that has been linked to money laundering.

5.6 Launch of the Wates Principles. The Committee noted that on 10 December 2018, the FRC issued a press release announcing the launch of the Wates Corporate Governance Principles for Large Private Companies. Refer to discussion item 6.3 for further information.

5.7 Regulations prohibiting restrictions on assignment of receivables. The Chairman reported that the Business Contract Terms (Assignment of Receivables) Regulations 2018 (**Regulations**) were made on 23 November 2018 and published along with an explanatory memorandum.

The Committee confirmed its view – a view shared by the Law Society Company Law Committee (**LSCLC**) at its meeting the previous week - that sale and purchase agreements (**SPAs**) and asset purchase agreements (**APAs**) do not need an additional statement to address the fact that they are intended to fall outside of the ambit of the Regulations, but that an appropriate statement should be included in any ancillary documents that might otherwise be caught by the Regulations if the intention is that they should not be so caught e.g. transitional services agreements; short term supply agreements; and IP licences which are entered into as part of the relevant sale arrangements.

The Chairman reported that this approach is in line with the discussions that he and others had with BEIS and the factoring/financing providers when assisting with the drafting of the Regulations and is entirely consistent with the wording of the Regulations and the accompanying explanatory.

5.8 2018 UK Corporate Governance Code – FAQs. The Committee noted that on 27 November 2018, the FRC published FAQs on the revised UK Corporate Governance Code.

5.9 FCA's first consultation paper on Brexit: proposed changes to the Handbook and Binding Technical Standards. The Committee noted that on 7 December 2018, the

Committee and the Law Society Company Law Committee submitted a joint response to the FCA's first consultation, CP18/28, on Brexit.

5.10 FCA's second consultation paper on Brexit: proposed changes to the Handbook and Binding Technical Standards. The Committee reported that on 21 December 2018, the Committee and the Law Society Company Law Committee submitted a joint response to the FCA's second consultation paper, CP8/36, on Brexit.

5.11 Takeover Panel consultation on asset valuations. The Committee reported that on 7 December 2018, the Committee and the Law Society Company Law Committee submitted a joint response to the Takeover Panel consultation paper PCP 2018/1.

Chris Pearson reported he had received a call from the Panel to discuss the Panel's approach to the shared jurisdiction rules post-Brexit as set out in Panel consultation paper PCP 2018/2 on the UK's withdrawal from the EU, to which the Committee had also submitted a response.

The shared jurisdiction regime currently applies to offers for companies which have their registered office in one Member State of the European Economic Area (and their securities admitted to trading on a regulated market in another EEA Member State (but not also on a regulated market in the EEA Member State in which the company has its registered office).

The Panel reiterated that, post-Brexit, there will be no grandfathering of the shared jurisdiction provisions, but that the Panel were alive to concerns that this would mean that certain listed companies will fall outside of the scope of the Takeovers Code. In particular, upon the deletion of section 3(a)(iii) of the Introduction, the Code would no longer apply to an offer for: (a) a company which has its registered office in an EEA Member State (i.e. not in the UK) and whose securities are admitted to trading on a regulated market in the UK (but not in that EEA Member State); or (b) a company which has its registered office in the UK and whose securities are admitted to trading on a regulated market in an EEA Member State (and not on a regulated marked in the UK) and which does not satisfy the "residency test" in section 3(a)(ii) of the Introduction to the Code. The Panel had indicated that they had been in contact with all of the affected companies.

Separately, on the question of conditions (in particular conditions relating to EU antitrust clearance), the Panel indicated that there would be a more widespread review in due course.

5.12 Law Commission consultation on electronic execution of documents. The Committee noted that on 23 November 2018, the Committee and the City of London Law Society Financial Law Committee submitted a joint response to the Law Commission's consultation on electronic execution of documents. It was noted that the response was broadly supportive of the Law Commission's view that it is possible to execute documents electronically but highlighted that the Committees would support this being clarified to remove any element of doubt. The Committee noted that Companies House currently refuses to accept documents which have electronic signatures and so are out of line with the Law Commission's views. The Chairman agreed to write to Companies House to raise this issue with them. LW reported that the issue regarding

Companies House refusing to accept documents with electronic signatures had been flagged in the Law Society's response to the consultation.

6. Discussions

6.1 BEIS consultation on national security and investment. The Chairman reported that he had spoken to BEIS to arrange a follow up meeting with them on 7 February 2019 at which BEIS will brief the joint Committee/Law Society Company Law Committee working group on some of the "tweaks" and "refinements" being made to the Government's proposed new national security regime in light of responses to the recent consultation.

6.2 Recommendations from the independent review of the FRC. Refer to item 5.2 above.

6.3 Wates Corporate Governance Principles for Large Private Companies. The Committee discussed whether members have seen any emerging practice in relation to the adoption of governance codes by large private company subsidiaries/subsidiaries which are unlisted public companies (or those with listed debt only) A number of members reported having discussed this issue with clients. Some reported that clients felt that Wates, whilst applicable to large private companies, was not applicable to private companies within a larger group with a listed parent. Others reported that clients were of the view that there was good governance within the larger group and that Wates was a useful framework to use to describe the governance within the group and the subsidiary itself, so whilst they were not formally adopting Wates, they were using it as framework to aide their description of their group governance practices. Another member reported that they had seen a large subsidiary in a listed group adopt Wates, rather than adopt the more detailed group governance code. No clear market practice appeared to have emerged at this early stage.

The Committee was also of the view that it would be open to non-listed PLCs (including those within larger groups) to adopt Wates notwithstanding its references to "private" companies.

6.4 Brexit. The Committee noted a memorandum submitted to government in November 2018 by Karen Anderson who chairs the CLLS Regulatory Law Committee setting out that Committee's view that English law governed private contracts are not within the scope of paragraphs 1(1)(a)(iii) and 2(1)(a)(iii) of Schedule 8 to the EU Withdrawal Act (**EUWA**). It was noted that if they were, then this would have the result that ambulatory references to EU legislation in such contracts would be amended in accordance with those provisions and this could have significant unintended consequences.

It was noted that subsequently a letter dated 21 December 2018 had been received by the City of London Corporation confirming DXEU's intentions regarding ambulatory references. The letter from DXEU confirms that, after internal consideration, DXEU have decided not to make secondary legislation at this stage relating to ambulatory references to EU law and their relationships to contracts and, that, if there is a need

after 29 March 2019 to revisit the issue of ambulatory references, DXEU would be open to receiving further views.

7. Recent developments

7.1 Company law

(a) The Committee noted that there were no matters to consider.

7.2 Corporate governance

(a) Private Equity Reporting Group: Eleventh report on conformity with Walker Guidelines and updated good practice reporting guide for portfolio companies. The Committee noted that on 14 December 2018, PERG published its eleventh report on conformity with the Walker Guidelines and an updated version of the good practice reporting guide for portfolio companies. It was noted that the guide has been updated following the review of portfolio company disclosures in 2018 and highlights examples of good practice in order to aid portfolio companies with their narrative reporting in 2019.

(b) QCA and UHY Hacker Young Corporate Governance Behaviour Review 2018. The Committee noted that on 3 December 2018, the QCA and UHY Hacker Young published their Corporate Governance Behaviour Review 2018 which analysed the corporate governance disclosures of 50 AIM companies to identify patterns and to examine the impact of the AIM Rule 26 change last September. The Committee noted that the report includes the five top tips for AIM company boards, the impact of AIM Rule 26 and the trends that can be seen from six years of examining mid and small-cap governance.

7.3 Reporting and disclosure

(a) Revised GC100 and Investor Group directors' remuneration reporting guidance*:* The Committee noted that on 10 December 2018, the GC100 and Investor Group published a revised version of its directors' remuneration reporting guidance (can be found on Practical Law). It was noted that the main updates to the guidance reflect the changes to reporting requirements introduced by the Companies (Miscellaneous Reporting) Requirements 2018.

(b) FRC thematic review of the 'other information' in annual reports. The Committee noted that on 6 December 2018, the FRC issued a press release announcing the publication of a thematic review of auditors' work on the 'other information' in annual reports i.e. all financial and non-financial information included in an annual report other than the financial statements and the audited parts of the directors' remuneration report. The Committee noted that according to the report, auditors' work on this information does not consistently meet the requirements of Auditing Standards.

(c) Report on climate-related disclosures. The Committee noted that on 10 January 2019, the Technical Expert Group on Sustainable Finance set up by the European Commission in July 2018 published its first report on companies' disclosure of climate-related information. It was noted that the report contains

recommendations which will allow the Commission to update its non-binding guidelines on non-financial reporting with specific reference to climate-related information and also contains proposals for disclosing not just how climate change might influence the performance of the company, but also the impact of the company itself on climate change.

7.4 **Equity capital markets**

(a) Public censure and fine for breaches of AIM Rules 11 and 31. The Committee noted that on 7 December 2018, the London Stock Exchange published AIM Disciplinary Notice 20 to announce that Bushveld Minerals Limited had been publicly censured and fined £700,000 (discounted to £490,000 for early settlement) for breaching AIM Rule 11 (general disclosure of price sensitive information) and AIM Rule 31 (AIM company and directors' responsibility for compliance). The Chairman reported that Bushveld had entered into exclusivity arrangements in relation to a potential transaction to acquire an interest in a vanadium mine and plant and that, as part of these arrangements, Bushveld was required to deposit with its lawyers a sum, which was material in the context of the company's financial position (it was operating under challenging commercial conditions), that would be released to the proposed seller on the fulfilment of certain conditions. It was noted that the breaches related to the failure to disclose in a timely manner that Bushveld had entered into a binding obligation regarding the deposit given that, on account of its materiality, this was held to give rise to an obligation to disclose without delay. It was further noted that Bushveld's nomad had advised that entering into the agreement would trigger a disclosure obligation but that Bushveld did not follow this advice when it entered into the agreement and, instead, followed the advice of its lawyers as its preference was to avoid or delay suspension of its shares due to the potential transaction being a reverse takeover.

(b) Draft European Commission delegated regulation on prospectuses. The Committee noted that on 28 November 2018, the European Commission published the draft text of its delegated regulation supplementing the new Prospectus Regulation, along with Annexes (both can be downloaded from this webpage). It was noted that the draft regulation will repeal and replace the Prospectus Regulation (809/2014) and determine the format, content, scrutiny and approval of prospectuses.

7.5 **MAR**

(a) FCA publishes Market Watch No. 58. The Chairman reported that on 17 December 2018, the FCA published Market Watch No. 58. It was noted that FCA has reviewed industry implementation of MAR and, in this edition, outlines its findings and offers clarity on some of the issues raised, including the implementation of the market soundings regime and insider lists.

7.6 **Accounting**

(a) Brydon review into UK audit standards. The Committee noted that on 18 December 2018, following publication of the CMA paper (see item 5.1),

BEIS announced the launch of a new independent review into standards in the UK audit market, to be led by Donald Brydon, outgoing chair of the London Stock Exchange Group. The Committee noted that the Brydon review into UK audit standards has been tasked with recommending what more can be done to ensure audits meet public, shareholder and investor expectations and will also build on the findings of the Kingman review. It was noted that detailed terms of reference and a project plan are to be published in 2019.

7.7 **Takeovers**

(a) Panel Statement 2018/19 – Ruling of the Chairman of the Hearings Committee. The Committee noted that on 29 November 2018, the Takeover Panel published Panel Statement 2018/19 which sets out the Ruling of the Chairman of the Hearings Committee that dismissed Mr King's request to convene the Hearings Committee under Rule 2 of the Hearings Committee's Rules. It was noted that Mr King made a request for the Hearings Committee to be convened to review a ruling of the Panel Executive that Mr King's obligation to procure a mandatory offer for Rangers shares should extend to the holders of new shares issued with the consent of shareholders given at an EGM of Rangers on 31 August 2018 and that the request was rejected by the Chairman because any attempt to persuade the Hearings Committee to waive the obligation to procure a mandatory bid to the holders of the new shares would have no reasonable prospect of success.

7.8 **Miscellaneous**

(a) Companies House to check for UN sanctions when reviewing registration applications. The Committee noted that on 5 December 2018, Companies House announced that, from 12 December 2018, it will check for UN sanctions when reviewing applications to register companies, Societas Europaea, limited liability partnerships and Scottish limited partnerships. It was noted that Companies House will check the details of proposed directors, secretaries, members and people with significant control for any matches to designated persons i.e. individuals or corporate bodies on which the United Nations has imposed financial sanctions and that, if Companies House believes any details sufficiently match those of a designated person, it will reject the application, but with the option to resubmit the application with evidence that the person is not a designated person.

7.9 **Cases**

(a) Global Corporate Limited v Dirk Stefan Hale [2018] EWCA Civ 2618. The Committee noted that the Court of Appeal overturned a High Court decision holding that payments made to a director shareholder were unlawful distributions, holding that the High Court judge should not have focussed on the intention of the directors when authorising the payments as dividends, but on whether the payments were lawful distributions of the company's assets when made.

(b) Hopkinson v Towergate Financial (Group) Limited [2018] EWCA Civ 2744. The Committee noted that the Court of Appeal had to construe a notice of

claims provision in a share purchase agreement, reiterating the point that every notification provision turns on its own individual wording. The Committee noted that the dispute revolved around what "Claim" meant in the notice of claim provision and whether a notice of a claim under an indemnity had to comply with the specified content requirements. The case is a reminder to drafters of sale and purchase agreements to ensure that the drafting of the limitations on liability is clear and accurately reflects the position agreed between the parties.

(c) Philip Morris v Swanton Care & Community Limited [2018] EWCA Civ 2763. The Committee noted that the Court of Appeal held that a clause in a share purchase agreement that stated one of the sellers, Mr Morris, would have the option to provide consultancy services for an initial period "and following such period such further period as shall reasonably be agreed between Mr Morris and the buyer" was unenforceable in respect of the further period as it was an agreement to agree.

(d) Katara Hospitality v (1) Gerard Guez and (2) Jacqueline Rose [2018] EWHC 3063 (Comm). The Committee noted that the High Court held that a power of attorney that did not contain the word "deed" did not satisfy the requirement in section 1(2) of the Law of Property (Miscellaneous Provisions) Act 1989 that an instrument shall not be a deed unless it makes it clear on its face that it is intended to be a deed.

(e) Re MDNX Group Holdings Limited & Others [2018] EWHC 3396 (Ch). The Committee noted that the High Court considered whether it had jurisdiction to approve the completion of two linked mergers by absorption under Regulation 16 of the Cross-Border Merger Regulations (**CBMR**) where there had been a failure to comply with all the pre-merger acts and formalities required to be satisfied prior to the issue of pre-merger certificates. It was noted that the High Court agreed with the approach adopted by Snowden J in ***Re M2 Property Invest Ltd [2017] EWHC 3218*** that, where an order has been made under Regulation 6 of the CBMR, the court at the sanction stage would be obliged to accept and give effect to the pre-merger certificate even if it was aware that the certificate may have been issued in error. It was further noted that the High Court also held that the order given by the Scottish court in relation to the Scottish company transferee that some, but not all, of the acts and formalities had been completed was not a pre-merger certificate for the purposes of Regulation 6 and, therefore, the English court at the sanction stage could not approve the completion of that merger.

(f) Re CT Infrastructure Holding Ltd and Thomas Lloyd Investments GmbH [2018] EWHC 3581 (Ch) (case transcript on Lawtel). The Committee noted that when sanctioning a cross-border merger, the High Court considered whether the benefits of "participators" in an Austrian company were reduced or eliminated by the proposed merger, applying the test in ***Re Diamond Resorts (Europe) Limited [2012] EWHC 3576 (Ch)*** i.e. in deciding whether to exercise its discretion to approve a merger, the court must examine whether stakeholders in the merged companies would suffer a material detriment such that the merger should not be approved. It was noted that the participators were entitled to certain benefits, which are well-known rights in Austria (but

there are no equivalent rights in the UK) and that the High Court was able to sanction the merger because provision had been made to replace the participation rights with shares in the company which the court was satisfied (having been taken through the rights attached to the new shares and comparing them to the participation rights) were at least equivalent to the participation rights or marginally better and that therefore, the High Court was satisfied that this class of stakeholder was not prejudiced.

8. **Any other business**

ICAEW's Corporate Governance Committee. The Chairman reported that the ICAEW was looking to recruit one or more company lawyers for its Corporate Governance Committee and that any interested members can apply via the link set out in the meeting agenda.

25 February 2019