

**THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE**

Minutes

of the 256th meeting
at 9.00 a.m. on Tuesday, 2 April 2012
at Slaughter and May, One Bunhill Row, EC1Y 8YY
(Tel: 020 7600 1200; Fax: 020 7090 5000)

1. Attendees and apologies for absence

The following members were present: William Underhill (Chairman); Patrick Speller; Michael Hatchard; Richard Spedding; Chris Pearson; Keith Stella; Robert Boyle; James Palmer; Nicholas Holmes; Lucy Fergusson; Murray Cox (Secretary).

The following members sent apologies: Martin Webster (alternate: Rob Hutchings); Vanessa Knapp (alternate: Mark Trapnell); Eileen Kelliher; David Pudge; Mark Curtis (alternate: Jo Weston); Simon Griffiths; Simon Jay.

2. Approval of minutes of previous meeting

The Secretary will circulate minutes for the 255th meeting.

3. Resignations

The Chairman noted that Eileen Kelliher and Richard Brown had resigned from the Committee and thanked them for their respective contributions. Two vacancies will be advertised in next edition of 'City Solicitor' in accordance with CLLS requirements.

4. Matters arising

- (A) The Secretary conveyed an update from Vanessa Knapp on the status of projects in which the Committee has an interest, which related to (i) an overseas payment service for takeovers; and (ii) ICOSA's proposal for the payment of dividends electronically. These are progressing.
- (B) The Chairman will make a proposal to progress the 'mix and match' issue (viz whether a 'mix and match' facility offered in the context of takeover implemented via a scheme of arrangement constitutes an offer to the public).
- (C) The Secretary noted that Alex Kay would shortly circulate a draft submission to the European Commission regarding its proposals for amending the Statutory Audit Directive.
- (D) It was agreed that the Committee should engage with the new Director of the Serious Fraud Office regarding its settlement with Mabey Engineering (Holdings) Ltd, since the current Director would be stepping down at the end of

April. James Palmer remarked that the press announcement was problematic and that he was unable to support the breadth of its assertions.

- (E) The Chairman noted (i) that the UK had opted out of the EU's new regime of criminal sanctions for market abuse; (ii) that on 20 March 2012 the Committee on Economic and Monetary Affairs had produced a first draft report on the Commission's proposals; and (iii) that HMT would be convening a stakeholder meeting after Easter. James Palmer remarked that ECON's draft report did not adequately address what ought to be acceptable use of 'trading information' (as per MAR).
- (F) The Chairman noted that (i) BIS published its response to the consultation on the future of narrative reporting; (ii) that there will be further consultation later in the year and (iii) that some of the responses to the consultation suggest that there is confusion about the liability regime for narrative reporting, in relation to which the Committee could play an important role.
- (G) The Chairman thanked Nicholas Holmes and his working group for co-ordinating responses on the FSA's CP11/28, ESMA's consultation on short selling and credit default swaps (ESMA/2012/30), and ESMA's consultation on possible delegated acts (ESMA/2012/98).
- (H) The Committee noted that the joint working party of the Committee and the Law's Society's Company Law Committee had circulated a draft response on CP12/2. Members of the Committee are invited to comment before the end of April. The Chairman noted in particular the reference in the draft response to relationship agreements, noting that in the context of the Kay Review, long-term ownership by an 'anchor' shareholder, coupled with a suitable relationship agreement, may be one way to promote long-term decision-making.
- (I) The Secretary conveyed comments from Martin Webster regarding the Government's Red Tape Challenge and its 'spotlight' on company law. Martin Webster will be invited to draft a submission to BIS re-iterating some of the points made by the Committee in its August 2010 submission.
- (J) The Committee noted the response of the joint working party of the Committee and the Law Society's Company Law committee, to the Commission's proposals for amendments to the Transparency Directive.

5. Possible summer event

The Committee agreed to explore the possibility of arranging a public event in the summer, possibly in the form of a debate about some of the issues raised by Prof. Kay in his interim report. A date in June would be preferable. Members of the Committee are invited to propose a topic. The Chairman will co-ordinate.

6. Executive compensation

The Committee noted the publication of the BIS consultation. The Chairman reported that he had been liaising with the GC100 group, who were also actively engaging with BIS on these issues.

The Committee agreed that implementation of the proposals would pose a number of challenges. For example, would the forward-looking section of the report (which would be subject to a binding shareholder vote) relate to the current financial year (having regard to the fact that the AGM is typically held five months into the financial year following that to which the relevant annual report relates) or to the next financial year? Could the future period be longer than a year? How specific must the shareholder-approved policy be, and what scope could it leave for discretion on the part of the Remuneration Committee? It was suggested that if Government intends to promote an ethos of long-term, responsible stewardship, it should bear in mind the possible effects of proposals that give directors no confidence about their long-term entitlements.

As regards termination payments, it is felt that an absolute prohibition on termination payments exceeding a year's salary is too strict, especially in the case of a leaver who is simply asked to move on (e.g. to make way for a replacement) without being a 'bad leaver' in the true sense. There would also seem to be some uncertainty about unvested benefits. There are situations, which readily come to mind, in which such a restriction would punish the wrong people and deter the right people from taking up office. Avoidance mechanisms have also not been dealt with; nor have the problems posed by takeovers.

The 'single figure' for historic reporting purposes could result in more confusion than clarity if it is not accompanied by proper explanations. Nor is there clarity on what the single figure should include.

The Chairman will co-ordinate a response by the Committee.

7. Kay Review

James Palmer reported that he had had a number of constructive discussions with Prof. Kay, who seemed to have a thorough grasp of all the issues. Reducing the costs of intermediation and improve the effectiveness of intermediaries would seem to be important concerns. Prof. Kay would also seem to take the view that transparency in markets is but one objective to be balanced against others, in the light of its costs and benefits. Lucy Fergusson remarked that fiduciary duties had been mentioned in the report; although it would seem that they are important in influencing behaviour not only on the part of the issuer, but also the intermediaries (pension fund trustees etc) holding shares.

James Palmer will circulate a list of ideas to take forward into a submission to Prof. Kay before the deadline on 27 April 2012.

8. Commission consultation: ‘The Future of European Company Law’

A working group will be formed to respond to this consultation.

9. Hansard Society consultation: ‘Lifting the Lid on Delegated Legislation’

The Committee noted this consultation, but agreed that no response was necessary.

10. BIS proposal re: equivalent accounting standards

The Committee noted the proposal from BIS to permit certain firms to prepare their accounts in accordance with other accounting standards. The Secretary conveyed the views of Vanessa Knapp that the ‘true and fair view’ override would apply as a statutory requirement in any event (the Chairman suggesting that further thought would have to be given as to how that concept would apply) and that the proposal could facilitate the Government’s objective of making the UK a more attractive corporate residence. While the proposal may only benefit few companies, those companies could be expected to be significant.

A working group will be formed to respond to BIS’s letter.

11. Noted

- (A) CP12/5 was noted, in particular the FSA’s regrettable proposal not to respond to queries via the helpline on a “no names” basis. Lucy Fergusson noted that the FSA would consult on changes to the Technical Notes via the Primary Markets Bulletin. This will enable the Committee to raise the issues identified in the work that has been done to identify issues dealt with in previous editions of List! but which have not been carried forward into the Technical Notes.
- (B) The Committee noted the response of the CLLS Regulatory Law Committee to the FSA’s statement in the Einhorn insider dealing matter. It would seem that the FSA is now aware that the statement at paragraph 3.11 of the Einhorn decision (viz, inside information only ceases to be such when a ‘cleansing announcement’ is issued) had caused some concern and is not correct. Chris Pearson referred the Committee to a more recent press announcement, which can only be an implicit retraction. The FSA has written to the CLLS Regulatory Law Committee confirming that a cleansing announcement is not always required (a copy of the letter is available on the CLLS website).
- (C) Lucy Fergusson attended a meeting of the CSD Stakeholder Group co-ordinated by HMT, ahead of a meeting in Brussels next week. An important concern is the prospect of compulsory dematerialisation. She will keep the Committee apprised of developments. There are important questions about whether European regulation in this area is really required.
- (D) The ASB’s publication of exposure drafts on the future of financial reporting in the UK, and accompanying ‘Key Facts’ document, were noted.

- (E) The publication of PIRC's 2012 Shareholder Voting Guidelines was noted but not discussed.
- (F) The publication of Lord Davies' first progress report re: women on boards, was noted but not discussed.
- (G) The publication of the FRC's report looking at the operation of the "comply-or-explain" principle, was noted but not discussed.
- (H) The Committee noted the publication of a consultation by the FRC on its possible re-organisation.
- (I) The Committee noted that the ICAEW had issued an exposure draft for new guidance on financial position and prospects procedures, intended to replace FRAG10/95. The Secretary will circulate a link to the Committee and, if considered appropriate, a working group will be formed to submit a response.
- (J) The Committee noted and welcomed the decisions of the High Court in *Re Halcrow Holdings Limited* [2011] EWHC 3662 (Ch) and *McKillen v Misland Cyprus (Investments) Ltd* [2011] EWHC 3466 (Ch).
- (K) The Committee noted the decision of the High Court in *Paros Plc v Worldlink Group Plc* [2012] EWHC 394 (Comm), which concerns the prohibition against financial assistance, and how this affects break fees and indemnities for offeror transaction costs, agreed in the context of a takeover on AIM. The Chairman referred the Committee in particular to paragraph 73 of the judgment, where it was held that a public company may give an indemnity for the bidder's transaction costs contingent on its being re-registered as a private company.

12. Any other business

- (A) Keith Stella remarked that it had been helpful to have the papers for the meeting well in advance this time and that it would be helpful if papers could continue to be circulated well in advance. He also remarked that it would be helpful to achieve consistency on the format of the Committee's responses and submissions.
- (B) The Secretary conveyed a suggestion by Eileen Kelliher that renewed consideration be given to the concept of a model confidentiality agreement for use in the M&A context, endorsed by City firms. The Secretary referred to the final report published a decade ago by the Financial Law Panel. After some debate it was agreed that it would probably not be possible to settle a model form (nor probably even model clauses) since the most negotiated aspects of confidentiality agreements were either client-specific requirements or important commercial points. However, the Committee did agree that where it was possible to reduce unnecessary effort and expense by standardising the terms of transaction documents, this was worth considering.