

THE CITY OF LONDON LAW SOCIETY  
COMPANY LAW COMMITTEE

Minutes

for the 323<sup>rd</sup> meeting  
at 9:00 a.m. on 27<sup>th</sup> September 2023

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1. **Welcome, new members and apologies**

*In attendance:* John Adebiyi; Adam Bogdanor; Tom Brassington; Richard Burrows; Jamie Corner; Lucy Fergusson; Chrissy Findlay; Nicholas Holmes; Chris Horton; Vanessa Knapp; Juliet McKean (Secretary); Ziyad Nassif; John Papanichola; James Parkes; Ben Perry; Jon Perry; David Pudge (Chair); Caroline Rae; Lucy Reeve (Chair of the Law Society Company Law Committee (**LSCLC**)); Richard Spedding; Allan Taylor; Liz Wall; Simon Witty; Simon Wood; and Victoria Younghusband.

*Apologies:* Kevin Hart; Stephen Mathews; and Matthew Rous.

The Chair welcomed four new members to the Committee: Jamie Corner of Simmons & Simmons; Ziyad Nassif of Freshfields; Ben Perry of Sullivan & Cromwell; and Simon Witty of Davis Polk. The Chair also informed the Committee that Edward Baker of Simmons & Simmons has stepped down as a member of the Committee.

2. **Approval of minutes**

A draft version of the minutes of the meeting held on 19 July 2023 was circulated to members on 29 August 2023. 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. **Matters arising**

3.1 *CLLS developments.* The Chair updated the Committee on the CLLS developments highlighted in the email from Kevin Hart which had been circulated to members alongside the agenda, including the formation of a new CLLS AI Committee, the revival of the CLLS Intellectual Property Law Committee and the proposal that each member of the main CLLS Committee should join one specialist committee as a "bridge" to increase communications between the CLLS Committee and the specialist committees. The Chair informed the Committee that Victoria Younghusband had volunteered to be the "bridge" for the CLLS Company Law Committee.

3.2 *ECCT Bill.* The Chair reported that the Economic Crime and Corporate Transparency Bill is currently in the "ping pong" stage and that the House of Lords will consider the House of Commons amendments on 18 October. The Chair noted that the Lords withdrew the proposed new section 113C of the Companies Act 2006 (**CA 2006**) that would have required nominee shareholders to declare whether or not they are holding any shares in the company "on behalf of, or subject to the direction of, another person" and, if they are, provide the name and service address of such person. The Chair however noted that the Lords agreed to a Government amendment that would allow the

Secretary of State to make regulations to make further provision for the purpose of enabling a company to find out who its PSCs are in cases where shares are held by a nominee, which has been agreed to by the House of Commons. The Chair also noted that the Lords withdrew the requirement for overseas entities to provide event-driven verified updates to the Register of Overseas Entities within 14 days of becoming aware of the relevant change and either to provide such updates or to confirm to Companies House that there has been no relevant change no more than 14 days prior to the acquisition or disposal of any qualifying estate. The Chair further noted that the Houses are yet to agree on whether the new failure to prevent fraud offence should be subject to a SME exemption or a micro-entities exemption and that the extension of the failure to prevent offence to money laundering has been withdrawn.

3.3 *Draft Companies (Strategic Report and Directors' Report) (Amendment) Regulations 2023.* The Chair reported that the draft Companies (Strategic Report and Directors' Report) (Amendment) Regulations were laid in Parliament on 19 July 2023 and that a small working group of members of the Committee had the opportunity to consider and comment on two previous drafts of these regulations early this year. The Chair reported that, if approved by Parliament, these regulations would require large UK companies (defined as companies with 750 or more employees and an annual turnover of £750 million or more) to include the following as part of their reporting: (i) an annual distributable profits figure (to be included as a note to the annual accounts) and an annual distribution policy statement; (ii) an annual resilience statement; (iii) an annual material fraud statement; and (iv) a triennial audit and assurance policy statement. The Chair noted that the regulations would come into force on 1 January 2025 and would apply to financial years on or after: (i) 1 January 2025, for UK companies whose equity share capital is admitted to trading on a UK regulated market; and (ii) 1 January 2026, for other in-scope companies. It was noted that DBT has published a webpage with a factual explanation of the draft legislation. It was further noted that on 20 July 2023 the FRC published a press release that welcomes the Government's publication of these draft regulations.

3.4 *PCP 2023/1.* The Chair reported that on 21 July 2023 the Joint CLLS/Law Society Takeovers Working Group submitted a response to PCP 2023/1.

3.5 *DBT call for evidence on non-financial reporting.* The Chair reported that on 16 August 2023 the Committee and the LSCLC submitted a joint response to DBT's call for evidence on non-financial reporting and that the response also contains the views of the CLLS ESG Committee and the Law Society Climate Change Working Group. John Papanichola, who led the joint working group, updated the Committee on the response.

#### 4. **Discussions**

4.1 *Reforms to the prospectus regime.* Nicholas Holmes updated the Committee in respect of a call between the Joint Prospectus and Listing Rules Working Group and the FCA that was held on 8 September 2023.

4.2 *FRC consultation on UK Corporate Governance Code.* The Chair reported that on 13 September 2023 the Committee and the LSCLC submitted a joint response to the FRC public consultation on proposed revisions to the UK Corporate Governance Code and that the response also contains the views of the CLLS ESG Committee. Allan Taylor, who led the joint working group, updated the Committee on the response.

- 4.3 *Digitisation Taskforce Interim Report*. Lucy Fergusson updated the Committee on the response to the questions raised in the Digitisation Taskforce's interim report being prepared by a working group of the Committee and the LSCLC (with input from the CLLS Financial Law Committee).
- 4.4 *NSI Act*. The Chair updated the Committee on the NSI Act roundtable event between the Government, the CLLS and the Law Society that was held on 23 July 2023 to discuss how the implementation of the Act is working in practice.

## 5. **Recent developments**

The Chair commented on the cases in section 5.9. The Committee noted the following additional items in sections 5.1 to 5.8 which time did not allow them to consider in the meeting, other than the Committee briefly discussed items 5.2(c) and 5.8(a).

### 5.1 **Company law**

- (a) See minutes 3.2 and 3.3.

### 5.2 **Corporate governance**

- (a) *QCA Corporate Governance Code Report*. On 30 August 2023, the QCA announced the publication of a report on the QCA Corporate Governance Code that considers the levels of adoption of that code by companies listed on the Main Market (Standard List), AIM and AQSE.
- (b) *Record number of Stewardship Code signatories*. On 30 August 2023, the FRC announced a record number of successful signatories to the UK Stewardship Code following the latest round of applications. The press release states that there are now 277 signatories to the Stewardship Code, representing £44.6 trillion assets under management.
- (c) *Glass Lewis 2023 Proxy Season: United Kingdom*. In July 2023, Glass Lewis published a blog that provides background on the changes to best practice guidance for the disapplication of pre-emption rights, insights into the impact of these changes on recent voting outcomes and a consideration of the narratives behind increased instances of significant shareholder opposition.

### 5.3 **Reporting and disclosure**

- (a) *Final TNFD Recommendations*. On 19 September 2023, the Taskforce on Nature-related Financial Disclosures (**TNFD**) announced the publication of its final recommendations. The TNFD recommendations include a set of general requirements for nature-related disclosures and a set of recommended disclosures structured around the four pillars of governance, strategy, risk and impact management and metrics and targets. The TNFD also published a suite of additional guidance, an executive summary and a glossary. The Environmental Audit Committee Chairman, Rt Hon Philip Dunne MP, issued a statement on 19 September 2023 commenting on the publication of the final TNFD recommendations.

- (b) *Consultation on amending SME size criteria for inflation in Accounting Directive.* On 13 September 2023, the European Commission announced a consultation on a draft Commission delegated directive amending Directive 2013/34/EU as regards the adjustments of the size criteria for micro, small, medium-sized and large undertakings or groups to account for the impact of inflation. The consultation closes on 6 October 2023.
- (c) *UK Sustainability Disclosure Standards.* On 2 August 2023, DBT published guidance on the Government's framework to create UK Sustainability Disclosure Standards (**UK SDS**) by assessing and endorsing the global corporate reporting baseline of IFRS Sustainability Disclosure Standards issued by the International Sustainability Standards Board (**ISSB Standards**). The Secretary of State for Business and Trade will consider the endorsement of the ISSB Standards to create UK SDS by July 2024. The guidance states that UK endorsed standards will only divert from the global baseline if absolutely necessary for UK specific matters. See also items 5.3(i) and 5.4(a).
- (d) *European Sustainability Reporting Standards.* On 31 July 2023, the European Commission announced that it has adopted a Commission Delegated Regulation (and related Annex 1 and Annex 2) that sets out the first set of European Sustainability Reporting Standards (**ESRS**) for use by all companies subject to CSRD. A Q&A on the adoption of the ESRS has also been published. In addition, on 31 July 2023, IFRS published a press release that provides an update on the discussions between the European Commission, EFRAG and ISSB around alignment and interoperability between ESRS and the ISSB Standards.
- (e) *Streamlining FCA rules on structured digital reporting of financial statements.* On 28 July 2023, the FCA published Handbook Notice 111 that sets out its response to feedback on CP23/2 in which the FCA consulted on changes to streamline its transparency rules on structured digital reporting of annual financial statements by companies. The FCA proceeded broadly as consulted. The instruments (FCA 2023/31 and FCA 2023/32) implementing the changes came into force on 28 July 2023 and the final rules apply to financial years starting on or after 1 January 2022. A new Technical Note (Structured digital reporting for annual financial statements prepared in accordance with International Financial Reporting Standards - Primary Market/TN/507.1) has been added to the FCA Knowledge Base.
- (f) *FRC thematic review of climate-related metrics and targets disclosures.* On 26 July 2023, the FRC announced the publication of a thematic review of climate-related metrics and targets disclosures. The review analysed TCFD disclosures from the 2022 annual reports of 20 companies across four sectors (materials and buildings, energy, banks and asset managers).
- (g) *IFRS Foundation comparison of IFRS S2 with the TCFD Recommendations.* On 24 July 2023, the IFRS announced that the IFRS Foundation has published a comparison of the requirements in IFRS S2 Climate-related Disclosures and the TCFD recommendations. The press release states that the requirements in IFRS S2 are consistent with the four core recommendations and eleven recommended disclosures published by the TCFD and companies that apply the ISSB

Standards will meet the TCFD recommendations and so do not need to apply the TCFD recommendations in addition to the ISSB Standards.

- (h) *FRC Lab report on ESG data distribution and consumption.* On 20 July 2023, the FRC Lab announced the publication of a report on ESG data distribution and consumption that examines how investors obtain and use ESG data on companies and highlights what actions companies can take to facilitate this.
- (i) *FRC call for evidence in relation to the proposed endorsement of the ISSB Standards in the UK.* On 19 July 2023, the FRC, in its role as The Secretariat to the UK Sustainability Disclosure Technical Advisory Committee, announced the publication of a call for evidence in relation to the proposed endorsement of the ISSB Standards in the UK. The call for evidence closes on 11 October 2023.
- (j) *Ethnicity pay reporting.* On 13 July 2023, the Government published its response to its ethnicity pay reporting consultation. The Government states that it does not believe that now is the right time to take forward a mandatory approach to ethnicity pay reporting. Note that in April 2023 the Government published guidance for employers on voluntary ethnicity pay reporting.

#### 5.4 **Equity capital markets**

- (a) *FCA Primary Market Bulletin No. 45.* On 10 August 2023, the FCA published Primary Market Bulletin No. 45. This edition sets out the FCA's observations on: (i) its proposed approach to implementing the ISSB Standards (IFRS S1 and IFRS S2) and enhanced transition plan disclosures. The FCA intends to consult on these proposals in the first half of 2024. Subject to completion of the Government's endorsement process within its envisaged timeframe (i.e. by July 2024 – see item 5.3(c)), the FCA aims to finalise its policy position by the end of 2024, with new requirements to apply for accounting periods beginning on or after 1 January 2025; (ii) the audit of financial statements by third country auditor firms and potential suspension of listings for failure to comply with DTR 4.1.7 R; (iii) the application of transitional provisions in relation to minimum market capitalisation for shell companies; and (iv) multi-factor authentication for the FCA's Electronic Submission System.
- (b) *ESMA and EBA report on implementation of SRD2 provisions on proxy advisors and the investment chain.* On 27 July 2023, ESMA announced the joint publication of a report on the implementation of SRD2 provisions on proxy advisors and the investment chain by ESMA and the European Banking Authority. The report assesses the implementation of SRD2 and identifies areas for further progress and provides detailed suggestions for policy action in relation to SRD2's effectiveness, difficulties in practical application and the appropriateness of the scope of application. The report will serve as the basis for the European Commission's work in assessing the implementation of SRD2 and for the potential review process of SRD2.
- (c) *LSE dividend procedure timetable 2024.* On 18 July 2023, the LSE published its dividend procedure timetable 2024.

## 5.5 **MAR**

- (a) No items to consider.

## 5.6 **Auditing and accounting**

- (a) *The Accounting Standards (Prescribed Bodies) (United States of America and Japan) (Amendment) Regulations 2023.* On 6 September 2023, the Accounting Standards (Prescribed Bodies) (United States of America and Japan) (Amendment) Regulations 2023 were laid before Parliament (see also the explanatory memorandum). These regulations come into force on 29 September 2023.
- (b) *FRC consultation on revisions to the Ethical Standard.* On 8 August 2023, the FRC published a revised Ethical Standard for public consultation, along with an invitation to comment and impact assessment. The consultation closes on 31 October 2023.
- (c) *IAASB consultation on proposed Global Sustainability Assurance Standard.* On 2 August 2023, the International Auditing and Assurance Standards Board (**IAASB**) announced the publication of an exposure draft of its proposed International Standard on Sustainability Assurance 5000, General Requirements for Sustainability Assurance Engagements. An explanatory memorandum and an FAQs document have also been published. The IAASB has requested comments by 1 December 2023.

## 5.7 **Takeovers**

- (a) See minute 3.4.

## 5.8 **Miscellaneous**

- (a) *Stamp taxes on shares - removal of 1.5% charge on issues and certain related transfers.* On 14 September 2023, HMRC announced that legislation will be introduced to remove the 1.5% Stamp Duty and SDRT charges on issues of securities into depositary receipt systems and clearance services and certain related transfers of securities and to remove the 1.5% (or 0.2%) charge in relation to the issue of bearer instruments. Following EU and UK court decisions in 2009 and 2012, the charge on such transactions has been 0% (due to the direct effect of EU law). The effect of the Retained EU Law (Revocation and Reform) Act 2023 (**REUL Act**) means that the Government needs to legislate in order to maintain the 0% charge. These measures will have effect from 1 January 2024. HMRC has published a policy paper and draft legislation (along with an explanatory note) for technical consultation. The consultation closes on 12 October 2023.
- (b) *New gateway for firms approving financial promotions.* On 12 September 2023, the FCA announced the publication of its policy statement on introducing a gateway for firms who approve financial promotions (PS23/13), which sets out the FCA's final policy position and response to the feedback it received to its consultation on introducing a gateway for firms who approve financial

promotions. Once the new gateway comes into effect, all authorised persons that want to continue to approve financial promotions for unauthorised persons will need to apply to the FCA for permission to do so, unless an exemption applies. On 6 September 2023, the Financial Services and Markets Act 2000 (Exemptions from Financial Promotion General Requirement) Regulations 2023 were laid before Parliament (see also the explanatory memorandum), which legislate for the exemptions. These regulations come into force on 27 September 2023. See also item 5.8(d).

- (c) *The Retained EU Law (Revocation and Reform) Act 2023 (Revocation and Sunset Disapplication) Regulations 2023*. On 4 September 2023, a draft of the Retained EU Law (Revocation and Reform) Act 2023 (Revocation and Sunset Disapplication) Regulations 2023 was laid before Parliament (see also the draft explanatory memorandum). These regulations preserve certain pieces of REUL that are listed in Schedule 1 to the REUL Act that have subsequently been identified as not obsolete to ensure that they will not be revoked at the end of 2023. These regulations also revoke further obsolete and inoperable pieces of REUL at the end of 2023. A table has been published which explains why each piece of REUL set out in Schedule 2 of these regulations is being revoked. Each piece of REUL in respect of company law that is being revoked by these regulations amended the Companies Act 1985 and all amended provisions were repealed with the commencement of the CA 2006.
- (d) *Financial Services and Markets Act 2023*. The Financial Services and Markets Act 2023 (Commencement No. 2 and Transitional Provisions) Regulations 2023 (SI 2023/936) were made on 22 August 2023. These regulations bring into force amendments to the Financial Services and Markets Act 2000 made by the Financial Services and Markets Act 2023 relating to the new regulatory gateway for financial promotion approvals. Explanatory notes to the Financial Services and Markets Act 2023 were published on 29 August 2023.
- (e) *Updated guidance on the Register of Overseas Entities*. On 8 August 2023, DBT published updated guidance for the registration of overseas entities on the UK Register of Overseas Entities. The guidance has been updated to reflect guidance changes on identifying foreign limited partners as beneficial owners and changes have been made to the information on rectification, dispositions, financial penalties and protected information.
- (f) *HMRC consultation on tougher consequences for promoters of tax avoidance*. On 18 July 2023, HMRC published a summary of responses to its consultation on tougher consequences for promoters of tax avoidance. Following the consideration of these responses, the Government has also published draft legislation and accompanying explanatory notes, along with a policy paper that contains details on the new measures that are targeted at the most persistent and determined promoters of tax avoidance, being: (i) the introduction of a new criminal offence for promoters of tax avoidance who fail to comply with an HMRC notice to stop promoting a tax avoidance scheme; and (ii) providing HMRC with the power to bring disqualification action against directors of companies involved in promoting tax avoidance, including those who control or exercise influence over a company. On 13 September 2023, the Finance Bill Sub-Committee published a call for written evidence for its inquiry on the draft

Finance Bill 2023-24. The inquiry will focus on, amongst other things, the provisions in the draft Bill that would bring about these new measures to deal with promoters of tax avoidance. Written submissions are requested by 6 October 2023.

## 5.9 Cases

- (a) *ClientEarth v Shell Plc and others [2023] EWHC 1897 (Ch)*. Following ClientEarth having exercised its right to ask the High Court to reconsider its May decision (which was based on papers alone) at an oral hearing, the High Court confirmed its earlier decision to refuse permission for ClientEarth to continue a derivative claim under Part 11 CA 2006 brought against the directors of Shell plc for alleged breaches of duties in connection with Shell's climate change risk management strategy. ClientEarth argued that the approach of the directors to managing climate change risk was flawed and fell outside the range of reasonable responses to the risks identified by Shell. It argued that certain alleged inadequacies and deficiencies in Shell's strategy meant that the directors were in breach of their duty to promote the success of the company under section 172 CA 2006 and their duty to exercise reasonable care, skill and diligence under section 174 CA 2006. Dismissing ClientEarth's application, the High Court held that ClientEarth had failed to establish a *prima facie* case that the directors acted in breach of their duties in relation to their management of Shell's climate change risk.
- (b) *(1) McGaughey (2) Davies v Universities Superannuation Scheme Limited and others [2023] EWCA Civ 873*. The Court of Appeal dismissed an appeal brought by two members of a pension scheme to continue proceedings against certain directors and former directors of the pension scheme's corporate trustee (USSL) for alleged breaches of their directors' duties by way of a common law multiple derivative claim. The claimants alleged, amongst other things, that the directors had breached their section 171 and 172 CA 2006 duties by failing to form an adequate plan to divest from fossil fuels investments. The central issue in this appeal was whether the claims could be brought as common law company derivative claims. The Court of Appeal held that in order to bring a multiple derivative action the company in question must have suffered a loss or harm which the claim seeks to remedy and the would-be claimant must have suffered harm or loss which is reflective of it. On the facts of the case, the Court of Appeal held that USSL had suffered no loss and, therefore, the claims were not derivative claims - there was no *prima facie* case that USSL had suffered a loss as a result of the alleged breaches of directors' duties.
- (c) *Stephen John Hunt v Jagtar Singh [2023] EWHC 1784 (Ch)*. The High Court had to consider at what point does the director's duty to consider the interests of creditors (the **creditor duty**) arise, in circumstances where the company is at the relevant time insolvent, but its insolvency is due to a tax liability which the directors (wrongly, as it later turned out) believed at the relevant time had been avoided by what they believed to be a valid tax avoidance scheme entered into by the company. Considering the decision of the Supreme Court in *BTI 2014 LLC v Sequana SA and others*, the High Court held that "*assuming some element of knowledge is required, where a company is faced with a claim to a current liability of such a size that its solvency is dependent on successfully challenging*



*that claim, then the creditor duty arises if the directors know or ought to know that there is at least a real prospect of the challenge failing".* The judge distinguished *Sequana* (where the Supreme Court rejected the language of "real risk" of insolvency) because in that case the company was still solvent at the time the duty had allegedly arisen; whereas in this case the company was substantially insolvent throughout the relevant period taking into account the debt owed by the company to HMRC due to the ineffective tax avoidance scheme.

11 October 2023