THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 299th meeting
at 9:00 a.m. on 25th September 2019
at Clifford Chance LLP, 10 Upper Bank Street, London E14 5JJ

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1. **Welcome and apologies**

David Pudge (Chairman), John Adebiyi, Mark Austin, Adam Bogdanor, Caroline Chambers (as alternate for Nicholas Holmes), Lucy Fergusson, Vanessa Knapp, Stephen Mathews, Jon Perry, Caroline Rae, Patrick Sarch, Richard Spedding, Patrick Speller, Richard Ufland, Martin Webster, Jo Weston (as alternate for Chris Horton), Victoria Younghusband and Kath Roberts (Secretary).

Apologies: Nicholas Holmes, Chris Horton, Elizabeth Wall, Murray Cox, Sam Bagot, Robert Boyle.

2. **Committee membership**

The Chairman reported that Chris Pearson had stepped down from the Committee as a result of recently relocating to Norton Rose's New York office and, as such, that Jon Perry from Norton Rose would be replacing Chris on the Committee. The Chairman asked that the Committee's thanks to Chris for his very strong contribution to the Committee's work over many years be noted.

The Chairman further reported that as Chris had been the chair of the Joint Takeovers Working Group a replacement chair would be required although Chris would remain as a co-opted member of that Working Group. Following discussions with Chris, the Chairman reported that, as an existing member of the Takeovers Working Group, he would take on this role with continued support from Chris and others at Norton Rose.

3. **Change of Chair of Law Society Company Law Committee (LSCLC)**

The Chairman reported that Liz Wall had stepped down from her role as chair of the LSCLC (although remained on that committee) and that Edward Craft of Wedlake Bell had taken on this role. The Chairman reported that, having spoken to both Edward and Liz, they had agreed that Liz would continue to attend this Committee's meetings to assist in ensuring that, where possible, the work of the two committees was appropriately aligned and co-ordinated.

4. **Approval of minutes**

The Chairman reported that a draft version of the minutes of the meeting held on 23 July 2019 will follow shortly after the meeting.

5. **Matters arising**

5.1 Prospectus Regulation. The Committee noted that on 26 July 2019, AFME published an updated version of its model equity selling restrictions to reflect the application in full of the Prospectus Regulation.

It was noted that these were in substantially the same form as those published by AFME in April save for updating to reflect the implementation of the Prospectus Regulation. It was further noted that the selling restrictions will required additional changes on the occurrence of Brexit (the Committee noted that a post Brexit version had in fact been published by AFME in March and that this was available on the AFME website).

5.2 Draft Registration of Overseas Entities Bill. The Committee noted that on 18 July 2019, the Government published its response to the House of Lords and House of Commons Joint Committee on the draft Registration of Overseas Entities Bill's pre-legislative scrutiny report on the draft Bill.

It was noted that in the response the Government stated that it believed the definitions of "overseas entity" and "legal entity" to be sufficient wide and clear and that it intends to publish some guidance to assist relevant parties to understand the requirements. It was further noted that there was no intention to lower the 25% ownership and voting threshold, although the threshold is to be kept under review.

It was also noted that there was a recognition that trusts might be used to try and circumvent the requirements of the Bill and, as such, the existing Trust Registration Service is to be expanded to include non-EEA trusts that acquire real estate in the EU. It was noted that the Government was also considering whether to require overseas entities registering at Companies House to declare if they represent a trust and that the Government also accepts the Joint Committee's recommendation to look at the viability of regulated professional advisers verifying information regarding beneficial ownership submitted to the register.

5.3 Statutory audit services market study - Initial consultation on the CMA recommendations. The Chairman reported that on 18 July 2019, the Department for Business, Energy and Industrial Strategy (**BEIS**) published an initial consultation on recommendations made by the Competition and Markets Authority (**CMA**) in its final report on its market study into statutory audit services. It was noted that the initial consultation sought views on the CMA's recommendations to improve audit quality, competition and resilience in the statutory audit services market and closed on 13 September 2019.

The Chairman reported that Martin Webster had led a Committee working group to respond to the consultation and that a response had been submitted to BEIS on 12 September.

Martin highlighted the key points raised in the response and, in particular, the need for BEIS to look holistically at the approach to the review of audit regulation and the audit market and that, in particular, BEIS should wait to see the outcome of the Brydon review into the quality and effectiveness of audit which is due to be published in December. The working group had focussed its response on two of the proposals in

the consultation, namely those in relation to greater regulation of audit committees and the introduction of joint audits. With regard to joint audits, the response noted that any reform must be with the aim of improving audit quality and that where there is a risk that joint audits may not achieve this aim then BEIS should not proceed with this option and should consider increasing competition in the audit market by other means such as periodic peer reviews.

5.4 PSC register tricky issues' list. The Committee noted that on 9 August 2019, the PSC Register Q&A prepared by a joint working party of the Committee and the LSCLC was submitted to BEIS for its review following the joint working group's meeting with BEIS on the PSC register tricky issues' list.

It was noted that only minor drafting changes had been made to the document submitted to BEIS from the version previously circulated to the Committee. The Chairman reported that no response had yet been received from BEIS. The Secretary agreed to follow up with Liz Wall to see if she had heard anything further from BEIS.

5.5 BEIS consultation on corporate transparency and register reform. The Chairman reported that on 31 July 2019, a joint response of the Committee and the City of London Law Society Financial Law Committee was submitted to BEIS.

The Chairman reported that the joint response expressed support for the Government's aims of combatting money laundering, ensuring that the UK is a transparent place to do business and increasing the accuracy of information at Companies House. However, it highlighted a number of reservations, including that any proposals brought forward should be proportionate, ensure the protection of personal data, not be overly burdensome so as to deter legitimate businesses from being set up in the UK and not hold up or delay corporate actions and commercial transactions. It was noted that the response agreed that Companies House should have the ability to check the identities of directors and PSCs on the register but that any identity verification process should be proportionate, quick, available at any time, reliable, not increase the costs of setting up a new business and not create any significant additional burdens or delays for people who are legitimately setting up and maintaining companies in the UK. It was also noted that the response set out serious concerns about the proposal that a director's identity would need to be verified before the director was appointed as this would have an obvious adverse impact on corporate actions and commercial transactions where directors need to be appointed with effect from a particular time e.g. at the end of a completion board meeting or when converting a shelf company.

6. Discussions

6.1 Law Commission consultation on electronic execution of documents. The Committee noted that on 4 September 2019, the Law Commission published a press release confirming its view that electronic signatures are valid, along with its report on electronic execution of documents and a summary of the report (the current project status webpage has also been updated). It was also noted that the report considers whether there are problems with the law relating to the electronic execution of documents and deeds which are inhibiting the use of electronic documents by commercial parties and consumers. The Committee noted that the Law Commission had confirmed that, under the current law, an electronic signature is capable of being used to validly execute documents, including where there is a statutory requirement

for a signature and the report contains a statement of the law regarding the validity of electronic signatures. However, the Law Commission had set out in the report an option for reform that the Government may wish to consider codifying the law on electronic signatures in order to improve the accessibility of the law.

The Chairman reported that the Law Commission also made recommendations in the report to address some of the practicalities of electronic execution and the rules for executing deeds, including that: (i) an industry working group should be established to consider practical and technical issues around electronic signatures and provide best practice guidance for their use in different types of transactions; and (ii) the industry working group should look at solutions to the practical and technical obstacles that exist to video witnessing. The Committee noted that following this work, the Law Commission recommended that the Government should consider legislative reform to allow for video witnessing - the Law Commission's view is that the requirement under the current law that a deed must be signed "in the presence of a witness" requires the physical presence of that witness; and (iii) a future review of the law of deeds takes place to consider broad issues about the effectiveness of deeds and whether they remain fit for purpose.

The Committee noted that on 4 September 2019, HM Land Registry issued a press release reminding companies and LLPs that from 20 September 2019 HM Land Registry will no longer accept "signed as a deed" as an acceptable form of wording in prescribed form deeds executed by corporate bodies. It was also noted that where a disposal is in a prescribed form that must be executed as a deed (such as form TR1 or CH1), the forms of execution set out in Schedule 9 of the Land Registration Rules 2003 must be used.

The Chairman referred to his previous letter to Companies House asking about their policy regarding the acceptance of documents signed electronically (refer to minutes of the Committee meeting held on 22 May 2019 for further details). Now that the Law Commission's report has been published, the Chairman confirmed that he would follow up with Companies House to see if they were prepared to finalise their position on this subject.

The Committee also discussed the need to take care over using electronic signatures on stock transfer forms, as the HMRC do not accept that an instrument with an electronic signature can be properly stamped.

6.2 BEIS research paper on share repurchases, executive pay and investment. The Chairman reported that on 19 July 2019, BEIS published a research paper on share repurchases, executive pay and investment, which explores whether share repurchases are used to meet performance targets of senior executives, and whether they displace investment. It was noted that the report had been prepared for BEIS by PwC. It was noted that the report had been commissioned by BEIS following concerns expressed to the Government about the use of share repurchases and their relationship to both executive pay and investment as part of the public consultation on the corporate governance reform green paper. The Committee noted that concerns had been raised that, rather than being driven by a desire to return surplus cash to investors, repurchase decisions may be driven by the desire to increase earnings per share and so increase executive pay. The Committee noted that, in short, the paper concludes that the evidence does not suggest that repurchases are being used systematically to

artificially hit earnings per share targets and inflate executive pay or at the expense of long term investment in the business.

It was noted however that some of the investor bodies, most notably PIRC, continue to vote against annual buy back authorities as a matter of policy.

6.3 Feedback from meeting with FCA on Article 10 of MAR. Victoria Younghusband provided feedback from the meeting with the FCA to discuss the disclosure of inside information pursuant to Article 10 of MAR.

6.4 Change in practice in relation to display documents: Richard Ufland reported back to the meeting about some recent discussions of the Joint Listing and Prospectus Rules Working Group regarding display documents for Class 1 circulars. It was reported that, as a result of the implementation of the Prospectus Regulation regime in July 2019, there has been a change in the requirements for documents relating to a Class 1 transactions (for example, the sale and purchase agreement) to be put on display – they must now be put on display online, rather than at a physical location. The change arises because under the Prospectus Regulation regime, documents need to be put up on display on the company's website, rather than just physically (i.e. at the company's and/or its counsel's offices). For prospectuses, this is unlikely to be an issue of concern given the types of the documents that need to be put on display, which would typically be the articles of association, historical and (if applicable) pro forma financial information (including the accountants' public reports), consent letters and the prospectus. It was reported that, the bigger concern is with regard to Class 1 circulars as Annex 1 to Listing Rule 13 reads across to the Prospectus Regulation regime and accordingly, there is a concern that material contracts (including, for example, the sale and purchase agreement) will prima facie need to be put up on a website.

6.5 Brexit. The Chairman reported that the items in the Brexit Annex have been published.

7. Recent developments

7.1 Company law

(a) Review of the implementation of the PSC register. The Committee noted that on 2 August 2019, BEIS published a research paper on the review of the implementation of the PSC register. Members noted that the key findings are that overall businesses were engaged with the PSC requirements (92% surveyed had a PSC) and that the financial cost of compliance with the PSC register was relatively minimal.

It was also noted that the research paper explores the costs, benefits, and overall effectiveness of the PSC register in promoting transparency. It was noted that BEIS commissioned the research paper to inform its post-implementation review of the PSC register regulations which it is carrying out in 2019 and the BEIS press release states that the post-implementation review will be published shortly.

7.2 **Corporate governance**

(a) QCA Audit Committee Guide. The Chairman reported that on 12 September 2019, the Quoted Companies Alliance (**QCA**) published an updated version of its Audit Committee Guide (free to download for members; non-members can pay for a copy). It was also reported that the guide has been prepared to assist audit committee members and, in particular, the audit committee chair, to be effective in their roles. It was further noted that it sets out views of best practice and is a companion to the QCA Corporate Governance Code. The Committee noted that the guide focuses on providing general advice and guidance to new audit committee members, who may not yet be entirely familiar with the role of the audit committee and the tasks to be performed by its members.

(b) QCA research report on the role of non-executive directors in growth companies. The Committee noted that on 6 September 2019, the QCA published a research report on the role of non-executive directors (**NEDs**) in growth companies. It was also noted that the report has been produced to investigate the differences between the role of the NED in growth companies, versus that of NEDs in large companies. The Chairman highlighted that the report provides insights about how the role, and skills required, of NEDs in growth companies vary greatly - size, complexity, type of ownership and stage of development all have an influence over the type of Chair and NED that can add value.

(c) Best Practice Principles for Providers of Shareholder Voting Research and Analysis 2019. The Committee noted that on 22 July 2019, the Best Practice Principles Group for Providers of Shareholder Voting Research and Analysis issued a press release announcing the publication of the Best Practice Principles for Providers of Shareholder Voting Research and Analysis 2019 which replace the original 2014 principles.

7.3 **Reporting and disclosure**

(a) FRC letter to Audit Committee Chairs and Finance Directors on Brexit preparations. The Chairman reported that on 16 September 2019, the Financial Reporting Council (**FRC**) wrote to Audit Committee Chairs and Finance Directors to assist with Brexit preparations. The letter sets out a small number of the most critical generic actions companies should consider in advance of Brexit. The Committee noted that in respect of corporate reporting, the FRC encourages companies to provide disclosure which distinguishes between the specific and direct challenges to their business model and operations from the broader economic uncertainties which may be a consequence of Brexit, and which may apply when companies report. It was also noted that where there are particular challenges posed, the FRC expects these to be clearly identified and for management to describe any actions they are taking, or have taken, to manage the potential impact.

(b) Revised GC100 and Investor Group directors' remuneration reporting guidance. The Chairman reported that on 22 July 2019, the GC 100 and Investor Group published a revised version of its directors' remuneration

reporting guidance (can be found on Practical Law). It was reported that the updates to the guidance flow from the implementation of the revised Shareholder Rights Directive and reflected the changes to reporting requirements introduced by the Companies (Directors' Remuneration Policy and Directors' Remuneration Report) Regulations 2019 which came into force on 10 June 2019.

7.4 **Equity capital markets**

(a) FCA Quarterly Consultation Paper No. 25. The Committee noted that on 6 September 2019, the FCA published a press release announcing the publication of FCA Quarterly Consultation Paper No. 25 (CP19/27). It was also noted that among other things, the FCA is consulting on proposals to make: (i) minor amendments to the FCA Handbook to update references to the UK Corporate Governance Code (Chapter 4); (ii) changes to the DTRs to implement the European Single Electronic Format (Chapter 5); and (iii) further Brexit-related changes to the FCA Handbook and binding technical standards following extension of Article 50 of the Treaty on European Union which will only come into effect if the UK leaves the EU without an implementation period (Chapter 7). Members noted that the consultation closes on 4 October 2019 for Chapters 2, 7, 9, 10, 11 and 12 and 1 November 2019 for Chapters 3, 4, 5, 6 and 8. Richard Ufland agreed to convene a call of the Joint Listing and Prospectus Rules Working Group to discuss the paper but it was generally agreed that it did not appear to contain any matters of concern.

(b) Law Commission call for evidence on intermediated securities. The Chairman reported that on 27 August 2019, the Law Commission published a press release and call for evidence on intermediated securities as part of the Law Commission's Thirteenth Programme of Law Reform. It was reported that the Law Commission has been asked by BEIS to produce a scoping study, providing an accessible account of the law and identifying issues in the current system of intermediation to inform public debate, develop a broad understanding of potential options for reform and develop a consensus about issues to be addressed in the future. Members noted that the call for evidence provides a brief summary of the intermediated securities system and discusses specific issues arising in relation to intermediated securities and invites observations and evidence as to whether these issues create problems in practice, and thoughts as to potential solutions.

The Committee noted that the call for evidence closes on 5 November 2019 and that the Law Commission plans to publish its scoping study in autumn 2020. The Chair reported that he had been in touch with Dorothy Livingston who chairs the CLLS Financial Law Committee and a Committee working group, led by Lucy Fergusson, who chairs the Committee's CREST working group, would prepare a joint response with the CLLS Financial Law Committee.

Members discussed the question raised in the call for evidence around the potential abolition of the headcount test for schemes of arrangements (s. 899 (1) CA 2006 which provides that the court may sanction a scheme where a

majority in number of the creditors or members (or class of creditors or members) have approved the scheme)). It was noted that each of Australia and Hong Kong had already changed their regulations to remove the headcount test and members agreed that, given the headcount test can have unintended consequences in the context of current methods of holding securities, they would support a review into abolishing this element of the requirements for a scheme of arrangement and relying on the court's general discretion in deciding whether or not to sanction the scheme to take into account the number of investors who vote for and against a scheme, overall turnout and other factors it considers relevant.

7.5 **MAR**

(a) FCA webpage on polling and MAR. The Chairman reported that on 3 September 2019, the FCA published a new webpage on polling and MAR. It was also reported that in response to questions on how MAR might apply to information obtained via electoral polling, the FCA sets out how it expects firms and individuals to handle any information that has the potential to be inside information, which could include information obtained as a result of polling.

(b) FCA publishes Market Watch No. 60. The Chairman noted that on 1 August 2019, the FCA published Market Watch No. 60 in which it considers insider lists and the control of access to inside information as required by Article 18 of MAR. Members noted that the FCA sets out its concerns and findings about control of access to inside information following the conviction of Fabiana Abdel-Malek, a former compliance officer in the London branch of a major investment bank. It was noted that Ms Abdel-Malek abused her position of trust by repeatedly accessing electronic compliance systems containing inside information about several, as then non-public, price-sensitive corporate transactions which she then passed to a private individual and not an employee of the bank, who used it to trade CFDs on the relevant securities. It was noted that in this edition, the FCA also highlighted its recent thematic review of money laundering risks in capital markets.

7.6 **Cases**

The Committee noted the following cases:

(a) (1) Stobart Group Limited (2) Stobart Rail Limited (formerly W.A. Developments Limited) v (1) William Stobart (2) William Andrew Tinkler [2019] EWCA Civ 1376. The Court of Appeal considered the approach to the construction of a unilateral notice to determine whether a notice of a tax claim under a share purchase agreement (**SPA**) was effective. The buyer argued that the parties common understanding was that the notice was a notice of a tax claim by the buyer against the sellers under the SPA and that an objective approach to construction should not be adopted where a common subjective intent can clearly be demonstrated. The Court of Appeal considered that construction of unilateral notices must be view objectively and contextually – how does a reasonable recipient understand the notice taking into account the relevant objective contextual scene. The Court of Appeal reiterated that,

although every notification provision is likely to turn on its own wording, the purpose of notification in this context is to make clear in sufficiently formal terms that a claim is being made against the sellers. The unilateral notice was held to be ineffective – a reasonable person would have understood the notice to be of a potential claim by a tax authority against the target company (as required by the SPA) rather than a notice of a tax claim by the buyer against the sellers in respect of the tax authority claim. Accordingly, the tax claim was time barred under the terms of the SPA as an effective notice had not been given in time.

(b) (1) Vald. Nielsen Holding A/S (2) Newwatch Limited v (1) Mr Victor Baldorino (2) Mr Richard Bennett (3) Mr Julian Mantell [2019] EWHC 1926 (Comm). The High Court considered whether directors owed shareholders fiduciary duties in the context of a management buyout. The High Court held that the general principle is that directors do not owe fiduciary duties to shareholders. By way of exception to the general rule, fiduciary duties may arise where there are special circumstances which replicate the salient features of well-established categories of fiduciary relationships. The High Court held that, even where a director is buying shares from a shareholder, the existence of a fiduciary duty depends on the existence of special circumstances – there were no special circumstances in this case.

(c) (1) Mr Stuart Kaye (2) Mr Murray Pickering v (1) Oxford House (Wimbledon) Management Company Limited (2) Mr Timothy Drake (3) Mr John Scott (4) Mrs Susan Scott [2019] EWHC 2181 (Ch). The High Court considered the role of the chairman at a general meeting and the scope of section 303(5) of the Companies Act 2006 (**CA 2006**) (which sets out when a resolution will not properly be moved at a general meeting requisitioned by shareholders). The High Court held that, following a shareholder requisition for a general meeting, once the directors have called the general meeting, only the shareholders can consider the proposed resolutions included in the notice convening the meeting – there is no residual power in the directors further to consider section 303(5) CA 2006 and determine that any particular resolution(s) should not be put to the shareholders at the meeting. Therefore, the chair of the general meeting did not have the power to refuse to put the resolutions to the meeting under section 303(5) CA 2006. The directors must consider if any resolution proposed by the shareholders may properly be moved (a resolution is properly moved unless it would, if passed, be ineffective or it is defamatory, frivolous or vexatious) and is intended to be moved at the meeting before calling the meeting.

(d) Re Realm Therapeutics plc [2019] EWHC 2080 (Ch). The High Court considered whether to approve a scheme of arrangement to effect a takeover. The scheme was contested with objections being raised as to the constitution of classes (i.e. that there should have been two classes rather than one because of the existence of a shareholder (BVF) which had a cross shareholding in the bidder and had been acquiring Realm Therapeutics plc shares from other Realm Therapeutics plc shareholders following announcement of the offer) and the power of the court to sanction the scheme (because if the votes cast by BVF at the scheme meeting had been discounted the statutory majorities

would not have been met). Among other things, the High Court held that the fact that a class member has acquired voting shares after the announcement of the transaction which is eventually embodied in the circular and is to be voted on at the scheme meeting does not fracture the class (though it might constitute a relevant factor at the subsequent "fairness" hearing). The High Court also considered authorities on minority oppression and the "fairness test" in relation to class members' interests in voting.

(e) Re Patagonia Gold Plc [2019] 7 WLUK 318 (case digest on Westlaw). The High Court considered whether to sanction a scheme of arrangement for the acquisition by Hunt Mining Corp (a Canadian incorporated company with securities admitted to trading on the TSX Venture Exchange) of Patagonia Gold Plc (a UK incorporated AIM company), which would constitute a reverse takeover under the rules of the TSX Venture Exchange (on which the consideration shares were to be listed). The scheme included lock-up and escrow arrangements to prevent the target's non-executive chairman and majority shareholder, Carlos Miguens, and Cantomi (a company owned and controlled by Mr Miguens) and the bidder's largest shareholder, Tim Hunt disposing of shares in Hunt Mining Corp. The High Court determined that the existence of lock-up arrangements did not create issues at the class stage (i.e. there was no requirement for a separate class meeting). The High Court sanctioned the scheme.

The Committee noted that similar facts had been considered on other schemes where the court had reached the same conclusion and, as such, this was not a new point.

(f) Re The Prudential Assurance Company Limited and Rothesay Life Plc [2019] EWHC 2245 (Ch). The High Court refused to sanction the proposed insurance business transfer of annuity policies under Part VII of the Financial Services and Markets Act 2000 between The Prudential Assurance Company Limited (**PAC**) and Rothesay Life Plc. A number of annuitants opposed the scheme, contending that they chose PAC as their annuity provider based on its long history as a leading UK insurance company, its size and the fact that it was part of a larger group which could provide support to it should the need arise. They had thought and expected that PAC would be committed to making payments to them for the remainder of their lives. The judgment emphasises that the role of the court on a business transfer scheme is different to that of the regulators (which may be restricted by their "statute based mandate") and the independent expert (which may be constrained by actuarial factors which guided its analysis) - the court has a wider discretion and would not simply "rubber stamp" a proposed transfer scheme. Leave to appeal this decision has been granted.

The Committee noted that the outcome of any appeal would be of general interest to practitioners given the potential impact of this decision on other transfers with similar fact patterns.

16 December 2019