

THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 326th meeting
at 9:00 a.m. on 20th March 2024

1. Welcome and apologies

In attendance: John Adebiyi (*Skadden Arps Slate Meagher & Flom (UK) LLP*); Danette Antao (alternate for Tom Brassington, *Hogan Lovells International LLP*); Adam Bogdanor (*Bryan Cave Leighton Paisner LLP*); Richard Burrows (*Macfarlanes LLP*); Jamie Corner (*Simmons & Simmons LLP*); Lucy Fergusson (*Linklaters LLP*); Chrissy Findlay (*Pinsent Masons LLP*); Nicholas Holmes (*Ashurst LLP*); Vanessa Knapp (*Independent*); Stephen Mathews (*Allen & Overy LLP*); Juliet McKean (Secretary, *Clifford Chance LLP*); Ziyad Nassif (*Freshfields Bruckhaus Deringer LLP*); John Papanichola (*Slaughter and May*); James Parkes (*CMS Cameron McKenna Nabarro Olswang LLP*); Ben Perry (*Sullivan & Cromwell LLP*); Jon Perry (*Norton Rose Fulbright LLP*); Johannes Poon (alternate for Chris Horton, *Latham & Watkins LLP*); David Pudge (Chair, *Clifford Chance LLP*); Allan Taylor (*White and Case LLP*); Liz Wall (*Allen & Overy LLP*); Simon Witty (*Davis Polk & Wardwell London LLP*); and Victoria Younghusband (*Charles Russell Speechlys LLP*).

Apologies: Tom Brassington (*Hogan Lovells International LLP*); Kevin Hart (*City of London Law Society*); Chris Horton (*Latham & Watkins LLP*); Caroline Rae (*Herbert Smith Freehills LLP*); Lucy Reeve (*Linklaters LLP*); Matthew Rous (*City of London Law Society*); Richard Spedding (*Travers Smith LLP*); and Simon Wood (*Addleshaw Goddard LLP*).

The Chair reminded members of the Committee that John Adebiyi would be retiring from Skadden Arps Slate Meagher & Flom (UK) LLP in March and, consequently, from the Committee. The Chair also informed members of the Committee that John Papanichola would be retiring from Slaughter and May in March and, consequently, from the Committee. The Chair thanked both John Adebiyi and John Papanichola for their contributions during their time on the Committee.

2. Approval of minutes

A draft version of the minutes of the meeting held on 2 February 2024 was circulated to members on 26 February 2024. The Chair asked members to send any comments on the minutes to the Secretary by the middle of the following week, otherwise the minutes would be considered settled.

3. Update on CLLS matters

Colin Passmore, Chair of the CLLS, provided members of the Committee with an update on the activities of the CLLS and its engagement with other legal and

Government organisations and an update on the priorities of the CLLS for the next year to 18 months.

4. **Matters arising**

- 4.1 *Certain company/LLP law reforms in ECCTA brought into force.* The Secretary reported that the Economic Crime and Corporate Transparency Act 2023 (Commencement No. 2 and Transitional Provision) Regulations 2024, made on 29 February 2024, brought into force on 4 March 2024 the first set of company law reforms contained in the Economic Crime and Corporate Transparency Act 2023 (ECCTA), including the ones that Companies House announced would be brought into force in March 2024 in its blogs published in January. The Secretary noted that these changes include the new requirements for a company to have an appropriate registered office address and appropriate registered email address, the stricter false statement offences when delivering information to Companies House and the greater powers of the Registrar. The Secretary noted that the Registrar has already used its new powers to remove material from, and annotate, the public register to deal with the recent widespread issue of fraudulently filed MR04s. The Secretary also reported that the Limited Liability Partnerships (Application of Company Law) Regulations 2024, also made on 29 February 2024, brought into force on 4 March 2024 changes to the law governing LLPs to ensure that certain of the company law reforms made by ECCTA also apply to LLPs. It was noted that the Registrar (Annotation, Removal and Disclosure Restrictions) Regulations 2024 made on 17 January 2024 also came into force on 4 March 2024.

It was noted that, in light of the above, Companies House published various new and updated guidance and forms on 4 March 2024, including a new form RP08 to apply to the Registrar to remove from the public register a document (or information within a document) which was not properly delivered to Companies House and new guidance on how to remove information that should never have been delivered to Companies House.

The Secretary also noted that, as expected, the identity verification reforms introduced by ECCTA have not yet come into force. The Secretary further noted that this means that the company law reforms in ECCTA that are linked to the identity verification reforms have also not yet come into force, such as the abolition of certain company registers, the new prohibitions on directors acting and the change to the director disqualification regime that will result in grounds for director disqualification including where a director has received multiple fines, under the new civil financial penalties regime, for breaches of Companies House filing requirements and the new identity verification requirements (i.e., three breaches or more over a five year period).

The Secretary also reported that on 19 February 2024 a draft of the Economic Crime and Corporate Transparency Act 2023 (Financial Penalty) Regulations 2024 was published, along with an explanatory memorandum. The Secretary noted that these regulations will allow the Registrar to impose a financial penalty on a person if satisfied beyond reasonable doubt that they have committed misconduct amounting to a "relevant offence" under the Companies Act 2006 (CA 2006) (as defined in new section 1132A CA 2006 as inserted by ECCTA) and that these regulations are drafted to come into force on 2 May 2024 (if made on or before 1 May 2024), otherwise they will come into force on the day after they are made.

It was noted that the imposition of a fine is an alternative to pursuing criminal prosecution through the courts. The Secretary noted that, under the new regime, where the Registrar suspects that a person has committed a relevant offence, it may issue a warning notice giving the person at least 28 days to make representations about their conduct. If the Registrar is satisfied beyond reasonable doubt that the person has committed a relevant offence at the end of the period in the warning notice, it may issue a penalty notice to that person, giving them 28 days' notice to pay the penalty. It was further noted that a person may appeal to the court against the penalty notice.

The Secretary noted that the maximum fine that can be imposed is £10,000, however, the Secretary reiterated the fact that, once the relevant provisions in ECCTA are brought into force, grounds for director disqualification will include where a director has received multiple fines for certain CA 2006 breaches under the new civil financial penalties regime.

It was further noted that the Government has republished its ECCTA factsheets and also published Explanatory Notes in relation to ECCTA. See also the items on ECCTA in section 6.1 below.

- 4.2 *Non-financial reporting reform.* The Chair reported that on 19 March 2024 the Government has announced that it intends to lay legislation this summer to introduce the first set of changes to non-financial reporting as part of its commitment to make the non-financial reporting framework simpler. The Chair noted that the first set of changes will lift the monetary thresholds that determine company size for reporting requirements.

5. **Discussions**

- 5.1 *IoD Commission code of conduct for directors.* The Chair updated members of the Committee on a meeting between certain members of the Committee and the IoD Commission held on 22 February 2024 to discuss the development by the IoD of a new code of conduct for directors.
- 5.2 *FCA consultation on listing regime reforms.* The Committee noted that on 16 February 2024, the Joint Prospectus and Listing Rules Working Group, led by Nicholas Holmes (NH), submitted a response to the LR 8 proposals regarding sponsor competence in CP23/31 (Primary Markets Effectiveness Review: Feedback to CP23/10 and detailed proposals for listing rules reforms).

It was noted that on 7 March 2024 the FCA announced the publication of a draft of UK Listing Rules Instrument 2024 which contains the second tranche of draft rules alongside the original tranche 1 drafting to form a complete draft instrument for the new UKLRs. It was noted that the FCA states that this updated draft instrument supersedes Appendix 1 of CP23/31 and should be taken as the full and complete draft UKLRs for consultation purposes. It was noted that the FCA has published a separate draft instrument that contains proposed consequential changes to other FCA Handbook sourcebooks. It was also noted that the CP23/31 closing date of 22 March 2024 remains unchanged for comments on the full set of policy positions and the tranche 1 draft rules, however, the closing date for the additional tranche 2 draft instrument material and the consequential changes instrument is 2 April 2024. It was further noted that the FCA is

in the process of reviewing and updating Technical and Procedural Notes and expects to consult on these in two Primary Market Bulletins during April and June.

Members of the Committee also noted that FTSE Russell published a press release on 15 March 2024 that states that it currently anticipates that all premium listed companies that will automatically move onto the new ESCC once the LR reforms are implemented will retain inclusion in the FTSE UK Index Series. It was noted that the free float thresholds would remain the same.

- 5.3 *FCA consultation on improving the transparency around enforcement cases.* The Chair reported that on 27 February 2024 the FCA announced the publication of a consultation on its Enforcement Guide and publicising enforcement investigations. The Chair reported that the FCA is consulting on plans to be more transparent when an enforcement investigation is opened against an issuer. It was noted that under the proposals the FCA would also publish updates on investigations as appropriate and be open about when cases have been closed with no enforcement outcome. The Chair informed the Committee that the FCA proposes to name companies at a much earlier stage of an FCA enforcement investigation process. The Chair noted that this proposal is not meant to apply to individuals, however, it may result in speculation about whether individuals at the named company are involved depending on the facts. The Chair also noted that currently the FCA only discloses an investigation and names the subject of it in 'exceptional circumstances'. The Chair reported that under the proposals the FCA would publicly announce that it has opened an enforcement investigation into a company if the FCA considers that it is in the public interest to do so. The Chair reported that factors which the FCA considers would indicate that an announcement would be in the public interest include the likelihood that it would enable the protection of the interests of consumers or would deter future breaches of FCA rules. The Chair noted that this may result in the FCA disclosing a greater number of investigations at an earlier stage and at a time when the company is not yet required to disclose the FCA investigation under MAR. It was noted that the consultation closes on 16 April 2024.
- 5.4 *Consultation on PISCES.* NH reported that on 6 March 2024 HMT announced the publication of a consultation on the proposed Private Intermittent Securities and Capital Exchange System (**PISCES**). NH explained that the new platform will allow private companies to trade their securities in a controlled environment and on an intermittent basis (rather than on a permanent basis). NH noted that PISCES will allow a limited form of secondary trading of shares in private companies, rather than capital raising, and noted that it is likely that only institutional and professional investors will be able to buy shares on PISCES. NH also noted that firms that wish to operate PISCES under the modified legislation in the sandbox will first need to apply to the FCA. It was noted that the proposals for PISCES incorporate elements from public markets, such as those that offer multilateral trading, and elements from private markets that provide greater discretion on what company disclosures should be made public. NH noted that the consultation closes on 17 April 2024 and that HMT is aiming to establish PISCES by the end of this year. NH noted that the Joint Prospectus and Listing Rules Working Group will be preparing a response to this consultation and that he would update members of the Committee on the response at the meeting of the Committee to be held in May.
- 5.5 *FRC policy update - launch of the UK Stewardship Code 2020 review.* The Chair reported that on 27 February 2024 the FRC published a policy update with further

details on its review of the UK Stewardship Code 2020 to ensure it supports growth and the UK's competitiveness. It was noted that as part of the review process the FRC is seeking views from all stakeholders on whether the Stewardship Code, in its current format, is being used by asset managers, asset owners and other signatories to the Stewardship Code in a manner that drives better stewardship outcomes from engagement with issuers across all asset classes. It was also noted that the policy update states that the first phase of the review will be a targeted outreach, focussed around the four main groups affected by the Stewardship Code's principles and application, those being issuers, asset managers, asset owners and service providers, on the topics outlined in the policy update. It was further noted that the FRC will then use the issues raised in the targeted outreach to inform a public consultation, which the FRC intends to launch after the 2024 AGM voting season during the summer months, and that the FRC expects to publish a revised Stewardship Code in early 2025. The Chair noted that the Committee should consider whether to respond to this forthcoming consultation in due course.

6. Recent developments

The Chair commented on the cases in section 6.9. The Committee noted the following additional items in sections 6.1 to 6.8 which time did not allow them to consider in the meeting, other than item 6.8(e).

6.1 Company law

- (a) *Ban on corporate directors.* The Small Business, Enterprise and Employment Act 2015 (Commencement No. 8) Regulations 2024 were made on 29 February 2024. These regulations brought into force section 87 of the Small Business, Enterprise and Employment Act 2015 on 4 March 2024 for the purpose of bringing into force section 156B CA 2006 which contains a power for the Secretary of State to make provision in regulations for cases in which a person who is not a natural person may be appointed a director of a company. The Government's ECCTA factsheet on identity verification and authorised corporate service providers contains information on the "principle based" exception to the ban on corporate directors, which is in line with the policy position set out in the Corporate Transparency and Register Reform White Paper published in February 2022.
- (b) *New processes for rectification of registered addresses.* The Registered Office Address (Rectification of Register) Regulations 2024 (see also the explanatory memorandum), The Service Address (Rectification of Register) Regulations 2024 (see also the explanatory memorandum) and The Principal Office Address (Rectification of Register) Regulations 2024 (see also the explanatory memorandum) came into force on 4 March 2024. These regulations, made under ECCTA, allow the Registrar to change: (i) a company's registered office address; (ii) the service address of a director, secretary or a registrable PSC/RLE; and (iii) the principal office address of a corporate director/secretary, a registrable RLE or a registrable PSC who falls within section 790C(12) CA 2006, respectively.

- (c) *Notice of Company Names Tribunal.* On 20 February 2024, the Company Names Tribunal issued a notice regarding changes to the CA 2006 made by ECCTA that impact the Company Names Tribunal.
- (d) *Changes to Companies House fees.* The Registrar of Companies (Fees) (Amendment) Regulations 2024 were made on 14 February 2024 and come into force on 1 May 2024. These regulations amend existing fees and introduce new fees following amendments made to section 1063 CA 2006 by ECCTA. Companies House has published a list of all new Companies House fees from 1 May 2024.
- (e) *Other ECCTA regulations.* On 1 February 2024, a revised draft of the Economic Crime and Corporate Transparency Act 2023 (Consequential, Supplementary and Incidental Provisions) Regulations 2024 was published, which supersedes the draft that was laid before Parliament on 10 January 2024.

6.2 Corporate governance

- (a) *Update report from the Parker Review.* On 11 March 2024, the Parker Review Committee published an update report which includes the results of its latest voluntary census on the ethnic diversity of the boards and senior management of FTSE 350 companies and large UK private companies (see also the EY press release).
- (b) *Pre-Emption Group's annual monitoring report (2022 - 2023).* On 5 March 2024, the Pre-Emption Group announced the publication of its first report monitoring the use of its updated statement of principles on the disapplication of pre-emption rights for UK listed companies. The report examines the implementation of the statement of principles by FTSE 100 and FTSE 250 companies for AGMs held between 4 November 2022 and 31 July 2023.
- (c) *FTSE Women Leaders Review progress update.* On 27 February 2024, the FTSE Women Leaders Review announced the publication of its latest report on achieving gender balance on FTSE boards and in their leadership teams.
- (d) *IA letter to Remuneration Committee Chairs.* On 26 February 2024, the Investment Association announced the publication of its letter to Remuneration Committee Chairs of FTSE 350 companies. In the letter the IA outlined how investors will engage with investee companies on executive pay in the 2024 AGM season. The letter has been sent ahead of publication of the IA's updated Principles of Remuneration later this year, as the IA is conducting a fundamental review of these principles to ensure they reflect current market thinking and are simplified, as well as providing the flexibility for companies to adapt their pay structures to best suit their business and strategy.
- (e) *FRC announces successful signatories to UK Stewardship Code.* On 21 February 2024, the FRC announced the successful signatories to the UK Stewardship Code following the latest round of applications. The FRC has also published a short document that collates previously published guidance to help signatories and applicants to the UK Stewardship Code prepare fair, balanced and understandable reports in 2024.

- (f) *PLSA Stewardship and Voting Guidelines 2024*. On 15 February 2024, the Pensions and Lifetime Savings Association announced the publication of its Stewardship and Voting Guidelines 2024. A summary of the guidelines has also been published.
- (g) *CGI terms of reference for the sustainability or ESG committee*. On 31 January 2024, the Chartered Governance Institute UK & Ireland announced the publication of a model set of terms of reference for a sustainability or ESG committee. The guidance note sets out how to ensure a sustainability or ESG committee adopts good practice in accordance with other committee recommendations under the UK Corporate Governance Code. It can be accessed by members of the Institute and people who are registered as "free subscribers".
- (h) *FRC Corporate Governance Code Guidance*. As covered at the meeting of the Committee held on 2 February 2024, on 29 January 2024, the FRC announced the publication of its guidance to the 2024 UK Corporate Governance Code. On 6 March 2024, the FRC announced that updates to the guidance would be made on the first Wednesday of the month.
- (i) *ISS 2024 proxy voting guidelines for the UK and Ireland*. In early January 2024, Institutional Shareholder Services Inc. published its 2024 proxy voting guidelines for the UK and Ireland, which is effective for shareholder meetings taking place on or after 1 February 2024.

6.3 Reporting and disclosure

- (a) *House of Commons Environmental Audit Committee report on the financial sector and the UK's net zero transition*. On 23 February 2024, the House of Commons Environmental Audit Committee published the Government's response to its report on 'The financial sector and the UK's net zero transition'.
- (b) *FRC thematic review – Reporting by the UK's largest private companies*. On 31 January 2024, the FRC announced the publication of its thematic review of reporting by the UK's largest private companies.

6.4 Equity capital markets

- (a) *FCA Market Watch No. 77*. On 14 February 2024, the FCA published Market Watch No. 77. In this edition, the FCA shares its observations on trading by organised crime groups and how firms can mitigate the risks of being used to facilitate their trading activities.
- (b) *EU Listing Act*. On 1 February 2024, the European Council announced that the Council and the European Parliament have reached a provisional agreement on the EU Listing Act, which aims to make EU public capital markets more attractive for EU companies and make it easier for companies of all sizes, including SMEs, to list on European stock exchanges. The text of the provisional agreement will now be finalised and presented to member states' representatives and the European Parliament for approval. If approved, the

Council and the Parliament will have to formally adopt the texts. See also item 6.5(a) below with regard to the impact of this development on EU MAR.

- (c) *The Public Offers and Admissions to Trading Regulations 2024*. The Public Offers and Admissions to Trading Regulations 2024 were made on 29 January 2024 (an explanatory memorandum has also been published). These regulations replace the UK Prospectus Regulation and create a new framework for the offering of securities to the public and the admission of securities to trading in the UK. These regulations will come fully into force alongside the commencement of the repeal of retained EU law relating to prospectuses.
- (d) *FCA PMB No. 47*. On 26 January 2024, the FCA published Primary Market Bulletin No. 47. In this edition, the FCA: (i) provides an update on recent developments in respect of the regulatory regime for short selling in the UK; and (ii) reminds issuers of their regulatory obligations when selecting multiple credit rating agencies.

6.5 MAR

- (a) *EU Listing Act amendments to EU MAR*. The EU Listing Act Regulation will make amendments to EU MAR including in relation to: (i) simplification of the format of EU insider lists; (ii) simplification of the reporting of trades under the EU share buyback safe harbour; (iii) a reduction of the administrative burden placed on EU PDMRs (as a result of increased thresholds for EU PDMR and PCA notifications); and (iv) changes to the rules on disclosing inside information in protracted processes and more detailed conditions for the delay in disclosure of inside information. In addition, there is a helpful clarification that the EU market sounding procedures are a 'mere option' (rather than mandatory) and confirmation that compliance with them provides a safe harbour from the offence of unlawful disclosure of inside information for those that comply. Those who do not comply will not be assumed to have disclosed inside information unlawfully but will not have the protection of the safe harbour.

6.6 Auditing and accounting

- (a) *Draft Accounting Standards (Prescribed Bodies) (United States of America and Japan) (Amendment) Regulations 2024*. A draft of the Accounting Standards (Prescribed Bodies) (United States of America and Japan) (Amendment) Regulations 2024 was published on 21 February 2024, along with an explanatory memorandum.
- (b) *Report on barriers to competition in UK audit market*. On 1 February 2024, the FRC announced the publication of a report entitled "Views of firms on entry, growth and exit in the markets for smaller PIE audits and non-PIE audits", which contains a summary of the key findings and potential actions from research that the FRC commissioned into barriers to entry and growth faced by audit firms in the UK. A two page summary has also been published.

6.7 Takeovers

- (a) No items to consider.

6.8 Miscellaneous

- (a) *HMT consultation on improving the effectiveness of the Money Laundering Regulations.* On 11 March 2024, HMT announced the publication of a consultation on improving the effectiveness of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017. The consultation closes on 9 June 2024.
- (b) *Further changes to the Financial Promotion Order 2005.* On 6 March 2024, the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment and Transitional Provision) Order 2024 was published, along with an explanatory memorandum. The Order comes into force on 27 March 2024 and makes further amendments to the exemptions in the Financial Promotion Order 2005 by (in effect) reinstating the financial thresholds to be eligible for the high net worth individual exemption, and the criteria to be eligible for the self-certified sophisticated investor exemption, that were in place before the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) (No. 2) Order 2023 came into force. These amendments have been made in response to concerns by stakeholders in the technology, angel investing and theatre sectors about the unintended impact of the recent changes on the ability of start-up businesses to obtain investment and the ability to finance theatre productions through small-scale investors. The FCA published a statement in response to these amendments on 6 March 2024.
- (c) *Finance Act 2024.* The Finance Act 2024 received Royal Assent on 22 February 2024.
- (d) *Call for evidence on the impact of the Modern Slavery Act 2015.* On 28 February 2024, the House of Lords Committee on the Modern Slavery Act 2015 announced the publication of a call for written evidence for its inquiry into the impact and effectiveness of the Modern Slavery Act 2015. The closing date is 10 am on 27 March 2024.
- (e) *Law Commission consultation on digital assets as personal property.* On 22 February 2024, the Law Commission announced the launch of a short consultation exercise on draft legislation to confirm the existence of a third category of personal property into which crypto-tokens and other assets could fall, which follows its report on digital assets in June 2023. The consultation closes on 22 March 2024. The Law Commission also announced the launch of a call for evidence to inform its project on private international law in the context of digital assets and electronic trade documents. The call for evidence closes on 16 May 2024.
- (f) *Retained EU Law Reform.* The Retained EU Law (Revocation and Reform) Act 2023 (Consequential Provision) Regulations 2024 were made on 23 January 2024 and came into force on 1 March 2024 (an explanatory memorandum has also been published). These regulations implement the relabelling of retained EU law (and related terms) as "assimilated law" (and related terms) in secondary legislation and make provision to remove references in secondary legislation to rights retained under section 4 of the European Union (Withdrawal) Act 2018.

6.9 Cases

- (a) *THG PLC & others v Zedra Trust Company (Jersey) Limited* [2024] EWCA Civ 158. The Court of Appeal held that unfair prejudice petitions brought under section 994 CA 2006 are subject to the statutory limitation periods in sections 8 and 9 of the Limitation Act 1980, despite the received wisdom for over 40 years that unfair prejudice petitions are not subject to any periods of limitation. The Court of Appeal considered that whether an unfair prejudice petition falls within section 8 or 9 will depend on the relief being sought. The Court of Appeal held that where the right to go to court is purely statutory and the only relief sought is the payment of money (whether liquidated or unliquidated), the action falls within section 9 of the Limitation Act 1980, with the consequence that it cannot be brought more than six years after the matters complained of. As petitions under section 994 more typically seek an order requiring the respondent to buy the petitioner's shares, which would not be a claim for the recovery of money, the applicable limitation period will more commonly be 12 years from the date on which the cause of action accrued.

The Chair noted that this case provides a helpful clarification to the question regarding whether the statutory limitation periods in sections 8 and 9 of the Limitation Act 1980 apply to unfair prejudice claims.

- (b) *Saxon Woods Investments Limited v Francesco Costa and Ors* [2024] EWHC 387 (Ch). Clause 6.2 in a shareholders' agreement required a company and its investors to agree to work towards an exit by 31 December 2019 and, failing an exit by that date, required the directors to engage an investment bank to cause an exit. In an unfair prejudice petition brought under section 994 CA 2006, the High Court found that the company had acted in breach of clause 6.2 and Mr Costa, who is the Chairman and a substantial investor in the company, was responsible for the company's breach. The High Court found that the petitioner had suffered unfair prejudice as a result of this. An interesting point of construction in respect of clause 6.2 was whether the directors were released from their obligations under clause 6.2 because it should be read as being subject to an implicit carve out that the directors were not obliged to comply with it at all if, by doing so, they would be acting in breach of their directors' duties. Mr Costa argued that the board did not consider that a sale executed on the timetable specified in the shareholders' agreement would maximise value for shareholders and sought to rely on the principle in *Heron International Ltd v Lord Grade* [1983] BCLC 244 that if directors are faced with two competing bids at different prices, they prima facie breach their fiduciary duties if they act so as to ensure that shareholders receive the lower rather than the higher offer. The High Court considered that the principle in *Heron International* was limited to its specific facts and did not support the suggestion that directors will breach their fiduciary duties if they elect to pursue a transaction today rather than wait for a possible but uncertain better one tomorrow. The judge considered that this was no more than a commercial decision.

The Chair noted that, although this decision is fact specific, given that these types of exit provisions are common in shareholders' agreements, members of

the Committee may want to consider the drafting of such exit provisions in light of this decision.

12 April 2024