

THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 292nd meeting
at 9:00 a.m. on 16 July 2018
at Clifford Chance LLP, 4 Coleman Street, London EC2R 5JJ

1. **Welcome and apologies**

Attending: David Pudge (Chairman), Mark Austin, Robert Boyle, Lucy Fergusson, Kevin Hart, Nicholas Holmes, Chris Horton, Simon Jay, Antonia Kirby (alternate), Vanessa Knapp, Stephen Matthews, Chris Pearson, Richard Spedding, Patrick Speller, Richard Ufland, Liz Wall, Martin Webster, Victoria Younghusband and Kath Roberts (Secretary).

Apologies: John Adebisi, Mark Bardell, Adam Bogdanor, Murray Cox and Rob Stirling (alternate).

2. **Approval of minutes**

The Chairman reported that draft minutes of the meeting held on 23 May 2018 were circulated to members for comment on 10 July 2018. Members were asked to provide comments to the Secretary.

3. **Matters arising**

3.1 Position of preference shareholders. The Committee noted that the Chairman had responded to the letter that he had received from BEIS on 8 May 2018 requesting the Committees' views on whether the Companies Act 2006 should be amended to provide greater protection for the position of preference shareholders. Reflecting the discussions of the Committee at the May 2018 Committee meeting, the Chairman had responded on the basis that the Committee was unanimously and strongly of the view that there was no need for any change to company law to address any perceived concerns around the position of preference shareholders.

3.2 Law Commission's Thirteenth Programme of Law Reform. The Committee noted that on 25 June 2018, the Law Commission published a document that contains an update on its current work, including on electronic execution of documents and smart contracts (topics raised in the Thirteenth Programme of Law Reform).

3.3 Fifth Anti-Money Laundering Directive. The Committee noted that on 19 June 2018, the text of the Fifth Anti-Money Laundering Directive was published in the Official Journal of the EU. It was noted that the Directive had entered into force on 9 July 2018 and that member states must implement the Directive by 10 January 2020. The Committee noted that amendments have been made to Article 30 of the Directive, which have been implemented in the UK through the PSC register regime.

- 3.4 New premium listing category for sovereign-controlled companies. The Committee noted that on 8 June 2018, the FCA issued a press release stating it had finalised rules creating a new category within its premium listing regime to cater for sovereign-controlled companies. The Committee noted that the FCA published Policy Statement PS18/11 containing feedback to the consultation (CP17/21) and the final rules and that the rules establishing the new category came into force on 1 July 2018.
- 3.5 Independent review of the Financial Reporting Council (FRC). The Committee noted that on 6 June 2018, BEIS published the Independent Review of the FRC: Call for Evidence which seeks to examine the FRC's role and to understand stakeholder views on the FRC's effectiveness. It was noted the review is being led by Sir John Kingman. The meeting noted that a working group led by Nicholas Holmes had met to discuss and prepare a response to certain areas of the consultation.
- 3.6 European Commission proposes new company law to help companies move across borders and find online solutions. The Committee noted that on 9 July 2018, a joint CLLS / Law Society CLC working group led by Vanessa Knapp submitted responses to the European Commission's consultations to: (i) provide for a procedure for cross-border conversions, mergers and divisions; and (ii) enable companies to register, file and update their data in business registers fully online.

It was noted that the majority of the working group's comments related to the consultation on cross border conversions. In particular, the response had focussed on seeking clarity about the precise nature of a "cross border conversion" for the purposes of the Directive. Whilst it appears that the Directive contemplates that where a company undergoes a conversion procedure, the intention is that the existing company is the same legal entity once it becomes a company in the destination Member State (subject to the legal rules that apply to a company of the form chosen in the destination Member State), there is language elsewhere in the Directive which raises a question as to whether the concept is in fact more akin to a cross border business transfer.

- 3.7 Updated CLLS/LSCLC MAR Q&A. The Committee noted that on 22 May 2018, the joint CLLS/Law Society CLC MAR Working Group republished its MAR Q&A with a new Q&A21A on how Article 19 MAR applies to issuers that have only debt financial instruments admitted to trading on an EU trading venue.
- 3.8 LSE consultation on changes to the AIM Rules for Nomads. The Committee noted that on 4 July 2018, the LSE published AIM Notice 52 that contains feedback on the LSE's consultation on proposed changes to the AIM Rules for Nominated Advisers published on 26 April 2018 and confirms the resulting rule changes. It was noted that the LSE has published a clean and marked-up version of the revised AIM Rules for Nominated Advisers, which come into effect on 30 July 2018.
- 3.9 BEIS consultation on insolvency and corporate governance. The Committee noted that on 11 June 2018, a working group, chaired by Murray Cox submitted a response to the BEIS consultation on insolvency and corporate governance. It was noted that the Law Society CLC had also submitted a response.

4. **Discussions**

- 4.1 Brexit. The Committee noted that on 26 June 2018, the Department for Exiting the European Union issued a press release stating that the EU (Withdrawal) Bill received Royal Assent and has become the European Union (Withdrawal) Act 2018. It was noted that the press release states that now that the Act has become law, the Government can start to use the powers in the Act to prepare the UK statute book for Brexit and that work on this will begin in the coming weeks as Departments start to lay the relevant secondary legislation in Parliament. The Committee noted that explanatory notes to the Act have also been published.

Brexit and financial services. The Committee noted that on 27 June 2018, HM Treasury launched a webpage where it published a document that sets out its approach to laying financial services statutory instruments under the European Union (Withdrawal) Act 2018. It was noted that HM Treasury will link to draft secondary legislation on the webpage as it becomes available. The Committee noted that following HM Treasury's announcement, both the FCA and the Bank of England released statements.

- 4.2 Corporate governance reform. The Committee noted that on 11 June 2018, a draft of the Companies (Miscellaneous Reporting) Regulations 2018 ("Regulations") and explanatory memorandum were laid before Parliament. It was noted that BEIS had also published a Q&A document on the regulations that sets out how and when companies will be affected by the new corporate governance reporting requirements and that BEIS welcomes feedback on it.

The Committee also noted that on 13 June 2018, the FRC issued a press release stating that it has published a consultation on the Wates Corporate Governance Principles for Large Private Companies. The meeting noted that large private companies will be encouraged to follow the six principles to inform and develop their corporate governance practices and adopt them on an "apply and explain" basis. It was noted that the consultation closes on 7 September 2018.

The Committee noted that the requirements of the Regulations in relation to s.172 CA 2006 reporting reflected what had been anticipated. The meeting also noted that the FRC was expected to publish the final UK Corporate Governance Code later in the day. With regard to the requirement to publish the ratio of the CEO's total remuneration to the median remuneration of UK employees, it was noted that companies were already giving thought as to how best to present this information and that there were certain industries where there would inevitably be a large disparity between the CEO and the median UK employee figures.

It was noted that there was a Law Society CLC call scheduled to discuss the Regulations and the Wates Principles and to prepare a response. Liz Wall invited the members of the Committee who wished to do so to participate in the call.

- 4.3 Consultation on FCA Knowledge Base technical note on periodic financial information and inside information. The Committee noted that on 11 June 2018, the FCA published its 19th Primary Market Bulletin covering the FCA's consultation on a proposed update to the existing technical note on periodic financial information and inside information involving the delay in the disclosure of inside information under

Article 17(4) MAR (proposed amended technical note – FCA/TN/506.2). It was noted that the consultation closes on 23 July 2018.

Victoria Younghusband reported back to the meeting on the outcome of the MAR working group call on 28 June 2018 at which the group's response to this consultation was discussed, following which a draft response had been circulated to the group for comment on 10 July 2018.

4.4 Regulations prohibiting restrictions on assignment of receivables. The Committee noted that on 4 July 2018, a draft of the Business Contract Terms (Assignment of Receivables) Regulations 2018 was laid before Parliament, along with an explanatory memorandum.

4.5 Consultation on Protecting Defined Benefit Pension Schemes – A Stronger Pensions Regulator. The Committee noted that following the publication in March 2018 of a White Paper entitled "*Protecting Defined Benefit Pension Schemes*", on 26 June 2018, the Department for Work and Pensions had published a consultation on the introduction of enhanced/additional powers for the Pensions Regulator.

It was noted that the Department for Work and Pensions is consulting on: (i) enhancing the Regulator's and trustees' role in scrutinising corporate transactions; (ii) expanding the sanctions regime to deter wrongdoing (including the introduction of new criminal sanctions in respect of directors and others who have been wilfully or grossly reckless in relation to a defined benefit pension scheme); and (iii) enhancing the Regulator's existing powers to issue contribution notices and financial support directions. The Committee noted that consultation closes on 21 August 2018.

The Committee discussed the consultation paper and noted the clear intention in it to strengthen the hand of the Pensions Regulator. It was noted that, if the proposals were to be implemented in the form proposed, they could have a significant impact on M&A transactions, as there would be significant new notification requirements which would apply at a much earlier stage in a transaction than is currently the case, possibly even at a stage where the information that the Regulator might require would not be available. It was also noted that board changes would become a notifiable event.

It was agreed that the Committee should respond to this consultation paper and that the Secretary would circulate an email after the meeting seeking volunteers. The Chairman stated his intention to check with the CLLS Insolvency Law Committee whether it was intending to respond.

4.6 Joint Working Group notes on guarantees and intra-group loans in light of the position reflected in the ICAEW TECH 02/17. The Committee noted that on 6 June 2018, the Joint Working Group published the guarantees note and the intra-group loans note.

5. **Recent developments**

5.1 **Company law**

(a) Draft regulations relating to the restoration of a company to the register by the court. The Committee noted that a draft of the Third Parties (Rights against

Insurers) Act 2010 (Consequential Amendment of Companies Act 2006) Regulations 2018 and a draft explanatory memorandum have been published. It was noted that the regulations will amend section 1030(1) of the Companies Act 2006 to allow an application to be made to the court at any time to restore a company for the purpose of an insurer bringing proceedings in the name of that company against a third party in respect of that company's liability for damages for personal injury.

The Committee noted that this will give an insurer of a company that has been dissolved for more than six years a right to restore the company to the register in order to take legal proceedings to recover contributions from other persons who are also liable for a personal injury claim in respect of which the insurer has made a payment.

5.2 Corporate governance

- (a) BEIS press release on women on boards. The Committee noted that on 27 June 2018, BEIS issued a press release stating that figures released by the Hampton-Alexander Review show 29% of FTSE 100 board positions are held by women, but urging FTSE 350 companies to step up to meet the 2020 women on boards targets. The Committee noted the progress made by FTSE 100 companies but observed that the majority of these appointments are to non-executive roles and that more needs to be done to increase the number of women in executive positions. It was noted that this is an issue for companies and their nomination committees to address as part of their succession planning work and in programmes to develop diversity among the management team at all levels in an organisation.
- (b) Investment Association press release on director-related concerns at AGMs. The Committee noted that on 23 June 2018, the Investment Association issued a press release stating that shareholder concerns over director accountability are on the increase and that executive pay remains high on the agenda at the midway point of the 2018 AGM season. It was noted that a total of 94 companies have been added to the Public Register in 2018 and that the total number of resolutions with more than 20% votes against so far in 2018 was 140 with an additional 14 resolutions having been withdrawn. It was also noted that more than a third of the companies on the Public Register were repeat offenders, who had also appeared on the 2017 Public Register.
- (c) An independent advisory group's report on Growing a Culture of Social Impact Investing in the UK. The Committee noted that on 12 June 2018, the Department for Digital, Culture, Media and Sport and HM Treasury published the Government's response to the industry-led report, Growing a Culture of Social Impact Investing in the UK, that was published in November 2017.
- (d) European Commission action plan for financing sustainable growth. The Committee noted that on 24 May 2018, the European Commission published a package of proposed measures as a follow-up to its action plan on financing sustainable growth. It was noted that the package includes three proposals aimed at: (i) establishing a unified EU classification system of sustainable economic activities; (ii) improving disclosure requirements on how

institutional investors integrate environmental, social and governance factors in their risk processes; and (iii) creating a new category of benchmarks that will help investors compare the carbon footprint of their investments. The Committee noted that the consultations on these proposals close on 23 August 2018. It was agreed that the Committee would not respond to these consultations.

5.3 Reporting and disclosure

- (a) Financial Reporting Lab's report on investors' views on the reporting of performance metrics. The Committee noted that on 22 June 2018, the FRC issued a press release on the publication of the Financial Reporting Lab's report on investors' views on the reporting of performance metrics. It was noted that report is the outcome of the first phase of the Lab's project on performance metrics and includes both a framework and a set of questions for companies and their boards to consider when deciding on how to report their performance.
- (b) Financial Reporting Lab's report on blockchain and the future of corporate reporting. The Committee noted that on 19 June 2018, the FRC issued a press release on the publication of the Financial Reporting Lab's report on blockchain and the future of corporate reporting. It was noted that the report considers how current developments and the use of blockchain technology might impact corporate reporting processes.

5.4 Equity capital markets

- (a) The Financial Services and Markets Act 2000 (Prospectus and Markets in Financial Instruments) Regulations 2018. The Committee noted that on 27 June 2018, the Financial Services and Markets Act 2000 (Prospectus and Markets in Financial Instruments) Regulations 2018 were made (an explanatory memorandum has also been published). It was noted that the regulations make consequential amendments to FSMA 2000 in order to implement part of the Prospectus Regulation that applies from 21 July 2018. It was also noted that the regulations make minor amendments to the UK transposition of MiFID II and come into force on 21 July 2018.
- (b) European Commission proposal for promoting SME growth markets. The Committee noted that on 24 May 2018, the European Commission published a proposed regulation to amend both the Market Abuse Regulation and the Prospectus Regulation in relation to the promotion of the use of SME growth markets. It was noted that the consultation closes on 25 July 2018. It was agreed that the Committee would not respond to this consultation.
- (c) FCA change of address. It was noted that on 1 July 2018, the FCA's registered office address changed to The Financial Conduct Authority, 12 Endeavour Square, London E20 1JN.

5.5 MAR

- (a) Australian cartel law prosecution against Citigroup Global Markets Australia Pty Ltd (Citi), Deutsche Bank Aktiengesellschaft (Deutsche) and Australian and New Zealand Banking Group (ANZ). The Committee noted that the Australian Competition and Consumer Commission has filed criminal cartel offences against Citi, Deutsche and ANZ and senior executives of those organisations in respect of ANZ's A\$2.3bn capital raising in August 2015, in which Citi, Deutsche and JPMorgan Australia Ltd (JPM) acted as underwriters. The Committee noted that JPM has cooperated with prosecutors in return for immunity.

5.6 Accounting

It was noted that there were no matters to consider.

5.7 Takeovers

- (a) Panel Statement 2018/8 on Mr King's offer for Rangers International Football Club plc. The Committee noted that on 4 July 2018, the Takeover Panel published Panel Statement 2018/8 that sets out a Ruling of the Chairman of the Hearings Committee issued on 21 June 2018. It was noted that the ruling rejects Mr King's request that the Hearings Committee be convened to review the Executive of the Takeover Panel's refusal to agree Mr King's request for an extension of time to send an offer document to Rangers shareholders pursuant to rule 24.1 of the Takeover Code.

5.8 Miscellaneous

- (a) Post-legislative scrutiny of the Bribery Act 2010. The Committee noted that on 20 June 2018, the House of Lords Select Committee on the Bribery Act 2010 published a call for evidence for its post-legislative scrutiny inquiry into the Bribery Act 2010 and that the deadline for submissions is 31 July 2018. The Committee noted that as there have been some cases brought under the Bribery Act, it will be interesting to see the findings of the review.

5.9 Cases

- (a) *(1) NF Football Investments Limited (2) Nottingham Forest Football Club Limited v (1) NFFC Group Holdings Limited (2) Fawaz Al-Hasawi [2018] EWHC 1346 (Ch)*. The Committee noted that the High Court held that an entire agreement clause in a share purchase agreement, which did not contain wording negating reliance on representations or excluding liability for misrepresentation, was drafted widely enough to exclude claims in misrepresentation when construed in the context of the share purchase agreement as a whole. It was noted that the buyer claimed damages for a misrepresentation in respect of the target company's liabilities. The Committee noted that the judge had construed the entire agreement clause in the context that the parties had agreed contractual provisions to deal with claims likely to arise under the agreement, including an indemnity for losses arising as a result of the company's liabilities being in excess of a particular

threshold and that, in light of this, the judge had held that the claim for statutory misrepresentation was excluded by the entire agreement clause. Accordingly, the judge struck out the claim.

- (b) *In the matter of Liberty Mutual Insurance Europe plc [2018] EWHC 1445 (Ch)*. The Committee noted that the High Court had made an order under Article 26 of the Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) in relation to a UK public limited company's application to become an SE by merging with a newly incorporated Luxembourg company. Article 2(1) of the regulations provides for the formation of an SE by merger. It was noted that the judge raised concerns with the proposed form of the order and, therefore, set out in his judgment the text of the order made, which the Committee felt was helpful to practitioners.
- (c) *Balbir Singh Chaggar v (1) Raghbir Singh Chaggar (2) Hi-Tech Autoparts Limited [2018] EWHC 1203 (QB)*. The Committee noted that the High Court held, amongst other things, that section 659(1) Companies Act 2006, which provides that a limited company may acquire its own fully paid shares otherwise than for valuable consideration, means "otherwise than for valuable consideration provided by/moving from/paid for by the company". It was noted that the High Court held that in so far as an agreement for an acquisition by a company of its own shares provided that the purchase price for the shares was to be paid by a third party, no valuable consideration for the shares was being provided by the company. It was noted that, therefore, the acquisition fell within the exception in section 659(1) and was not prohibited by section 658(1) Companies Act 2006. As a consequence, it did not matter that the judge found that the buyback of the company's shares would not meet the conditions for an off-market purchase of own shares set out in the Companies Act 2006 as the exception in section 659(1) applied.
- (d) *Carlos Sevilleja Garcia v Marex Financial Limited [2018] EWCA Civ 1468*. The Committee noted that the Court of Appeal held that the rule against reflective loss should apply to all creditors of a company, whether they are shareholder creditors or non-shareholder creditors. It was noted that considerations that justify the rule, including no double recovery and avoiding prejudice to the other creditors, are equally applicable to all creditors. The Committee also noted that the judgment considers in detail how the rule against reflective loss has developed.
- (e) *AAA & Others v (1) Unilever PLC (2) Unilever Tea Kenya Limited [2018] EWCA Civ 1532*. The Committee noted that this is another Court of Appeal decision that considers when a parent company will owe a duty of care in tort to claimants for the acts or omissions of its subsidiary. It was noted that the Court of Appeal held that a parent company will only be found to owe a duty of care in relation to an activity of its subsidiary if ordinary, general principles of the law of tort regarding the imposition of a duty of care are satisfied. The Committee noted the Court's view that there is no special doctrine in the law of tort for a parent company duty of care and that the Court emphasised that whilst *Chandler v Cape Plc [2012] EWCA Civ 525* contains helpful guidance, that case does not lay down a separate test, distinct from the general principle of the law of tort, for the imposition of a duty of care in relation to a parent

company. It was noted that the cases where a parent company might owe a duty of care will usually fall into two types: (i) where the parent has in substance taken over the management of the relevant activity of the subsidiary in place of the subsidiary's own management; or (ii) where the parent has given relevant advice to the subsidiary about how it should manage a particular risk. The Committee noted that the Court of Appeal held that this case did not fall into either category.

6. **Any other business**

- 6.1 The Committee noted the request for nominations for the City of London Law Society Lifetime Achievement and were asked to submit any nominations via the process set out in an email previously circulated to the Committee by the Secretary.
- 6.2 The Committee discussed whether it should advertise for an additional member following expressions of interest from other firms. The Chairman expressed a view that whilst the Committee was relatively large in number, and he was pleased to see an increasing number of members taking the lead on the various working groups/consultation responses, he felt that, on balance, the Committee could support one further member. After discussion it was agreed to advertise a vacancy in the autumn.

2 October 2018