

THE CITY OF LONDON LAW SOCIETY

COMPANY LAW SUB-COMMITTEE

**Minutes of the 239th meeting held at 9.00am on Tuesday 24 March, 2009
at Slaughter and May, One Bunhill Row, EC1Y 8YY**

1. Apologies for absence

Apologies for absence were received from Barney Hearnden and James Palmer. It was noted that alternates attending were: Gary Green (for Barney Hearnden) and Alex Kay (for James Palmer).

2. Minutes of 238th meeting

The minutes of the previous meeting were approved by the Committee.

3. Matters arising

3.1 Companies Act 2006

The items set out in section 3.1 of the appendix of the agenda were noted.

3.2 Short Selling

The Chairman asked the Committee if there was any aspect of the FSA's consultation (FSA DP 09/01) that the Committee should respond to. The Committee discussed various short selling scenarios (particularly in the context of takeovers) and concluded that sufficient regulatory tools already existed to deal with abusive transactions and further regulation was not required. The Committee agreed that more regulation may be needed in relation to stock lending and it was agreed that the Committee would prompt the FSA to investigate this.

3.3 Rights issues and capital raisings

The Committee noted the letter that had been sent to company directors by the ABI. The Committee thought that directors may be taking a more cautious approach in the use of cash-box structures since the letter had been circulated, but it was too early to tell if the letter had had a real impact.

The items set out in section 3.3 (B) – (F) of the agenda were noted.

3.4 Execution of agreements and deeds following the Mercury case

The Chairman reported that the Working Party (which was now a joint working party together with the Law Society Company Law Committee and the CLLS Financial Sub-Committee) had drafted a set of Guidelines for practitioners and was seeking the advice of counsel (Mark Hapgood QC). There was to be a Conference with Counsel on Friday

27th March and details (and the Instructions to Counsel) would be circulated to all members.

4. Discussions

4.1 UKLA Liaison Group Meeting

The Chairman reported back to the Committee on the meeting that had taken place with the UKLA on 12 March 2009 and informed the Committee that minutes of the meeting would be circulated shortly. The issues that were discussed at that meeting were:

1. Disclosure and Model Code obligations for PDMRs in respect of the use of their shareholdings as security;
2. Valuation requirements for property companies - feedback on the paper the Committee had submitted in December 2008;
3. Application of LR Class Tests in current economic climate;
4. DTR 4.1.3 and DTR 6.3.5(2): announcement required when annual report is released. Information required by DTR 6.3.5(2)(b) in the preliminary announcement; and
5. DTR 5: Application of DTR 5 where an issuer receives conflicting notifications regarding shares (i.e. where one party informs the issuer that another party who has or may notify an interest does not have an interest in shares).

Regarding item 3, the Chairman reported that one issue that had been discussed at the UKLA Liaison meeting was the treatment of break fees and indemnities under the Listing Rules, the points raised being:

1. under current market conditions listed company share prices are depressed and this has meant that under certain of the class tests set out in Annex 1 of LR 10, the use of the "aggregate market value of the shares of the listed company" as a part of the tests has meant that some listed companies are being required to put to shareholder vote break fees are immaterial in relation to the assets of the listed company;
2. where a listed company has agreed to indemnify a third party for its costs in circumstances where that third party is proposing to acquired assets from the listed company, that transaction should properly be characterised as an indemnity and not a break fee arrangement. However, the "break fee" definition in the LR's arguable could cover this (and the UKLA appear to think that it should); and
3. the current definition of "break fee" (in the LR definitions) and of "indemnity" (under LR 10.2.4R) are so wide as to catch arrangements that may be put in place between a listed company and a third party pursuant to which the parties agree that the listed company will pay a liquidated sum for breach of certain obligations within

its power in relation to the implementation of the transaction (e.g. anti-trust filing). However, such arrangements (i.e. the payment of liquidated damages for breach of contract) should neither be categorised as break fee nor an indemnity

The Committee agreed that it would be useful to draw to the attention of the UKLA to the circumstances which the Committee thought should properly be regulated and those that should be left to companies to determine.

The Chairman noted that a Draft Submission for UKLA on break fees had been circulated to Committee members and it was proposed that a Working Party be set up to discuss the submission and the issues contained therein.

4.2 Treatment of underwriting agreements and unissued shares under the new CFD regime

The Committee noted that, from 1 June 2009, the DTR disclosure regime would be extended beyond the existing DTR categories of shares and qualifying instruments by also requiring disclosure of any financial instruments that have a “similar economic effect” to a qualifying instrument.

It was also noted that the FSA had stated in PS 09/03 that it considered that convertibles which give a legal right to acquire voting shares which had not yet been issued *are* within the scope since the effect is to allow for the acquisition of voting shares in the issuer.

The issue was raised that some clients have asked if underwriting agreements (and sub-underwriting agreements) in respect of unissued shares (e.g. in a rights issue) may be caught and fall to be notified to the issuer (and then disclosed to the market). The Committee discussed the issue and the construction of “financial instruments” and concluded that an underwriting agreement would not naturally be characterised as an “instrument”, but instead was a “conditional agreement to purchase shares”. As such, since settlement of underwriting agreement is subject to conditions which are beyond the control of the parties, it does not fall to be disclosed unless and until two trading days after the underwriter is called to take up the stick (pursuant to DTRs 5.1.1(4) and 5.8.3).

The Committee then went on to consider the possible treatment of other financial instruments such as nil paid rights, warrants, and other convertibles and whether holdings of these would be required to be disclosed. The Committee concluded that the treatment and disclosure requirements of these instruments needed to be thoroughly thought through by the FSA. For example, how would holdings of nil paid rights be reported when (i) nil paid rights may or may not be taken up and (ii) for the purpose of calculating a persons holding, the denominator is referenced to the issued share capital.

The Committee also considered how in practice unissued shares should be disclosed and were concerned that there was a risk of parallel disclosures and confusion as to which shares were issued and which unissued. For example, in the case of nil paid rights that may or may not be taken up, how was this to be notified?

The Committee also noted that the drafting of new DTR 5.3.1 – 5.3.3 needed to be clarified as the reference to unissued shares only appeared in the FSA's policy statement (FSA PS 09/3).

Although the deadline for submissions on FSA PS 09/03 had passed, the Committee thought it would be worthwhile to submit a paper highlighting the issue to the FSA and in particular stating that there should be some exemptions from notification for some categories of convertible instruments. It was agreed that a Working Party would be set up to prepare such a submission.

5. Current problems and recent developments

5.1 Company law and legislation

The Committee noted the reports that the SEC had indicated that it would not accept auditor limited liability agreements by British companies that are registered with it and noted that the issue should continue to be monitored.

Items 5.1 (B) – (C) of the agenda were noted.

5.2 Listing Rules, DTRs and Prospectus Rules

The Committee noted that the FRC had published a call for evidence on the effectiveness on the Combined Code. The Committee thought that although it may be useful to consider its effectiveness, the Committee did not think that the principals of the Combined Code itself needed amending.

Items 5.2 (B) - (F) of the agenda were noted.

5.3 FSMA/FSA

The Committee noted that the FSA had fined Wolfson Microelectronics Plc ("Wolfson") for delaying disclosure of inside information. The circumstances were that a major customer had informed Wolfson that it would not be required to supply parts for future editions of two of its products and Wolfson had estimated that this represented a loss of around 8% of its forecast revenue for 2008. However, Wolfson also expected, based on other more positive information, that its expectations for 2008 revenue would still be met. The negative news was such that it constituted inside information and should have been disclosed as soon as possible. However, on the advice of its investor relations adviser, Wolfson had not disclosed the negative news.

The Committee noted that, in penalising Wolfson, the FSA had again emphasised its position that issuers are not allowed to aggregate good and bad information. The Committee agreed that this was an unsatisfactory approach since all results are a product of aggregation of many transactions. An alternative, and more satisfactory basis for imposing sanctions in such a case would be to emphasise that the information as a whole should be analysed and if price sensitive disclosed and that it is not enough that there is no change in the expected result. In Wolfson's case it should have been

appreciated that loss of a contract with an important customer on which the company knew the market placed great importance would be likely to be price sensitive.

5.4 Mergers and acquisitions (public)

Item 5.4 (A) was noted.

5.5 Mergers and acquisitions (private)

Items 5.5 (A) and (B) of the agenda was noted.

5.6 EU/overseas law and practice

Items 5.6 (A) – (D) of the agenda were noted.

5.7 Accounting

Item 5.7 of the agenda was noted.

6. Cases not otherwise discussed

The cases listed in section 6 of the Appendix were noted.

7. Any other business

- Directors' Remuneration: it was noted that the European Commission was to again review Directors' Remuneration and that there was to be a conference in Brussels regarding the issue.
- Acquisitions Directive: the implementation of the Acquisitions Directive was raised and it was noted that the term "acting in concert" had been left undefined. There was general concern that this would prove to be a problem.

It was noted that the time qualifying for CPD credit would be 1.45 hours.

8. Close

There being no further business the meeting closed.

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Chairman