THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 304th meeting
at 9:00 a.m. on 22nd July 2020

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1. **Welcome and apologies**

The Chairman reported that he had received apologies from Richard Spedding (who had appointed an alternate) and Stephen Mathews.

The Chairman reported that Richard Ufland was retiring and had stepped down from the Committee and his colleague Tom Brassington was joining the Committee in his place. The Chairman welcomed Tom to the Committee.

The Secretary was asked to note the Committee's sincere thanks to Richard for his contribution to the Committee, including his leadership of the Joint Prospectus and Listing Rules Working Group. The Chairman reported that Nicholas Holmes had kindly offered to take over leadership of this working group and that Richard and Nicholas had arranged a handover to ensure a smooth transition.

The Chairman welcomed to the call Robert Hodgkinson (**RH**) and Katerina Joannou (**KJ**) from the ICAEW who were joining the call today for the purposes of discussing the publication in June 2020 by the ICAEW of its final guidance for preparers of prospective financial information (see item 4 below).

2. **Attending:** David Pudge (Chairman), John Adebayi, Mark Austin, Sam Bagot, Adam Bogdanor, Edward Baker, Robert Boyle, Murray Cox, Lucy Fergusson, Nicholas Holmes, Chris Horton, Jon Perry, Caroline Rae, Patrick Sarch, Patrick Speller, Liz Wall, Martin Webster, Victoria Younghusband, Anthony Foster (as alternate) and Kath Roberts (Secretary).

Apologies: Vanessa Knapp, Richard Spedding, Stephen Mathews

3. **Approval of minutes**

The Chairman reported that a draft version of the minutes of the meeting held on 20 May 2020 had been circulated to members on 20 July 2020 and asked members to send any comments on the minutes to the Secretary by 31 July 2020.

4. **ICAEW guidance for preparers of prospective financial information**

Robert Hodgkinson reported that on 4 June 2020, the ICAEW published the final version of its guidance for preparers of prospective financial information (**Guidance**), along with a feedback statement that is a record of the comments received on the ICAEW Exposure Draft published for consultation in December 2018 and of how the

ICAEW responded to those comments. RH reported that whilst the effective date of the Guidance is 15 October 2020, the ICAEW is encouraging early adoption of the Guidance.

RH reported that the Guidance is intended to assist in the preparation of prospective financial information (**PFI**) for which there is a prescribed form. By way of example, in the UK, in connection with regulated capital markets transactions, and in situations where there are no regulatory requirements, for example, in connection with the private raising of debt or equity, or in connection with the private sale of a business. It was noted that the Guidance both updates, and is wider in scope than, ICAEW's 2003 guidance, *Prospective Financial Information, Guidance for UK Directors*, which focused mainly on specific types of PFI published by listed companies. RH confirmed that the 2003 guidance will be withdrawn on 15 October 2020.

RH reported that the Guidance sets out four overarching principles for the preparation of PFI. In particular, to be useful, PFI should be prepared according to four principles. These are set out on in paragraph 9 of the Guidance and are as follows:

- User needs: PFI should have the ability, in a timely manner, to influence its users' economic decisions and have predictive value or confirmatory value for its users ;
- Business analysis: PFI should be supportable or based on sound business analysis;
- Reasonable disclosure: PFI should contain reasonable disclosure about what it relates to, its risks, uncertainties and mitigating actions;
- Subsequent validation: PFI should be capable of subsequent validation by comparison with historical financial information.

5. **Matters arising**

5.1 *Government's response to the BEIS Committee inquiry into Thomas Cook.* The Chairman reported that on 14 July 2020, the Business, Energy and Industrial Strategy Committee (**BEIS Committee**) published a press release announcing the publication of the Government's response to the BEIS Committee's inquiry into the collapse of Thomas Cook. The Chairman reported that in the response, the Government states that legislation to create the new Audit, Reporting and Governance Authority will be brought forward as soon as Parliamentary time allows. In addition, with regard to the issue of audit firms and the separation of the audit and non-audit function, the Chairman reported that the Government was broadly supportive of this proposal, but was clear that the CMA Review, the Brydon Review and the Kingman Review should be considered together and that it would respond with comprehensive proposals and bring forward legislation when Parliamentary time permits. Whilst not on the meeting agenda, the Chairman reported that on 17 July 2020, the FRC had published its Annual Report for 2019/20 setting out its progress against recommendations for change of the FRC itself and the activities it regulates. The Chairman noted that the report highlighted that, during the year under review, the FRC had brought together many of the recommendations of the Kingman review, the CMA review and the Brydon review into a unified transformation programme (details of which are set out in the FRC's Strategy 2020/21 which was considered at the Committee meeting in May).

5.2 *Metlifecare MAC case*. The Committee noted that, as raised at the last Committee meeting, Asia Pacific Village Limited (**bidder**) had purported to terminate a scheme

implementation agreement (**SIA**) in relation to a proposed scheme of arrangement for Metlifecare Limited (**target**) on grounds including that the emergence and spread of Covid-19 in New Zealand constituted a material adverse change under the SIA because it had reduced, or had likely reduced, the target's consolidated net tangible assets and underlying profit. It was noted that, whilst the purported termination of the SIA was subject to litigation proceedings which were scheduled to be heard on 23 November 2020, the bidder had in fact announced that it would be prepared to make a new (slightly lower) offer for Metlifecare conditional on the termination litigation being dropped. The Chairman reported that an announcement had been made on 10 July 2020 by EQT (which owns the bidder) that Asia Pacific Village Group has entered into a scheme implementation agreement with Metlifecare . It would, therefore, appear that the litigation has been dropped.

5.3 *New practice statement on schemes under CA 2006 published.* The Chairman reported that on 30 June 2020, the Courts and Judiciary Service published a new practice statement on schemes of arrangement under Part 26 and Part 26A of the Companies Act 2006 (new Part 26A on 'Arrangements and reconstructions: companies in financial difficulty' has been inserted into the Companies Act 2006 (**CA 2006**) by the Corporate Insolvency and Governance Act 2020 (**CIGA**) – see item 6.1) that replaces the Practice Statement (Companies: Schemes of Arrangement).

The Chairman noted that the practice statement is directed to the practice to be followed on applications pursuant to Part 26 or Part 26A CA 2006 seeking the sanction of the court to a scheme of arrangement between a company and its creditors and/or members. It was noted that the purpose of the practice statement is to facilitate the identification of issues in relation to the jurisdiction of the court to sanction the scheme, the composition of classes of creditors and/or members, and the convening of meetings so that they can be resolved early on in the proceedings as appropriate. In particular, it was noted that the new practice statement clarifies when the convening hearing for both creditors' schemes and members' schemes under Part 26 should be listed before a High Court judge, rather than an ICC judge.

5.4 *Companies to receive three-month extension period to file accounts*. The Chairman reported that on 26 June 2020, Companies House: (i) updated its guidance on applying for more time to file company accounts to reflect the Corporate Insolvency and Governance Act 2020 (see item 6.1) – the guidance now provides that if a company is eligible for more time to file accounts, Companies House will update the filing deadline automatically (i.e. the company does not need to apply for an extension); and (ii) published guidance on filing accounts which applies to public limited companies and Societas Europaea (**SEs**) with a filing deadline between 26 March 2020 and 29 September 2020.

5.5 *Updated Law Society note on the use of virtual execution and e-signature during the coronavirus (COVID-19) pandemic*. The Committee noted that on 18 June 2020, the Law Society published an updated note on its position on the use of virtual execution and e-signature during the coronavirus pandemic to include tips on how to operate in practice. Liz Wall reported that a separate Law Society Q&A was being prepared, which it was intended would be published in the Autumn and that the Q&A would address common questions that arise in the context of virtual execution, including, by way of example, the validity of video-witnessing.

5.6 *FCA PMB No. 29.* The Chairman reported that on 9 June 2020, the FCA published Primary Market Bulletin No. 29, along with a best practice note on identifying, controlling and disclosing inside information which is aimed at government departments, industry regulators and public bodies to help them in complying with the relevant obligations under MAR. It was noted that this follows the consultation on the best practice note in PMB No. 25 and that in this edition of PMB, the FCA set out the feedback it received in response to the consultation and the changes it has made in response.

5.7 *Coronavirus and AGMs.* The Committee noted that on 8 June 2020, the FRC published an updated version of its Q&A on measures in respect of company filings, AGMs and other general meetings during Covid-19, which includes guidance on best practice for AGMs. It was also noted that in light of the enactment of the CGIA (see item 6.1), the Chartered Governance Institute (**ICSA**) (with the assistance of a Committee working group) had prepared supplemental guidance on the practice of holding AGMs and that a press release had been published on 9 July 2020.

The Committee noted the pressing need for a further extension of CIGA beyond 30 September 2020 to 31 December 2020 on the basis that a number of companies were already making arrangements for annual general meetings that would be held after 30 September 2020 and there was a clear need for certainty as to how such meetings could be lawfully held should Covid-19 related restrictions remain in place. The Chairman reported that a working group of the Committee was working with ICSA to lobby BEIS for an extension and that the Committee was to endorse a letter being submitted by ICSA to BEIS in this regard.

5.8 *Prospectus Regulation.* The Chairman reported that on 4 June 2020, the European Commission published draft delegated regulations to amend and correct: (i) Commission Delegated Regulation (EU) 2019/979 which supplements the Prospectus Regulation with regard to regulatory technical standards on key financial information in the summary of a prospectus, the publication and classification of prospectuses, advertisements for securities, supplements to a prospectus, and the notification portal (along with Annexes); and (ii) Commission Delegated Regulation (EU) 2019/980 which supplements the Prospectus Regulation as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (along with Annexes).

5.9 *FRC guidance for companies on corporate governance and reporting (including interim reports).* The Committee noted that on 20 May 2020, the FRC published an updated version of its guidance for companies on corporate governance and reporting to explain how companies should report exceptional items and alternative performance measures in their reports and accounts in the context of the coronavirus outbreak.

5.10 *Temporary measures concerning general meetings of SEs and SCEs in light of coronavirus.* The Chairman reported that on 27 May 2020, the Council Regulation on temporary measures concerning the general meetings of SEs and of European Cooperative Societies (**SCEs**) was published in the Official Journal and entered into force on 28 May 2020. It was noted that the regulation allows SEs and SCEs to hold their general meetings within 12 months (instead of within six months) of the end of

their financial year, but in any case no later than 31 December 2020, and that this is a temporary extension only.

5.11 *Consultation on expanding the dormant assets scheme.* The Committee noted that on 8 July 2020, a working group of the Committee led by Robert Boyle had submitted a response to the Government consultation on expanding the dormant assets scheme. Robert reported that the working group's response had largely focussed on seeking clarification as to both how the proposals would apply where shares are held via a series of intermediaries and which companies are considered to be within the scope of the proposed expansion.

5.12 *BEIS Committee inquiry on delivering audit reform*. The Chairman reported that on 15 July 2020, a joint response of the Committee and the Law Society Company Law Committee was submitted to the BEIS Committee inquiry on delivering audit reform. It was noted that the response had been prepared by a joint working group led by Vanessa Knapp.

6. **Discussions**

6.1 *Corporate Insolvency and Governance Act*. The Chairman reported that on 25 June 2020, the CIGA received Royal Assent. It came into force (other than paragraph 51 of Schedule 3) on 26 June 2020. The CIGA introduces both temporary emergency measures and permanent measures.

The temporary emergency measures are: (i) flexibility for companies on how they can hold and conduct general meetings in the period up to 30 September 2020 (see also item 5.7); (ii) an extension for public companies to file their reports and accounts (see also item 5.4); (iii) granting the Secretary of State powers to make regulations which would extend the deadline for filing certain forms at Companies House - The Companies etc. (Filing Requirements) (Temporary Modifications) Regulations 2020 came into force on 27 June 2020, which temporarily extend the period within which certain filing requirements must be met by companies (and other bodies). The Chairman reported that on 1 July 2020, Companies House published guidance that outlines how the measures introduced by these regulations affect public companies, private companies, LLPs, SEs, overseas companies and European Economic Interest Groupings (EEIGs) when those entities have to file documents or notices with Companies House; (iv) a relaxation of the personal liability that may be imposed on directors under the wrongful trading provisions, so that the court must assume that for the period between 1 March and 30 September 2020 the director is not responsible for the worsening of the company's financial position; (v) statutory demands served between 1 March and 30 September 2020 may not be used to form the basis of a winding up petition; and (vi) winding up petitions cannot be presented between 27 April and 30 September 2020 unless it can be established that the insolvency is not related to coronavirus.

It was reported that the permanent measures are: (i) a standalone moratorium for viable companies, which provides the company with a payment holiday for certain payments and protection from proceedings including enforcement – Companies House has published guidance on applying for a moratorium under the Act; (ii) a new compromise procedure, modelled on a scheme of arrangement which permits, with the court's approval one class of creditors to bind others to an arrangement to

eliminate, reduce or prevent or mitigate the effects of any financial difficulties; and (iii) a prohibition on suppliers relying on termination clauses triggered by formal insolvency proceedings, including the new moratorium or the new compromise procedure.

The Committee noted that on 1 June 2020, the Department for Business, Energy & Industrial Strategy (**BEIS**) and The Insolvency Service published various factsheets that provided explanations of each of the measures in the Bill.

The Chairman reported that, in addition, the Limited Liability Partnerships (Amendment etc.) Regulations 2020 came into force on 26 June 2020 and make provisions to apply the new measures introduced by the CGIA to LLPs and it was noted that an explanatory memorandum had also been published.

6.2 *FRC principles for operational separation of audit practices.* The Committee noted that on 6 July 2020, the FRC issued a press release announcing its principles for operational separation of the audit practices of the Big Four firms. It was noted that the objectives of operational separation are to ensure that audit practices are focused above all on delivery of high-quality audits in the public interest, and do not rely on persistent cross subsidy from the rest of the firm. It was also noted that the FRC was now asking the Big 4 firms to agree to operational separation of their audit practices on this basis and to provide a transition timetable to complete implementation by 30 June 2024 at the latest. It was further noted that each firm would need to submit an implementation plan to the FRC by 23 October 2020 and the FRC would then agree a transition timetable with each firm.

6.3 *FRC call for participants in new FRC Lab project: reporting on stakeholders and section 172 disclosures*. The Chairman reported that on 9 July 2020, the FRC's Financial Reporting Lab (**FRC Lab**) published a call for investors, companies and other interested parties to participate in a new project on corporate disclosures on stakeholders, including statements in response to section 172 CA 2006. It was noted that the project will consider the usefulness to investors of disclosures about stakeholders across a range of reporting formats and seek to identify how information about stakeholders can be reported most effectively by examining existing best practice and understanding investors' needs. It was further noted that the FRC Lab expects to publish a range of outputs in the last quarter of 2020 and the first half of 2021.

6.4 *The Companies (Shareholders' Rights to Voting Confirmations) Regulations 2020.* The Committee noted that on 6 July 2020, the Companies (Shareholders' Rights to Voting Confirmations) Regulations 2020 were made. It was noted that these regulations implement certain provisions of article 3c (facilitation of the exercise of shareholder rights) of the Shareholder Rights Directive (as amended by the Shareholder Rights Directive II) (**SRD**) and that the regulations insert the following provisions into the CA 2006: (i) an obligation on a traded company to provide a confirmation of receipt of those votes which are cast on a poll electronically (new section 360AA); and (ii) the right for shareholders to request information from the company to enable them to determine that their votes have been validly recorded and counted (new section 360BA). It was noted that the regulations come into force on 3 September 2020.

6.5 *Expansion of the Trust Registration Service.* The Chairman reported that on 15 July 2020, the HMRC and HM Treasury published the consultation outcome to their technical consultation seeking views on the expansion of the Trust Registration Service as required to transpose the Fifth Money Laundering Directive into national law. It was noted that a summary of the responses received to the consultation has been published, along with the revised proposed regulations that have been laid for consideration in the House of Commons and the House of Lords. It was further noted that the response document states that the Government will seek stakeholder input as required to ensure that guidance to the new legislation is suitable and meets the requirements of users.

It was noted that the Committee had responded to an initial technical consultation. The main concern raised in that response was around the widespread use of trusts, including on M&A deals where the use of trusts is merely incidental to the principal purpose of the transaction, and having to register the beneficial owners of these trusts with the HMRC. It was noted that the proposed legislation published with the consultation had some exemptions that took certain trusts out of scope and helpfully the Government consulted on whether there should be any more exemptions. In its response the Committee requested further exemptions to deal with trusts found in an M&A and company law context. Helpfully, the Government has taken on board some of the Committee's comments and included additional exemptions for:

- Incidental trusts on commercial transactions i.e. where the trust is created for the purpose of enabling/facilitating a transaction effected for genuine commercial reasons or protecting/enforcing rights relating to such a transaction where the use of the trust is incidental to the principal purpose of the transaction. However, there is no definition of "genuine commercial reasons; and

- Registration gap trusts i.e. trusts created on the transfer or disposal of an asset where the purpose of the trust is to hold the legal title to the asset on trust for the person to whom the transfer or disposal is being made until the time when the procedure required by law to effect the transfer or disposal of legal title is completed.

It was noted that these are helpful additions, particularly the commercial transactions exemption, which should cover many of the trusts that we come across. The Government also took on board the comments that the exemptions should apply to all types of trusts (and not just UK express trusts as proposed in the draft legislation) as there were concerns about the unintended consequences of this.

However, the Chairman reported that it appears that the Government did not accept that there should be a general exemption for trusts over shares in a UK company – the Committee had suggested an exemption for these as companies are already subject to regimes where significant beneficial ownership needs to be disclosed i.e. under the PSC regime and DTR5.

6.6 *FCA/CLLS Liaison Committee meeting.* The Chairman reported that there was a meeting of FCA/CLLS Liaison Committee meeting scheduled for 27 July and that feedback on that meeting would be provided to the Committee at the September meeting. It was noted that on the agenda for discussion was the application of the

Listing Rules where a company is undertaking a scheme of restructuring sanctioned by the court under new Part 26A of the CA 2006,

6.7 *FCA roundtable in relation to CP20/3.* Victoria Younghusband reported that she had received an email from the FCA asking whether representatives of the Committee would be interested in attending a virtual roundtable with the FCA to discuss their proposal to introduce a comply-or-explain TCFD-aligned disclosure obligation for premium-listed commercial companies in the Listing Rules. The Committee agreed that it would keen to engage with the FCA on this point and Chris Horton, who is leading the Committee's response to CP20/3, agreed to follow up with the FCA.

6.8 *Brexit.* The Committee noted that the items in the Brexit Annex to the agenda for this meeting had been published. In addition it was noted that: (i) on 3 July 2020, the European Commission published an updated notice on the withdrawal of the UK and EU rules on company law; and (ii) on 2 July 2020, the Ministry of Justice (**MoJ**) issued a press release announcing a consultation on the departure from retained EU case law by UK courts and tribunals. It was noted that the consultation closes on 13 August 2020.

It was noted that the MoJ consultation outlines the Government's proposals to extend powers under section 6 of the European Union (Withdrawal) Act 2018 to courts less senior than the Supreme Court and the High Court of Justiciary in Scotland to be able to depart from retained EU case law after the end of the transition period. The government's preliminary view is that this is desirable, in broad terms, to allow a more rapid development of retained EU law after the end of the transition period.

6.9 *TheCityUK Recapitalisation Group report "Supporting UK economic recovery: recapitalising businesses post Covid-19".* The Committee noted publication of this report on 16 July 2020.

7. Recent developments

The Committee noted the following additional items in sections 7.1 to 7.8 below which were set out in the agenda but which time did not allow them to consider.

7.1 Company law

(a) *Companies House temporary online service for certain forms.* On 9 June 2020 (updated on 24 June 2020 and 6 July 2020), Companies House issued a press release providing updated guidance on its temporary online service to upload certain forms to Companies House during the coronavirus outbreak. The press release contains a link to guidance that sets out which documents can be uploaded using the temporary upload service (change of constitution forms were added on 24 June 2020 and articles and resolutions in relation to change of constitution were added on 6 July 2020). It also notes that this service is not available for Companies House documents that can already be sent to Companies House online.

(b) *Updated Companies House coronavirus guidance.* On 11 May 2020, Companies House updated its coronavirus guidance for customers, employees and suppliers to state that, from 1 June 2020, there will be an exception to the

temporary suspension of strike off activity where Companies House's law enforcement partners have concluded that companies are no longer in operation following an investigation – in such cases the registrar will continue with strike off action. On 10 July 2020, Companies House also updated this guidance to state that it will restart the process for companies who have applied for voluntary strike off from 10 September 2020 – it also published a news story on this change. On 15 July 2020, Companies House further updated this guidance to state that it has put in place a temporary service for users to request to have the company authentication code for online filing sent to a home address instead of the company's registered office.

7.2 **Corporate governance**

(a) *PLSA and Investor Forum stewardship toolkit*. On 1 July 2020, the Pensions and Lifetime Savings Association (**PLSA**) issued a press release announcing the publication by the PLSA and the Investor Forum of a practical toolkit to help pension schemes assess the effectiveness of their asset managers' delivery of stewardship. The guidance focuses on the key questions that schemes need to ask their asset managers to ensure they are effectively engaging on schemes' and savers' behalf. It also provides a framework against which to assess the quality of asset managers' engagement and stewardship work.

(b) *Consultation on the ICGN Global Governance Principles.* On 30 June 2020, the International Corporate Governance Network (**ICGN**) launched an initial consultation on its Global Governance Principles (**GGP**), which asks a series of questions about the purpose, use, structure and content of the GGP. This initial consultation closes on 15 September 2020. The ICGN will factor the responses to its initial consultation into a new draft of the GGP, which will be subject to a second consultation expected to start in October 2020. The revised GGP will then be put forward for member ratification at the 2021 ICGN annual general meeting.

(c) *The IoD Centre for Corporate Governance.* On 29 June 2020, the Institute of Directors (**IoD**) issued a press release announcing that it has established a new Centre for Corporate Governance, which seeks to explore how companies are currently run, and how they could be run in the future, by commissioning research based on the issues boardrooms are facing following the coronavirus pandemic. Initial areas of investigation will include: sustainability, feasibility of stakeholder oriented governance and the implications of emerging technology for board practice.

(d) *Revised ICSA guidance on terms of reference for risk committee*. On 1 June 2020, ICSA published a revised guidance note on terms of reference for the risk committee.

(e) *OECD report on national corporate governance related initiatives during the coronavirus outbreak.* On 28 May 2020, the OECD published a report providing an overview of certain corporate governance and capital markets-related measures that 37 jurisdictions have taken in response to the economic crisis caused by the coronavirus outbreak. The report is based on a survey that

focused on three main areas of regulation that are relevant to the implementation of the G20/OECD Principles of Corporate Governance where coronavirus related adjustments have been common: (i) conduct of annual general meetings; (ii) frameworks for insolvency; and (iii) disclosure requirements. The survey also included a fourth more general question on corporate governance measures, such as measures related to the functioning of the stock market, to allow for inclusion of other relevant initiatives.

(f) *QCA report from NEDs survey 2020.* On 26 May 2020, the QCA published the report from its Non-Executive Directors (**NEDs**) Survey 2020. The report sets out the results of the QCA's survey of 110 small and mid-size quoted companies and 39 advisory firms and contains information on NEDs' salaries, working hours and independence.

7.3 **Reporting and disclosure**

(a) *New FRC Lab reports.* On 15 June 2020, the FRC issued a press release announcing the publication of two new reports from the FRC Lab that provide practical guidance to companies in areas of reporting that investors have highlighted as being most critical. The first report provides further practical advice to companies following the FRC Lab's infographic issued in March setting out the disclosures investors expect to see from companies during this time of economic uncertainty. The second report gives specific guidance on going concern, risk and viability disclosures during this time of economic uncertainty. The FRC has also published a short Q&A that covers both of the reports.

(b) *IOSCO public statement on issuers' fair disclosure about coronavirus related impacts.* On 29 May 2020, the International Organization of Securities Commissions (**IOSCO**) issued a press release announcing the publication of a public statement highlighting the importance to investors and other stakeholders of having timely and high quality information about the impact of coronavirus on issuers´ operating performance, financial position and prospects.

7.4 **Equity capital markets**

(a) *Former Worldspreads CEO fined for market misconduct.* On 3 July 2020, the FCA issued a press release announcing the publication of a decision notice in respect of Conor Foley, the former Chief Executive Officer of Worldspreads, fining him £658,900 for market abuse and banning him from performing any roles linked to regulated activity.

(b) *Redcentric PLC publicly censured for market abuse.* On 26 June 2020, the FCA issued a press release announcing the public censure of Redcentric PLC for committing market abuse between 9 November 2015 and 7 November 2016. Redcentric issued unaudited interim results and audited final year results which materially misstated its net debt position and overstated its true asset position in circumstances where it knew, or ought to have known, that the information was false and misleading. As a result, investors were misled and paid more when purchasing shares than they would have done had they

known the true position. Redcentric agreed to offer compensation to affected investors who purchased Redcentric shares between the above dates. The press release states that this is the first time that an AIM listed company has offered to implement its own scheme to pay some compensation to those affected by the harm it caused as a result of market abuse. The FCA took Redcentric's approach to compensate affected shareholders into account in deciding that it would impose a public censure rather than a financial penalty. The Final Notice was also published on 26 June 2020.

(c) *Prospectus Regulation - Draft delegated regulation on minimum information content for exemption document.* On 16 June 2020, the European Commission published for consultation a draft delegated regulation (along with an Annex) which supplements the Prospectus Regulation as regards the minimum information content of the document to be published for a prospectus exemption in connection with a takeover by means of an exchange offer, a merger or a division. The consultation closed on 14 July 2020.

(d) *Prospectus Regulation - ESMA final report on guidelines on disclosure requirements*. On 15 July 2020, the European Securities and Markets Authority (**ESMA**) published its final report on the guidelines on disclosure requirements under the Prospectus Regulation ((EU) 2017/1129). In addition to the final text of the guidelines, the report includes an overview of feedback received on the consultation draft that ESMA published in July 2019 and ESMA's responses to that feedback. Respondents were broadly satisfied with ESMA's proposal to update the original CESR recommendations and to do so on a comply-or-explain basis. ESMA has converted the recommendations into guidelines. Following translation into the official EU languages, the final guidelines will be published on ESMA's website and will become effective two months after the date of publication.

(e) *Inside AIM - Temporary measures for publication of half-yearly reports.* On 9 June 2020, the LSE published an Inside AIM that sets out temporary changes relating to an AIM company's obligation to notify half-yearly reports in accordance with the AIM Rules for Companies due to the coronavirus pandemic. AIM companies are allowed an additional one month in which to notify their half-yearly report while the temporary measures are in place. An AIM company wishing to utilise the additional one month period must notify via an RIS its intention to do so prior to the AIM company's reporting deadline under AIM Rule 18 and the AIM company's nominated adviser must separately inform AIM Regulation.

(f) *FCA PMB No. 28 – coronavirus update.* On 27 May 2020, the FCA published Primary Market Bulletin No. 28, which includes: (i) a statement on temporary relief for the timing of the publication of half-yearly financial reports; (ii) a statement on market practice on 'going concern' assessments, which follows difficulties raised by issuers about how to address coronavirus-related uncertainties in the 'going concern' assessment they perform whenever they produce financial statements; and (iii) commentary on the FCA's view on issuers' engagement with shareholders at this time, and issuers' role in delivering 'soft pre-emption' in placings.

(g) *ESMA statement on half-yearly financial reports.* On 20 May 2020, ESMA announced the publication of a public statement addressing the implications of the coronavirus pandemic on the half-yearly financial reports of listed issuers.

7.5 **MAR**

(a) *FCA Market Watch 63.* On 27 May 2020, the FCA published Market Watch 63, in which the FCA sets out its expectations of market conduct in the context of increased capital raising events and alternative working arrangements due to coronavirus.

7.6 **Accounting**

(a) *UK Government's position on ESEF Regulation requirements.* On 1 June 2020, BEIS issued a press release on the publication of a policy paper that sets out the UK Government's position on the directors' sign-off of accounts of companies that are subject to the requirements of the European Single Electronic Format (**ESEF**) Regulation and the Transparency Directive (which are implemented in the UK in the DTRs). The policy paper addresses whether directors must consider the Inline eXtensible Business Reporting Language (iXBRL) tagging when confirming that the accounts meet the requirements of the CA 2006 and give a true and fair view of the company's financial position.

(b) *FRC updated implementation guidance on its revised ethical standard.* On 26 May 2020, the FRC published updated implementation guidance on its revised Ethical Standard for 2019 for auditors, which includes guidance on transitional arrangements for "Other Entities of Public Interest".

7.7 **Miscellaneous**

(a) *UK national security reviews.* On 21 June 2020, BEIS issued a press release announcing: (i) changes to the Enterprise Act 2002 to protect UK businesses critical to combating coronavirus and future public health emergencies; and (ii) an extension of existing powers to protect companies and technologies which are key to national security. On 23 June 2020: (i) the Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2020 came into force and was published along with an explanatory memorandum. The Order amends the existing national security regime (under the Enterprise Act 2002) to make it clear that the UK Government has the power to review investments that could affect the capabilities in the UK to combat, and to mitigate the effects of, public health emergencies such as the coronavirus pandemic. BEIS has published non-statutory guidance that explains why the Government amended the Act, describes the practical effect of the amendments and offers guidance to businesses and others about what they might wish to do as a result of these changes; and (ii) a draft of the Enterprise Act 2002 (Share of Supply) (Amendment) Order 2020 was published, along with an explanatory memorandum. The draft Order lowers the thresholds at which the UK Government can carry out a national security review for acquisitions of targets with activities involving artificial intelligence (AI), advanced materials or cryptographic authentication.

7.8 **Cases**

(a) *Chalcot Training Limited v (1) Matthew Anthony Ralph (2) The Commissioners for HMRC [2020] EWHC 1054 (Ch)*. The High Court had to consider the true nature and characterisation of certain transactions entered into by a company in relation to a tax avoidance scheme. In particular, it had to consider whether the transactions should properly be characterised as distributions to shareholders, rather than remuneration to directors/employees, and whether certain of those transactions breached the prohibitions in the CA 2006 relating to the issue of shares at a discount (section 580) and the payment of commissions (sections 552 and 553). After considering the relevant case law in the area of alleged disguised distributions of capital, the judge set out his conclusions on the legal test for re-characterising remuneration as a distribution to shareholders in paragraph 166.

(b) *(1) Kevin John Hellard (2) Ian Richardson v Registrar of Companies and others [2020] EWHC 1561 (Ch)*. The claimants sought to restore 31 companies to the register of companies pursuant to section 1029 CA 2006 and to be appointed as liquidators of the restored companies pursuant to section 108 of the Insolvency Act 1986. The High Court considered whether the claimants were 'persons interested' in the restoration application for the purposes of section 1029(2) CA 2006 in order for them to have standing to seek the restoration. The judge held that none of the previous authorities laid down a rule that there is or is not a need to show a pecuniary/proprietary interest or pre-existing statutory duties in order to establish standing. The judge concluded that, whilst there is guidance in existing case law, highlighting various factors considered relevant to the issue of standing, it would be wrong to treat the cases as providing a comprehensive checklist of factors which must be present to establish standing and whether a person is 'interested' will depend on the facts. However, the judge held that there must be some interest in the 'matter' of restoration beyond idle (or officious) curiosity. On the facts of the case, the judge held that the claimants had failed to establish that they were 'interested persons' for the purposes of section 1029 and, therefore, did not have standing to seek restoration of the companies.

(c) *Burford Capital Limited v London Stock Exchange Group plc [2020] EWHC 1183 (Comm)*. The High Court considered whether a listed company could bring a civil claim for manipulation of its share price. Burford was subject to a short-selling attack by Muddy Waters, which had built a short position before publishing a report alleging that Burford was in financial trouble. As Burford's share price fell, Muddy Waters exited its position. Burford considered that its share price had fallen, in part, because of unlawful spoofing by unknown market participants. Both the FCA and LSE investigated and did not find evidence of market abuse, but Burford sought disclosure of trading data from the LSE which would allow it to identify those who had traded in its shares. In dismissing Burford's claim against the LSE, the High Court considered whether Burford might have a claim in tort arising directly from an alleged breach of Article 15 of the Market Abuse Regulation. The High Court rejected Burford's assertion that it could make such a claim, finding that such a right of action was not necessary in light of the existing remedies under MAR

and the role of the national regulators (here the FCA). As to the other causes of action argued by Burford (which included a claim for common law deceit and conspiracy), a key difficulty identified by the High Court was that, such claims, if they arose at all, would belong to shareholders who had suffered loss, not to the company itself. The High Court accepted that Burford might have a claim against Muddy Waters for malicious falsehood in respect of the content of its published report but such a claim did not arise from the alleged spoofing and it was not necessary for Buford to obtain an order to bring that claim. As to whether Burford could bring a private prosecution under the Fraud Act 2006, the High Court found that, since the FCA has the exclusive statutory function under FSMA and MAR of investigating and deciding whether to prosecute market abuse and there is no right of private prosecution under FSMA, claimants could not seek to use the Fraud Act to bypass this restriction. More broadly the High Court also commented on the harm that might be caused to the confidence in the LSE and the FCA were the High Court to look behind their conclusion that there had been no market abuse.

(d) *Re Organic Milk Suppliers Co-operative Limited [2020] EWHC 1270 (Ch).* The High Court considered the issue of class composition in relation to a scheme of arrangement where the proposed arrangement transferred the same rights of all members from one company to a new holding company. The court granted permission to convene a single court meeting, even though some members (the **founders**) had enhanced rights (which would be transferred across to the new holding company). Although the founders had different legal rights to the other scheme shareholders, when it came to considering how to vote, the founders would have the same broad question to consider as other shareholders, being whether to surrender the bundle of rights they had against the company for the grant of the same bundle of rights by the new holding company. The High Court held that all scheme shareholders form a single class for the purpose of the court meeting.

(e) *Re Sirius Minerals plc [2020] EWHC 1447 (Ch).* The High Court sanctioned a scheme of arrangement to allow Anglo American plc to acquire Sirius Minerals plc (**Sirius**) despite the fact that objections had been raised about the disenfranchisement of the beneficial owners of Sirius (Sirius had a number of nominees on the register of members who represented a large number of beneficial owners). A key objection was that the vote at the meeting to accept the offer of 5.5p per share was not representative of the views of the beneficial owners of the shares (many of whom may have been unsophisticated investors who had paid over 20p per share in 2019), and that such shareholders were disenfranchised - many were not aware of the proposed scheme (despite much publicity about it in the national papers and social media) in time to take action (e.g. to transfer shares to them so that they would be on the register of members and able to vote). The court recognised the arguments made in relation to shareholder democracy and acknowledged there was a movement to seek a change in the law in this area; however, the court held that it is required to take the law as it is, not as it might be if changes are made in the future.

(f) *Bridgehouse (Bradford No. 2) Limited v BAE Systems plc [2020] EWCA Civ 759.* The Court of Appeal dismissed an appeal against a decision of the

Chancery Division that stayed, in favour of arbitration, the appellant company's claim for relief under section 1028(3) CA 2006. The Court of Appeal found that the scope of the arbitration clause in the relevant contract covered a claim for relief under section 1028(3). It held that the correct approach to the construction of arbitration clauses remained that set out in ***Fiona Trust & Holding Corporation v Privalov [2007] UKHL 40*** - that the court should start "from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal" and this should apply unless "the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction". The Court of Appeal also considered the relevant case law in relation to arbitrability and adopted the approach that a statutory claim would be arbitrable unless either: (i) the statute prohibited reference of such matters to arbitration; or (ii) arbitration was precluded by public policy considerations. The court concluded that, in relation to section 1028(3), neither was the case, therefore, the claim was arbitrable.

8. **Any other business**

There was no other business.

10 November 2020