THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 328th meeting
at 9:00 a.m. on 17th July 2024

1. **Welcome and apologies**

*In attendance*: Michael Bloch (alternate for Stephen Mathews, *A&O Shearman LLP*); Adam Bogdanor (*Bryan Cave Leighton Paisner LLP*); Tom Brassington (*Hogan Lovells International LLP*); Richard Burrows (*Macfarlanes LLP*); Jamie Corner (*Simmons & Simmons LLP*); Andrew Edge (*Taylor Wessing LLP*); Lucy Fergusson (*Linklaters LLP*); Chrissy Findlay (*Pinsent Masons LLP*); Nicholas Holmes (*Ashurst LLP*); James Inness (alternate for Chris Horton, *Latham & Watkins LLP*); George Knighton (*Skadden Arps Slate Meagher & Flom (UK) LLP*); Jaya Gupta (alternate for Simon Wood, *Addleshaw Goddard LLP*); Kathy MacDonald (alternate for Jon Perry, *Norton Rose Fulbright LLP*); Juliet McKean (Secretary, *Clifford Chance LLP*); Ziyad Nassif (*Freshfields Bruckhaus Deringer LLP*); James Parkes (*CMS Cameron McKenna Nabarro Olswang LLP*); Ben Perry (*Sullivan & Cromwell LLP*); David Pudge (Chair, *Clifford Chance LLP*); Caroline Rae (*Herbert Smith Freehills LLP*); Lucy Reeve (Chair of the Law Society Company Law Committee (**LSCLC**)); Simon Tysoe (*Slaughter and May*); Adrian West (*Travers Smith LLP*); Peter Wilson (alternate for Allan Taylor, *White and Case LLP*); and Victoria Younghusband (*Charles Russell Speechlys LLP*).

*Apologies*: Kevin Hart (*City of London Law Society*); Chris Horton (*Latham & Watkins LLP*); Vanessa Knapp (*Independent*); Stephen Mathews (*A&O Shearman LLP*); Jon Perry (*Norton Rose Fulbright LLP*); Matthew Rous (*City of London Law Society*); Allan Taylor (*White and Case LLP*); Liz Wall (*A&O Shearman LLP*); Simon Witty (*Davis Polk & Wardwell London LLP*); and Simon Wood (*Addleshaw Goddard LLP*).

1. **Approval of minutes**

A draft version of the minutes of the meeting held on 29 May 2024 was circulated to members on 4 July 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.

1. **Matters arising**
	1. *DBT non-financial reporting consultation*. The Chair reported that on 27 June 2024 a joint working group of the Committee and the LSCLC, led by Simon Tysoe (**ST**), Harriet Redwood and Julie Stanbrook, submitted a response to the DBT consultation on non-financial reporting that is seeking views on raising the employee threshold for medium-sized companies from not more than 250 employees to 500 employees and exempting eligible medium-sized companies from having to produce a strategic report. ST reported that the joint working group is supportive of DBT's proposed changes given that they would reduce the regulatory burden for medium-sized companies, although ST noted that it is estimated that only around 2,000 companies would be impacted if the changes were brought into force. ST also reported that the response notes that, in the joint working group's experience, shareholders of medium-sized companies will often have other means of accessing information that goes beyond the information required to be published in a strategic report and are more likely to make use of information obtained through these other means and, as a result, may get limited benefit from the strategic report.
	2. *FCA consultation on listing regime reforms*. The Chair reported that on 30 May 2024 the Joint Prospectus and Listing Rules Working Group submitted further comments to the FCA on the proposed disclosure requirements for issuers entering into transactions in severe financial difficulty / transactions to address the risk of a working capital shortfall, as set out in CP 23/31, following a call with members of the FCA’s Primary Market Oversight team to discuss the JWG's feedback on these proposed requirements. For further information, see minute 4.1.
	3. *Proposed new FCA board confirmation*. The Chair reported that on 24 May 2024 the Joint Prospectus and Listing Rules Working Group submitted a short response on the draft version of the new Procedures, Systems and Controls Confirmation Form that was published by the FCA alongside PMB No. 48. It was noted that the response also includes some minor drafting and typographical comments on the technical notes published for consultation. Lucy Fergusson (**LF**), who led on drafting the response, reported that the FCA has addressed a number of the concerns of the JWG in a way that has improved the position for issuers in respect of the confirmation form, including as follows:
* The confirmation form will only be provided by an applicant that is making an application for admission of securities for the first time and not (as had been proposed) on each subsequent application for admission of securities. LF noted that the confirmation form will not, therefore, be relevant for our existing listed clients.
* While the confirmation form will be required to be signed by a duly authorised member of the applicant’s board, the form has been amended to reflect that the obligations referred to in it are those of the applicant. It was noted that the prior draft of the form had proposed that the board provide the confirmations, including confirmations in respect of guidance for issuers in the UK Listing Rules, which had raised concerns around potential increased liability of directors in giving the confirmations, the practical steps that directors would need to take in order to be able to give the confirmations and increased administrative burdens.

The Chair noted that this had been a successful piece of advocacy and thanked LF for her role.

* 1. *PCP 2024/1 – Companies to which the Takeover Code applies*. The Chair reported that on 16 July 2024 the Joint CLLS/Law Society Takeovers Working Group submitted a response to PCP 2024/1, which proposes a new jurisdictional framework that would narrow the scope of the companies to which the Takeover Code applies under section 3 of the Introduction to the Code, refocusing the application of the Code on companies which are registered and listed (or were recently listed) in the UK. The Chair noted that the response was short given that the Takeover Panel had put forward sensible proposals and given that there was unanimity amongst members of the JWG in respect of the proposals.
	2. *DAOs*. The Chair reported that on 11 July 2024 the Law Commission published a scoping paper that looks into how Decentralised Autonomous Organisations (**DAOs**) can be characterised and how the law of England and Wales might accommodate them now and in the future, which follows the Law Commission's previous call for evidence on DAOs. It was noted that the paper seeks to identify current issues around DAOs to inform any future law reform.
1. **Discussions**
	1. *Listing regime reforms*. The Chair reported that on 11 July 2024 the FCA announced the publication of its new UK Listing Rules, which set out a simplified listings regime with a single category and streamlined eligibility for those companies seeking to list their shares in the UK, along with Policy Statement PS24/6 which provides feedback to CP23/31. The Chair noted that the UK listing regime is being reformed to level the playing field with other listing venues by removing some of the historic shareholder protections and moving to a more disclosure-based regime. The Chair reported that the final version of the UK Listing Rules, which will come into force on 29 July 2024, addresses many of the concerns previously raised by the Joint Prospectus and Listing Rules Working Group and that the FCA briefed members of the JWG and the FCA/CLLS CLC Liaison Committee on the key changes on a call held on 11 July. The Chair thanked Nicholas Holmes (**NH**) and all of the members of the JWG for their efforts. NH commented that this is a major milestone for the UK listing regime reforms.

NH updated the Committee as follows in respect of some of the important changes made to the final version of the UK Listing Rules vis a vis the previously published draft, noting that the FCA has made some of these changes in response to feedback given by the JWG:

* The most significant changes that have been made are to the new significant transactions regime, which the FCA has made more flexible in terms of the content and timing of announcement of information to the market. For acquisitions, the FCA has dropped the requirement for the issuer to disclose historical financial information of the target or, where such information is not available, to publish a board fairness opinion in respect of the consideration. However, these disclosure requirements remain for disposals as this information in respect of the target would be more readily available to the issuer. On timing, the FCA has retained the requirement to announce as soon as possible after the terms of the transaction have been agreed, however, the content can be disclosed in two stages so that an issuer is able to announce at a later date some of the required information when such information becomes available, but this announcement must be no later than the completion of the transaction. The assumption is that issuers are not expected to drip feed any such further information into the market but should publish the outstanding information in one announcement once all of the relevant information is available. The issuer must also make an announcement once the transaction has completed to confirm its completion and that there has been no material change to the information disclosed to the market in relation to the transaction.
* As noted in minute 3.2, the JWG had a dedicated call with the FCA on the proposed disclosure requirements for issuers entering into transactions in severe financial difficulty. The FCA has dropped the proposed separate enhanced disclosure regime for companies in 'severe financial difficulty' and has opted for a more flexible arrangement by introducing guidance that sets out the FCA's expectations for companies in such a situation and on the types of information issuers should consider disclosing.
* Issuers with a controlling shareholder will no longer be required to have a relationship agreement in place to demonstrate independence. Other parts of the controlling shareholder regime remain, including the voting requirements relating to the election of independent directors. However, there is a new requirement for directors to formally give opinions on any resolutions proposed by a controlling shareholder when a director considers the resolution is intended or appears to be intended to circumvent the proper application of the UK Listing Rules.
* A significant change to the dual class share structures regime is that institutional investors will be permitted to hold shares with enhanced voting rights subject to a maximum 10-year period after which enhanced voting rights should expire; the position remains that natural persons may hold enhanced voting rights without a time-based sunset clause.
* The significant and related party transaction regimes for closed-ended investment funds have been more closely aligned with the regimes for commercial companies as the FCA received feedback that its proposals in this area were overly complex. However, the FCA is retaining the requirements for a circular and shareholder vote for certain changes to the investment manager's fees or other remuneration.
* The FCA is proceeding to create a separate listing category for shell companies but it is no longer requiring shell companies to be structured as SPACs and the FCA is implementing its proposals regarding the concept of an 'initial transaction' and to require shell companies to complete an initial transaction within a specified time period.

Members of the Committee noted that the FCA has also made some helpful amendments to DTR 2.5.7G on selective disclosure to shareholders following feedback from the JWG, which also come into force on 29 July. Members of the Committee also noted that for international commercial companies secondary listings the FCA will be able to dispense with or modify the requirement that an applicant’s place of central management and control must be situated either in its country of incorporation or in the country of its qualifying home listing.

It was also noted that the FCA has published Primary Market Bulletin 50, in which the FCA provides an update on the work it has been doing in relation to the sponsor regime and in which the FCA consults on the introduction of new technical notes relating to supervisory reviews of sponsor firms and the FCA’s expectations of a sponsor in relation to specialist due diligence and on an update to its existing technical note on sponsor record keeping.

* 1. *FCA thematic review on notifications of delayed disclosure of inside information*. The Chair reported that the FCA is carrying out a thematic review focussed on notifications of delayed disclosure of inside information and has requested an outreach meeting with the Committee as it is seeking practical knowledge and experience of delaying disclosure of inside information and completing and submitting the delayed disclosure notification form to the FCA. The Chair reported that a call has been arranged between the FCA and members of the FCA/CLLS CLC Liaison Committee on 5 August 2024 and that the members of the FCA/CLLS CLC Liaison Committee will have a pre-call on 24 July.
	2. *IoD consultation on a code of conduct for directors*. The Chair reported that on 6 June 2024 the IoD announced the publication of a consultation document on a code of conduct for directors. The Chair also reported that the press release states that the code of conduct: (i) is a practical tool to help directors make better decisions and is structured around six key "Principles of Director Conduct" (leading by example, integrity, transparency, accountability, fairness and responsible business); and (ii) represents a voluntary commitment and is not intended to hold back directors or create a new burden of compliance. The Chair noted that Allan Taylor is leading a working group of the Committee that has been formed to respond to this consultation, an initial call was held on 26 June 2024 and the consultation closes on 16 August 2024.
	3. *OECD case study of UK AGMs*. The Chair provided feedback to the Committee on his engagement with the OECD on the law and practice relating to AGMs in the UK, noting that the OECD is conducting a multi-jurisdictional thematic peer evaluation of policy frameworks and best practices for general shareholder meetings.
1. **Recent developments**

The Committee noted the following additional items in sections 5.1 to 5.9 which time did not allow them to consider in the meeting, other than the Chair briefly commented on item 5.9(a).

* 1. **Company law**
		1. *DBT progress report on the implementation of ECCTA 2023*. On 24 May 2024, DBT published a progress report on the implementation and operation of Parts 1 to 3 of ECCTA 2023.
	2. **Corporate governance**
		1. *CSDDD*. On 24 May 2024, the European Council announced its formal adoption of the Corporate Sustainability Due Diligence Directive. The directive was published in the Official Journal of the European Union on 5 July 2024 and enters into force on 25 July 2024. Once in force, Member States have two years to transpose the provisions of the directive into national law.
	3. **Reporting and disclosure**
		1. *EU corporate sustainability reporting*. On 5 July 2024, ESMA announced the publication of a final report on the guidelines on enforcement of sustainability information and a public statement on the first application of the European Sustainability Reporting Standards.
	4. **Equity capital markets**
		1. *Updated FCA PMB No. 49*. On 31 May 2024, the FCA published an updated version of Primary Market Bulletin 49 following feedback from industry. The updates are in respect of the section on "Listing Rules in relation to Long Term Incentive Plans (LTIPs)". The FCA states that it has established high levels of compliance with the Listing Rules based on a survey that it undertook of a sample of LTIPs of 25 premium listed companies.
	5. **MAR**
		1. *European Commission report on the delegation of power to adopt delegated acts conferred on the Commission pursuant to EU MAR*. On 17 June 2024, the European Commission published a report to the European Parliament and the European Council on the delegation of power to adopt delegated acts conferred on the Commission pursuant to EU MAR. In the report, the Commission calls on its empowerment to adopt delegated acts under EU MAR to be extended for a further period of five years (the initial five-year period expires on 31 December 2024). The report itself aims to satisfy the Commission's obligation to prepare a report when requesting an extension of its power.
		2. *ESMA statement on good practices in relation to pre-close calls*. On 29 May 2024, ESMA announced the publication of a statement reminding issuers about the legislative framework applicable to "pre-close calls" and encouraging issuers to follow good practices when engaging in such calls, with the goal of contributing to maintain fair, orderly and effective markets.
	6. **Auditing and accounting**
		1. No items to consider.
	7. **Takeovers**
		1. No items to consider.
	8. **Miscellaneous**
		1. *The UK ratifies 2019 Hague Convention*. On 27 June 2024, the UK deposited its instrument of ratification of the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. The 2019 Hague Convention will enter into force for the UK on 1 July 2025.
		2. *The Retained EU Law (Revocation and Reform) Act 2023 (Commencement No.2 and Saving Provisions) Regulations 2024*. The Retained EU Law (Revocation and Reform) Act 2023 (Commencement No.2 and Saving Provisions) Regulations 2024 were made on 24 May 2024. These regulations bring into force section 6 of the Retained EU Law (Revocation and Reform) Act 2023 on 1 October 2024, subject to saving provisions.
		3. *Digital Markets, Competition and Consumers Act 2024*. On 24 May 2024, the Digital Markets, Competition and Consumers Bill received Royal Assent, becoming the Digital Markets, Competition and Consumers Act 2024. Most of the provisions in the Digital Markets, Competition and Consumers Act 2024 will enter into force on a day to be appointed by regulations. However, section 129 (Mergers of energy network enterprises) will enter into force on 24 July 2024 and section 130 (Mergers involving newspaper enterprises and foreign powers) entered into force on 24 May 2024.
	9. **Cases**
		1. *Wright & Ors v Chappell & Ors [2024] EWHC 1417 (Ch)*. The High Court held that two former directors of the British Home Stores group were personally liable for wrongful trading under section 214 of the Insolvency Act 1986 and misfeasance under section 212 of the Insolvency Act 1986 on the basis that the directors had breached their duties under the CA 2006, including breach of the duty in section 172 to promote the success of the companies by considering the interests of their creditors and the duty in section 171(b) to exercise their powers for a proper purpose. The High Court also held that if the two directors had complied with their duties the BHS group companies would not have continued to trade but would have gone into insolvent administration in June 2015. This case is fact specific, however, it contains helpful commentary on wrongful trading and directors' duties, including the duty to act in the interests of creditors in certain circumstances (the "*Sequana duty*"). The award granted by the High Court is the largest to date for a wrongful trading claim and is also the first award granted for a misfeasance claim.

The Chair observed that this case is perhaps at the more extreme end of what can go wrong but contains some helpful reminders for directors in terms of their responsibilities when faced with a looming insolvency situation, including that directors should seek financial and legal advice and then act on it and ensure that they maintain an appropriate record of their deliberations and appropriately discharge their directors' duties. The Chair also noted that the judgment made it clear that directors’ liability would not be capped at the level of D&O cover or the amount the directors could afford and that, in this respect, the judge was sending a clear message in relation to directors and their responsibilities and liabilities in such circumstances.

* + 1. *Re The Lakes Distillery Company Plc [2024] EWHC 1535 (Ch)*. This judgment was handed down after a Court sanction hearing in relation to a Part 26 CA 2006 scheme at which Hildyard J had questioned the adequacy of the disclosures in relation to the description of directors' interests in certain debt securities which would be repaid with a 100% premium (in addition to the repayment of principal) in the event of a change of control of Lakes Distillery in the explanatory statement and scheme circular. Hildyard J gave a reminder of the importance that the skeleton argument in support of a scheme should alert the Court to any difficulties which may require thought or explanation at the Court sanction hearing. Issues as to benefits outside the scheme, even if not submitted to be part of it or ancillary to it, should be highlighted and the adequacy of disclosure of these benefits should be addressed specifically. The disclosure, both in format and content, must be specific to, and fair and reasonable in the context of, the scheme. Any deficiency, unless found to be exceptional (as it was here, on the specific facts), would result in a refusal to sanction the scheme, pending a further meeting after full and proper disclosure.
		2. *Cantor Fitzgerald & Co v YES Bank Limited [2024] EWCA Civ 695*. When construing the definition of a "Financing" in a financial adviser engagement letter to determine whether additional fees were payable to Cantor Fitzgerald, the Court of Appeal agreed with YES Bank's interpretation that the word "private" in the phrase "the private placement, offering or other sale of equity instruments in any form" qualified not only "placement" but also "offering" and "other sale". Although the Court of Appeal acknowledged that there is no firm grammatical rule that an adjective or determiner at the start of a list of nouns qualifies them all, as a matter of ordinary language, it considered that unless something in the content of the list or another adjective or determiner within the list suggests otherwise, the reader will naturally tend to assume that an adjective or determiner at the start of a list qualifies the entirety of it. The Court of Appeal also held that YES Bank's interpretation of the provision was supported by the contractual context and the factual matrix. As a result, the Court of Appeal held that the definition of "Financing" in the engagement letter referred to private forms of equity financing and that the further public offer (**FPO**) carried out by YES Bank did not fall within that definition (with the consequence that Cantor Fitzgerald was not entitled to recover the additional fees in connection with the FPO).
		3. *Dr Rohit Kulkarni v (1) Gwent Holdings Limited (2) St Joseph's Independent Hospital Limited [2024] EWHC 1357 (Ch)*. The High Court has confirmed that a breach of contract that is repudiatory in nature at common law can still be otherwise capable of remedy. The defendant in this case had admitted repudiatory breaches of an SHA, but disputed the claimant's argument that such breaches had triggered the compulsory transfer provisions under the SHA, which provided that a transfer notice was deemed to be served in the event of a shareholder committing a material breach of the SHA which, if capable of remedy, has not been so remedied within 10 business days of the board serving notice to remedy the breach. The defendant argued that as its breach was capable of remedy and the board had failed to issue any such notice, the transfer notice could not be deemed to have been served. The judge rejected the claimant's submission that repudiatory breaches are by their nature irremediable for all purposes and thus the SHA did not require the board to serve notice for the compulsory transfer provisions to be triggered. Rather, common law gives the innocent party to a repudiatory breach a "clear choice: affirm or go", and the breaching party cannot deprive the innocent party of that right to terminate by remedying the breach; remediation is a separate matter.
		4. *King Crude Carriers SA and others v Ridgebury November LLC and others [2024] EWCA Civ 719*. The Court of Appeal overturned the High Court's decision that, whilst the "maxim" that a person cannot derive a benefit from their own wrong can operate to bar a party from relying on its own breach of contract to argue that a condition precedent has not been fulfilled, such maxim cannot be given effect to by deeming a condition precedent to be fulfilled where that condition is as to the accrual of a debt. The Court of Appeal found that there is a principle in English law that an obligor is not permitted to rely upon the non-fulfilment of a condition precedent to its debt obligation where it has caused such non-fulfilment by its own breach of contract, provided that such condition is not the performance of a principal obligation by the obligee, nor one which it is necessary for the obligee to plead and prove as an ingredient of its cause of action, and save insofar as a contrary intention is sufficiently clearly expressed (or is implicit because the nature of the condition or the circumstances of the case make it inappropriate). In order for such principle to apply, there must be: (i) an agreement capable of giving rise to a debt rather than damages; (ii) an agreement that the debt will accrue and/or be payable subject to fulfilment of a condition precedent; and (iii) an agreement that the obligor will not do the thing which prevents the condition precedent being fulfilled so as to prevent the debt accruing and/or becoming payable.
1. **Any other business**
	1. *Committee LinkedIn page*. Victoria Younghusband (**VY**) informed the Committee that the CLLS is keen for each of the specialist committees to have their own LinkedIn page in order to promote their work, including by adding consultation responses to their page. VY informed members of the Committee that the CLLS has a good PR team that can help with this initiative and that the CLLS Commercial Law Committee has already set up a good LinkedIn page. VY agreed that she would set up the page to get it up and running but it would be preferable if the responsibility for the Committee's page could be rotated around members of the Committee. The Chair agreed with this proposal and once again asked members of the Committee to let him or the Secretary know if they would be willing to volunteer to help with the Committee's page following VY's initial involvement.

5 August 2024