

THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 302nd meeting
at 9:00 a.m. on 25th March 2020
by telephone

1. **Welcome and apologies**

Attending: David Pudge (Chairman), John Adebayi, Mark Austin, Sam Bagot, Adam Bogdanor, Edward Baker, Lucy Fergusson, Nicholas Holmes, Chris Horton, Vanessa Knapp, Stephen Mathews, Jon Perry, Caroline Rae, Patrick Sarch, Richard Spedding, Patrick Speller, Liz Wall, Martin Webster, Richard Ufland, Victoria Younghusband and Kath Roberts (Secretary).

Apologies: Robert Boyle, Murray Cox.

The Chairman welcomed Edward Baker from Simmons & Simmons to the Committee. The Chairman extended his thanks to Lucy Fergusson for chairing the January 2020 Committee meeting in his absence.

2. **Approval of minutes**

The Chairman reported that a draft version of the minutes of the meeting held on 29 January 2020 was circulated to members on 18 March 2020 and asked members to send any comments on the minutes to the Secretary.

3. **Matters arising**

- 3.1 *Government written statement on the Law Commission report on electronic execution of documents.* The Chairman reported that on 3 March 2020, the Government published a written statement supporting the conclusions and recommendations in the Law Commission report on electronic execution of documents.

It was noted that the written statement agreed with the Law Commission report's conclusion that primary legislation is not required to reinforce the legal validity of electronic signatures. Members also noted that the statement accepts the Law Commission's recommendation that an industry working group be convened to consider both practical and technical issues associated with the electronic execution of documents, and confirms that the group will be asked to consider the question of video witnessing of electronic signatures.

A Committee member raised concerns that on a recent transaction another City law firm had suggested that the Law Society/CLLS guidance on e-signing was no longer up to date on the basis that a recent case, *Bioconstruct GmbH v Winspear and*

another,¹ casts doubt over whether deeds can be signed electronically. The meeting considered this case and its commentary on the *Mercury* case². In the *Bioconstruct* case, the defendant had applied his signature (which was not witnessed) to an earlier draft of a deed of guarantee and not the final version. It was held that the deed was invalid as the requirements for executing a deed had not been complied with. The Committee noted that, in light of the judgment in the *Mercury* case, pre-signed signature pages could not be attached to deeds and that when carrying out a virtual signing the "whole document" requirement had to be complied with. Members of the Committee were in agreement that this case was consistent with the judgment in the *Mercury* case.

Members agreed that it should be formally minuted that the Committee was of the view that the *Bioconstruct* case did not change the position set out in the CLLS/Law Society guidance on the execution of deeds electronically.

Members were asked to discuss the Committee's views with colleagues and to contact Liz Wall and the Secretary after the meeting if their firms took a different view. No dissenting views have been subsequently notified.

- 3.2 *HM Treasury consultation on the transposition of the Fifth Money Laundering Directive*. It was noted that on 23 January 2020, HM Treasury published a response to its consultation on the transposition of the Fifth Money Laundering Directive (**5MLD**). The Chairman reported that the provisions in 5MLD have been transposed into UK law through the Money Laundering and Terrorist Financing (Amendment) Regulations 2019 which amend the Money Laundering, Terrorist Financing, Transfer of Funds (Information on the Payer) Regulations 2017 and that the amendments came into force on 10 January 2020.
- 3.3 *Expansion of the Trust Registration Service*. It was noted that on 21 February 2020, the Committee submitted its response to HMRC/HM Treasury's consultation on 5MLD and Trust Registration Service, which was published on 24 January 2020.

4. **Discussions**

- 4.1 *Insider lists*. The Chairman reported that the GC100 MAR guidelines on the requirement to maintain insider lists were updated on 31 October 2019 to include an additional statement that the requirement to create and maintain an insider list applies whenever a company has inside information, even if that information is disclosed as soon as possible. The Committee discussed whether this requirement should apply where a company has realised/decided something is inside information and has made a public announcement of the relevant information via a RIS as soon as possible (i.e. within a few hours/by the following day).
- 4.2 *FCA proposals to improve climate-related disclosures*. The Chairman reported that on 6 March 2020, the FCA issued a press release announcing a consultation on proposals to enhance climate-related disclosures by listed issuers and clarification of existing

¹ [2020] EWHC 7 (QB)

² *R (on the application of Mercury Tax Group and another) v HMRC* [2008] EWHC 2721

disclosure obligations (CP20/3). It was noted that the proposed rule will require all commercial companies with a premium listing either to make climate-related disclosures consistent with the approach set out by the Taskforce on Climate-related Financial Disclosures or explain why not. It was further noted that the FCA intends to consult on extending this rule to a wider scope of issuers. It was reported that the consultation was due to close on 5 June 2020, but that this has been extended to 1 October 2020. The Chairman reported that Chris Horton of Latham & Watkins was leading a working group to respond to this consultation. Chris confirmed that the intention is for a response to be submitted jointly with the CLLS Planning & Environmental Law Committee and members who were interested in joining the working group were asked to contact Chris and the Secretary after the meeting.

- 4.3 *Consultation on expanding the dormant assets scheme.* The Chairman reported that on 21 February 2020, the Department for Digital, Culture, Media & Sport issued a press release announcing the launch of a consultation on expanding the dormant assets scheme to include new financial assets. It was noted that the government is consulting on expanding the scheme beyond bank and building society accounts to include assets from the insurance and pensions, investment and wealth management and securities sectors and that the assets proposed to be within the scope of the expansion include dormant share proceeds, dormant distributions and proceeds from investment assets and other dormant security distributions. It was noted that the consultation originally closed on 16 April 2020 but that the deadline has been extended to 16 July 2020. The Chair reported that Robert Boyle of MacFarlanes was leading a working group to respond to this consultation and that the working group had held an initial call to discuss the consultation paper. It was noted that whilst, in principle, the working group had no objection to the extension of the scheme, there were some technical issues regarding which companies should be covered by the scheme – currently public limited companies listed in the UK are to be covered but not private limited companies. It was noted that Robert was preparing an updated draft response which would be circulated to the working group and then to the Committee in due course.
- 4.4 *Coronavirus and AGMs.* The Committee noted the publication on 17 March 2020, by the ICSA: The Chartered Governance Institute of a press release announcing the publication of guidance about company AGMs and the impact of Covid-19. It was noted that since the publication of that note, the government had introduced restrictions on the operation of certain businesses, which was followed by the imposition of "stay at home" restrictions on 23 March 2020. The Chairman reported back to the meeting on the work of the AGM working group which was preparing a paper to be submitted to BEIS on behalf of the Committee setting out a series of proposals in relation to the Government's management of the impact of the Covid-19 situation on meetings and communications.
- 4.5 *PMB No. 27 – Coronavirus update.* The Chairman reported that on 17 March 2020, the FCA published PMB27 in which it provides key commentary for issuers and market participants in light of the coronavirus pandemic. See discussion item 4.6 below for further information.
- 4.6 *CLLS CLC/FCA Primary Markets Liaison Group.* The Chairman reported that on 19 March 2020, at the request of the FCA, the FCA Primary Markets Liaison Group and the FCA had met by telephone. The purpose of the call was to take views on the

practical challenges facing advisers and issuers and to discuss the views expressed by the FCA in PMB27.

4.7 *Data trusts.* The Chairman reported that he had received a request from the Law Society for assistance regarding potential ownership structures for data generated and disseminated via the world wide web. The Committee noted that it might be possible to work with the CLLS Data Law Committee on structures for data trusts but agreed to hold this item over for discussion at another meeting.

4.8 *BEIS and BEIS Committee requests for reform topics / future inquiries.* The Chairman reported that on 11 March 2020, BEIS issued a press release on an open consultation inviting businesses and the public to suggest how regulation could be improved to help the government ensure that regulation in the UK is sensible and proportionate. It was noted that BEIS had indicated that it was particularly interested in the needs of small businesses. The meeting noted that the consultation closed on 11 June 2020 and members were asked to provide any thoughts on matters that might be considered by BEIS to the Secretary.

In addition, it was reported that on 5 March 2020, the BEIS Committee invited the public to submit suggestions on the issues the BEIS Committee should investigate over the course of the current Parliament, including issues relating to business, corporate governance and climate change. It was noted that the deadline to submit inquiry ideas was 31 March 2020.

4.9 *Preliminary financial statements:* The Chairman reported that on 21 March 2020, the FCA wrote to listed companies asking them to observe a moratorium on the publication of preliminary financial statements for at least two weeks and that this was followed by the publication by the FCA of a technical Q&A. It was noted that in the announcement, the FCA confirmed that it is in talks with the FRC and the PRA about a package of measures aimed at ensuring companies take the necessary time in these uncertain times to prepare appropriate disclosures and address current practical challenges and the three bodies intend to announce details shortly.

The Committee noted the general concerns of auditors and issuers regarding the sign off of year-end financial statements due, in part, to the difficulties auditors were having signing off accounts on a going concern basis in light of the uncertainties created by the global pandemic. It was noted that issuers were being asked to provide additional comfort to their auditors to assist them in being able to sign off on the accounts.

4.10 *Audit reform:* It was reported that on 20 March 2020, the BEIS Committee had issued a Call for Evidence to develop a roadmap for implementing reform of the UK's audit industry. It was noted that this call for evidence follows the publication of three independent reviews of the UK's audit industry over the last couple of years: the Brydon Review on the nature of audit, the Kingman Review on the regulation of the audit industry and the Competition and Markets Authority review on competition, conflicts of interest, oversight and resilience in the audit market. It was noted that the publication of these reports was followed by the publication by the BEIS Committee in April 2019 of the 'Future of Audit' report.

It was reported that later this year, the BEIS Committee will take oral evidence from stakeholders on their response to the various reviews to examine how these results can deliver reform to the UK audit industry. Members noted that the provisional closing date for the submission of written evidence is Monday 4 May 2020 but this date will be kept under review.

5. Recent developments

The Committee noted the following additional items in sections 5.1 to 5.9 below which were set out in the agenda but which time did not allow them to consider.

5.1 Company law

- (a) *Companies House coronavirus guidance.* On 17 March 2020, Companies House issued coronavirus guidance for its customers, employees and suppliers. The guidance states that the Companies House London office is closed to the public and all mail must be sent directly to the Cardiff office. It also states that all same day services have been suspended until further notice.
- (b) *Companies House advice on coronavirus and late filing of accounts.* On 11 March 2020, Companies House issued a press release advising that if coronavirus has affected a company and the company needs more time to file its accounts, the company should act before its filing deadline.

5.2 Corporate governance

- (a) *ICGN viewpoint on corporate governance and investor perspectives relating to coronavirus.* On 12 March 2020, the International Corporate Governance Network (ICGN) published a viewpoint that explores the corporate governance and investor perspectives relating to coronavirus.
- (b) *ISS proxy climate voting guidelines.* On 9 March 2020, Institutional Shareholder Services Inc. (ISS) issued a press release announcing the launch of new international climate proxy voting guidelines that provide a framework for investors to exercise their voting rights with reference to their portfolio companies' climate disclosures and performance.
- (c) *IA Good Stewardship Guide 2020.* On 5 March 2020, the Investment Association (IA) issued a press release on investors demanding companies to manage climate change risk ahead of the 2020 AGM season, which contains a link to the IA Good Stewardship Guide 2020. The guide outlines the IA's expectations of companies on issues including climate change, executive pay, audit quality and diversity.
- (d) *IA's Public Register.* On 20 February 2020, the IA issued a press release stating that in 2019 158 FTSE All-Share companies were added to the IA's Public Register, which tracks when there is a vote of 20% or more against a shareholders' resolution. The press release also states that 62 companies appeared on the IA's Public Register in 2019 for pay-related resolutions and the opposition to individual director re-election also remained a key theme.

- (e) *PLSA Stewardship Guide and Voting Guidelines 2020*. On 21 February 2020, the Pensions and Lifetime Savings Association (**PLSA**) issued a press release announcing the publication of its Stewardship Guide and Voting Guidelines 2020, along with its voting recommendations summary. The press release states that the guidelines have a toughened-up section on climate change and sustainability, reflecting pension schemes' heightened focus on ESG and the growing number of climate-related resolutions tabled at AGMs.
- (f) *Revised ICSA guidance on terms of reference*. ICSA has published revised guidance notes on terms of reference for audit committees, remuneration committees and nomination committees. The guidance notes have mainly been revised to reflect the UK Corporate Governance Code published in July 2018.
- (g) *Women on boards*. On 8 February 2020, BEIS issued a press release announcing that a third of all board positions in the UK's FTSE 100 companies are now held by women (ten months ahead of the December 2020 target). However, the press release states that further work is needed for many FTSE 100 companies individually, and for the FTSE 250 overall to meet the 33% target, as it currently sits at 29.5%. On 10 February 2020, the FRC responded to BEIS' update by stating in a press release that it expects companies to clearly set out how they plan to develop their diversity pipeline with much improved reporting, including progress towards any measurable targets.
- (h) *Ethnic diversity of UK boards – The Parker Review*. On 5 February 2020, BEIS issued a press release on the 2020 update report from The Parker Review. This independent review considers how to improve the ethnic and cultural diversity of UK boards to better reflect their employee base and the communities they serve. The report sets out objectives and timescales to encourage greater diversity, and provides practical tools to help business leaders to address the issue. On the same date, the FRC issued a press release stating that most UK companies' approach to board ethnic diversity is unsatisfactory.
- (i) *IA shareholder priorities for listed companies*. On 5 February 2020, the IA issued a press release on the publication of its shareholder priorities for 2020 for listed companies. The report outlines four areas that IA members asked the IA to prioritise to drive long term value – responding to climate change, audit quality, stakeholder engagement and diversity. The report outlines investor expectations on each issue, the actions the IA is taking to improve them and the approach IVIS will be taking during the year to assist members in monitoring the improvements companies are making.

5.3 Reporting and disclosure

- (a) *European Lab on climate-related reporting*. In March 2020, the European Lab on climate-related reporting published a report on how to improve climate-related reporting, along with two supplement reports. Supplement 1 contains detailed findings from the project's general review of climate-related disclosures. Supplement 2 contains the project's detailed findings from an in-

depth review of scenario analysis reporting. The main document outlines the key messages and synopsis of the findings, based on the content of the two supplements. A summary has also been published.

- (b) *FRC assesses company and auditor responses to climate change.* On 20 February 2020, FRC issued a press release announcing a major review of how companies and auditors assess and report on the impact of climate change. The press release states that the FRC will review the extent to which UK companies and auditors are responding to the impact of climate change on their business to ensure reporting requirements are being met.
- (c) *Consultation on the NFRD.* On 20 February 2020, the European Commission issued a press release announcing the launch of a consultation on the review of the non-financial reporting directive (**NFRD**). This follows the Commission's commitment to review the NFRD in 2020 as part of the strategy to strengthen the foundations for sustainable investment. The consultation closes on 14 May 2020.
- (d) *FRC advice on coronavirus.* On 18 February 2020, the FRC issued a press release announcing the publication of advice to companies and auditors on disclosure of risks and other reporting consequences arising from the emergence and spread of the coronavirus. On 16 March 2020, the FRC issued a press release announcing that it has issued updated guidance for auditors which may be facing practical difficulties in carrying out audits as a result of coronavirus.
- (e) *ESMA amends guidelines to further harmonise enforcement of financial information by NCAs.* On 4 February 2020, the European Securities Markets Authority (**ESMA**) issued a press release announcing the publication of an amended version of its guidelines on enforcement of financial information, along with a report containing an explanation of the amendments and a track-changes version of the main amendments to the guidelines. The guidelines apply to national competent authorities' (**NCAs**) enforcement of financial information which issuers, listed on regulated markets, are required to publish under the Transparency Directive.

5.4 **Equity capital markets**

- (a) *Updated ESMA Q&As on the Prospectus Regulation.* On 18 February 2020, ESMA issued a press release announcing the publication of an updated version of its Q&As on the Prospectus Regulation. Two new Q&As have been added to provide clarification on the number of additional pages that can be included in a summary: (i) where there is more than one guarantor; and (ii) relating to several securities, as per Article 7(7) of the Prospectus Regulation.
- (b) *AFME selling restrictions for equity.* On 9 February 2020, AFME published an updated version of its model equity selling restrictions for use following the UK's withdrawal from the European Union until the end of the transitional period.

5.5 **MAR**

- (a) See item 4.1.

5.6 **Accounting**

- (a) *Audit, accounting and corporate reporting during the transition period.* On 13 February 2020, the FRC and BEIS published joint letters for accountants and auditors with information regarding auditing, accounting and corporate reporting standards during the transition period following the UK's exit from the European Union.

5.7 **Takeovers**

- (a) *Takeover Panel coronavirus statement.* On 17 March 2020, the Takeover Panel issued a statement on coronavirus, which states that the Executive has decided, as a precautionary step, to implement a policy of working remotely for the immediate future.
- (b) *New Takeover Panel checklists.* On 5 February 2020, the Takeover Panel published two new checklists: (i) revised offer document/offeree board circular checklist; and (ii) revised scheme circular checklist. These are on the Takeover Panel checklists webpage.

5.8 **Miscellaneous**

- (a) *EU merger control – impact of coronavirus.* On 16 March 2020, the European Commission issued a notice regarding special measures due to coronavirus. The notice states that, while a number of measures have been put in place to ensure business continuity in the enforcement of the EU Merger Regulation, due to complexities and disruptions caused by the coronavirus, companies are encouraged to delay merger notifications originally planned until further notice, where possible.
- (b) *TI UK report on Open Business.* On 12 March 2020, Transparency International UK (**TI UK**) issued a press release announcing the publication of a new report titled 'Open business: Principles and guidance for anti-corruption corporate transparency' (along with a summary of the report). The press release states that the report sets a new bar for disclosures in anti-corruption and governance and provides an aspirational but achievable roadmap to better corporate practice.
- (c) *ESMA statement on coronavirus.* On 11 March 2020, ESMA issued a public statement in which it makes recommendations to financial market participants for coronavirus impact.
- (d) *Government coronavirus guidance for UK businesses.* On 9 March 2020, the Department for International Trade and UK Export Finance published coronavirus guidance for UK businesses.
- (e) *FCA coronavirus statements.* On 4 March 2020, the FCA issued a statement on coronavirus. It states that the FCA, in conjunction with the Bank of

England and HM Treasury, is working closely with the financial services sector to ensure it is responding effectively to the coronavirus outbreak. On 17 March 2020, the FCA issued information for firms on coronavirus response.

- (f) *Climate contract playbook*. On 26 February 2020, The Chancery Lane Project published the first edition of the climate contract playbook which contains draft contractual clauses to address the issue of climate change. The clauses cover a wide variety of issues including green investment obligations in investment documentation to allow investors to assess climate risks, Paris Agreement compliant company objects clause for use in a company's articles of association and board minutes incorporating consideration of climate change factors. It also lists ideas in the pipeline, including drafting a climate change section for a standard due diligence questionnaire.
- (g) *CMA's role post-Brexit*. On 28 January 2020, the Competition and Markets Authority (CMA) issued a press release on the CMA's role post-Brexit, along with guidance on the functions of the CMA under the Withdrawal Agreement and an explanatory note. The guidance explains: (i) how Brexit affects the CMA's powers and processes for competition law enforcement, merger control and consumer protection law enforcement during the transition period, towards the end of that period, and after it ends; and (ii) the treatment of 'live' cases, which are those cases that are being reviewed by the European Commission or the CMA during and at the end of the transition period.

5.9 Cases

- (a) *Guest Services Worldwide Limited v David Shelmerdine [2020] EWCA Civ 85*. The Court of Appeal had to construe restrictive covenants in a shareholders' agreement; more specifically whether the covenants given by "Employee Shareholders" continued to apply after cessation of employment where the person remained a shareholder. Applying usual principles of construction, it was held that the covenants did continue to apply as the agreement expressly provided that they applied whilst a person was a shareholder and for a period of 12 months after the person ceased to be a shareholder. The case is a useful reminder that the courts are less likely to interfere with restrictive covenants in a shareholders' agreement when compared to an employment contract.
- (b) *(1) Stephen John Hunt (As Liquidator) (2) System Building Services Group Limited – In Liquidation v (1) Mr Brian Michie (2) System Building Services Limited [2020] EWHC 54 (Ch)*. The High Court held that, notwithstanding the limited case law and commentary in this area, the general duties of a director of a company set out in sections 171 to 177 of the Companies Act 2006 survive the company's entry into administration and creditors' voluntary liquidation.
- (c) *Kabab-Ji S.A.L. v Kout Food Group [2020] EWCA Civ 6*. Following the Supreme Court decision in *Rock Advertising Limited v MWB Business Exchange Centres Limited [2018] UKSC 24*, the Court of Appeal held that a third party to a contract containing a "No Oral Modification" (NOM) clause

did not become a party to the contract unless the *Rock Advertising* test for estoppel was satisfied i.e. "(i) *there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself*". It also held that there is little difference between the UNIDROIT Principles of International Commercial Contracts 2016 and the English law approach to NOM clauses through the doctrines of estoppel and principles of good faith and fair dealing could not be used to override the clear wording of this NOM clause to a greater extent than identified in *Rock Advertising*.

6. **Any other business**

There was no other business.

7 May 2020