

BIRMINGHAM LAW SOCIETY

COMPANY LAW COMMITTEE

**Minutes of a meeting of the Company Law Committee held on 10 March 2011 at
1 pm at the offices of HBJ Gateley Wareing**

Present:	J Campion
	M Lakin
	J Irving
	A Gordon
	A McGiveron
	A Percival (for K Spedding)
	C Reed (for S Gill)
Apologies:	K Silvester
	S Gill
	M Sagoo
	D Stevenson
	D Ellis
	A Beedham
	S Gupta
	K Spedding

1. Minutes of the last meeting

The minutes of the last meeting held on 13 January 2011 were approved.

2. Report on Chancery Lane

Andrew Stilton had confirmed that there had been no recent news coming out of the Chancery Lane company law committee.

3. Progress Property Company Ltd v Moorgarth Group Ltd

The committee discussed this case in which the Supreme Court had held that the sale of assets at an undervalue by a company to another company under the same control did not infringe the common law rule against unlawful distributions of capital because the common director who had orchestrated the sale had genuinely believed that the sale had been at market value. The court had rejected a submission that there was an unlawful return of capital whenever a company entered into a transaction with a shareholder which resulted in a transfer of value not covered by distributable profits, regardless of the purpose of the transaction. It considered that a relentlessly objective rule of that sort would be oppressive and unworkable and would tend to cast doubt on any transaction between a company and a shareholder, even if negotiated at arm's length and in perfectly good faith.

The committee noted that there appeared to be a distinction between a transaction classified as a dividend where an amount paid out of capital would be unlawful however technical the error and however well-meaning the directors who made the payment.

The committee noted the distinction with the Companies Act provisions on distributions in section 845 of the Companies Act 2006 (codifying the decision in *Aveling Barford*) which would allow intra-group transfers of assets to be at book value rather than market value where the company making the transfer had positive reserves. It was not clear from the Progress Property case summary as to whether the company had positive reserves or not. The consensus on the committee was that there would still need to be proper thought given to valuation and directors who simply gave no thought to valuation issues would be unlikely to be protected from liability.

4. Lord Davies consultation on women on boards

It was noted that the Lord Davies report on women on boards had recently been published. Although the report did not recommend formal quotas it did contain some targets against which it was indicated that public companies would be required to report in future reports and accounts.

Companies in the FTSE 100 have been told they should aim for 25 per cent female board representation and the report also calls for FTSE 350 companies to set out their aspirational goals for female representation in 2013 and 2015 within the next six months.

The committee noted that this was likely to be an area of increasing focus over the next few years and would be likely to extend to large private companies in due course.

5. Consultation paper on revised financial regulatory structure

The committee noted that a revised consultation had been issued concerning the proposed new financial regulatory structure to be implemented following the recent financial crisis. While the details of that consultation were outside the scope of this committee it was noted that the Financial Conduct Authority (in the earlier consultation called the Consumer Protection and Markets Authority) would be responsible for conduct of business regulation of the financial services industry and financial markets. It was also noted that the FCA would be expected to take over the current functions of the UK Listing Authority.

6. First conviction for corporate manslaughter

It was noted that the first conviction for corporate manslaughter had recently been reported – *Cotswold Geotechnic (Holdings) Limited*.

7. Seminar with BLS

It was noted that the committee had been asked to assist in putting on a company law related training seminar later in the year in conjunction with the training arm of BLS. Adam McGiveron had kindly agreed to take that forward and the committee discussed a number of topics which might make sense to include in the programme. It was agreed that any ideas should be forwarded to Adam by email who would contact Glenda at BLS with a view to agreeing a programme and date for the seminar.

8. Piece for Birmingham Post

It was also noted that the committee had been asked to do a short piece for a forthcoming supplement in the Birmingham Post. It was suggested that corporate manslaughter might be an appropriate topic to cover (there recently having been the first reported conviction under the new provisions). However, at this stage the committee did not have further information on what would be required and the likely timing and so it was agreed that John Campion would follow up to see what was envisaged and update the committee accordingly.

9. Any other business

Adam McGiveron raised with the committee the recently reported case of *Holland v Revenue and Customs & Anor* where the Supreme Court had considered whether an individual director of a corporate director of another company was a de facto director of that other company. The court had held (by a 3-2 majority) that he was not and that to hold otherwise would be an unjustified extension of the concept of de facto director. The committee felt that this decision was the right one as if it was accepted that as a matter of law it was permissible to have a corporate director it would seem to be inconsistent with that concept if an individual director of a corporate director would automatically be considered a de facto director.

10. Date of next meeting

It was noted that the next meeting would be on Thursday 12 May at DLA Piper.

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Chairman