

January 2018

2017 Half-year in review

M&A legal and market developments

In this issue...

Contractual provisions.....	1	Listed companies	8
Company law.....	5		

Authors: Philip Broke, Veronica Carson, Tamsin Dow

We set out below a number of interesting English and European court decisions and market developments which have taken place and their impact on M&A transactions. This review looks at these developments and gives practical guidance on their implications. Summaries feature below, and you can click where indicated to access more detailed analysis.

Contractual provisions

A number of cases have looked at common contractual provisions on M&A deals

Specific performance of share option despite management veto discretion

The Supreme Court granted three individuals specific performance of a share option agreement even though the company had what appeared a right of veto under the agreement, applying a line of case law that this nonetheless did not amount to an absolute decision right. The judgment provides guidance on the processes that should be followed in exercising a contractual discretion.

The company (C) entered into a services agreement with a business development consultancy firm (A). C also granted options over its shares to three directors of A. A clause in the share option agreement stated: *"The Option may only be exercised with the consent of a majority of the board of directors of the Company."* C refused to issue the shares when the option-holders purported to exercise the options, on the basis that its directors did not consent. The High Court decided that C did not have an unconditional right to veto the exercise of the option and granted specific performance of the option agreement. It applied a line of case law showing that a court may find that a decision-maker must exercise a contractual

Key lessons

- ❑ **Unfettered right of veto rare:** The judgment highlights the risks in arriving at an arbitrary decision without evidence of proper process.
- ❑ **Document factors to take into account:** It also emphasises the merit in expressly documenting any conditions which must be met before a contractual consent will be given.

Click [here](#) to read more

discretion in a way which is not arbitrary, capricious or irrational and that the decision reached must not be so unreasonable that no reasonable decision-maker could have come to that conclusion. The court stated that the option would have been meaningless otherwise, because the grant of shares would have been entirely within the gift of C. To assess whether a contractual discretion had been exercised properly, you had to identify what the target of the discretion was, in the sense of what the decision-maker was meant to be considering when

deciding how to exercise it. The High Court took into account that part of the commercial arrangement was the desire to find an investor to meet C's needs moving forward. With this in mind, it decided that the board should have asked itself whether A and/or the claimants had made a real or significant

contribution to C's progress or growth. By contrast, there had in fact been no proper exercise of the discretion. There had been hardly any discussion and the board had proceeded on the mistaken view that it had an absolute veto. (*Watson and Ors v Watchfinder.co.uk Limited* [2017] EWHC 1275 (Comm))

Discretion on fees chargeable under receivables finance agreement and penalties analysis

The High Court decided that a bank, which was entitled under a receivables finance agreement to charge its client a fee for taking over collection of outstanding receivables of up to 15% of the amounts collected, did not have an open discretion to charge any fee it wished up to 15%. However, the collection fee imposed here was not a penalty.

C entered into a receivables finance agreement (RFA) with Bank L. C subsequently went into administration and its associated company B agreed to indemnify L in respect of any sums due under the RFA. Following a letter of demand issued to C before it went into administration, L took over receivables on C's sales ledger. The monies owed included a collection fee charged by L. The relevant clause in the RFA stated that, if C failed to repurchase any receivables within seven days of a demand, L would be entitled to charge an additional collection fee of up to 15% of amounts subsequently collected. L notified C that it would be charging a fee of the full 15% on all receivables needing to be collected. B challenged this. The High Court decided that L did not have an open discretion to set a fee of its choice. The target of the provision was to compensate L for the additional costs and expenses which it would incur once it had taken over the collections. This meant that a proper process should be followed, taking into account all material considerations and not irrelevant ones. On the facts here there was no proper exercise of a discretion, including: no attempt to calculate the likely costs and expenses on all receivables needing to be collected; no thought to possible involvement of third parties in the collection process, with separate charging arrangements; and no consideration of deferring imposing a charge to reach a more informed view first of the proper percentage to be applied. However, the High Court decided that the collection fee was not a penalty.

Key lessons

- **Case law on exercise of contractual discretions:** The discretionary formulation in this clause triggered the test in the preceding line of case law on the duty to act rationally when exercising certain contractual discretions.
- **Importance of proper process:** As in previous case law, L needed to be able to demonstrate that it had followed a proper process to arrive at a rational basis for its decision.
- **Previous Supreme Court guidance on penalties applied:** The test set in the leading Supreme Court decision in *Cavendish Square v Makdessi*¹ was applied here to determine that the provision was not a penalty, taking into account the contractual discretion to set the fees together with the upper cap on the fees which could be charged.

Click [here](#) to read more

It said that C's obligation to pay the fee was a primary obligation, which could not amount to a penalty. Even if it might be treated as a secondary payment obligation triggered on breach of a primary provision, it was significant that the payment obligation was not a fixed sum or even a particular formula, but a fee to be arrived at in the exercise of a discretion "tempered" by the duty not to do so in an arbitrary way. It was not penal or extortionate. L had a clear legitimate and commercial interest in being compensated for its internal costs of the collect-out and the process of being able to make an estimate and charge the fee at the outset was commercially legitimate. It was in any event significant that the RFA had been negotiated on an arm's length basis. (*BHL v Leumi ABL Limited* [2017] EWHC 1871 (QB))

¹ [2015] UKSC 67.

Minorities' challenge to use of drag-along rights failed

Minority shareholders failed to get summary judgment on their claim that the past share transfers under which majority shareholders had acquired control were void because the related right of first refusal provisions in the shareholders' agreement (SHA) had been incorrectly applied.

The majority shareholders (H) had increased their shareholding under a number of past transfers from former shareholders, through which they claimed to hold a majority of the shares in the company (C). On that basis, they invoked certain "drag-along" rights under the SHA for the compulsory acquisition of the minority claimants' shares in certain circumstances. The claimants alleged that the various transfers by which H had increased their shareholding were void under the SHA. Clause 5 provided for shareholders to have rights of first refusal where a transfer of shares was proposed and required the offeror to specify in the relevant transfer notice the price and "material terms" on which the shares were to be transferred. The claimants argued that the sellers had failed to set out a material term of the offer to sell, namely, that they were only willing to sell their shares if their share of the senior debt owed to them by C's group was sold at the same time. H had acquired shares on this basis, but that was not referred to in any of the transfer notices. The High Court refused the minorities' application for summary judgment. The court said that "material"

No express or implied duty to supply information under share SPA

The High Court decided that a seller (S) was not under an express or implied duty under a share sale and purchase agreement (SPA) to provide the buyer (B) with certain information about the ultimate investors in S's parent company for the purposes of negotiating settlement of a tax dispute between the Danish target company (T) and the Danish tax authorities under a tax indemnity in the SPA.

Under the SPA, S agreed to indemnify B in respect of any sums T might be required to pay to the Danish tax authorities in an ongoing dispute over withholding tax on interest payable by T on monies it had borrowed from S. The indemnity expired on the sixth anniversary of completion. B argued that it could negotiate a settlement of the tax dispute before the indemnity expired, and significantly reduce T's liability, if S supplied certain information about S's ultimate investors. B alleged S was obliged to provide this either because of the further assurance clause, read with the indemnity provisions, or because there was an implied term to that effect. Applying recent Supreme Court decisions, the High Court said that it had to ascertain the objective meaning of the language used. In doing so the contract must be considered as a whole, taking into account the parts of the contract that provide its context. Nothing in the SPA required S to provide

Key lessons

- **Clear and unambiguous drafting:** The judgment highlights the merits of clear and express drafting in SHAs on requirements for a valid transfer notice and related mechanics to apply on a share transfer.
- **Express provisions in SHAs on treatment of shareholder loans:** It also shows the benefits in expressly providing in SHAs for shareholder debt to be acquired in conjunction with a share acquisition or repaid by the company.

Click [here](#) to read more

connoted relevance. Clause 5 of the SHA conferred rights of first refusal in respect of shares. It did not confer any rights in relation to other property which might be purchased or sold at the same time as the shares, whether that was the senior debt or anything else. It was relevant that there was no mechanism in the SHA for allocating other property among investors, meaning that sales of other property were outside the scope of the SHA. It was a separate question for full trial as to the effect on pricing of the arrangement. (*M&G Broad European Loan Fund Limited and Ors v Hayfin Capital Luxco 2 Sarl* [2017] EWHC 1756 (Ch))

Key lessons

- **Implication of terms:** The court will not imply terms unless it is necessary to give business efficacy to the agreement.
- **Information-sharing and co-operation:** It is advisable to include express provisions on information-sharing and/or co-operation required between the parties.

Click [here](#) to read more

the requested information, and so there was nothing for the further assurance clause to bite on. The conduct of claims clause imposed obligations on B for S's benefit, and no information requirement was imposed on S. By contrast, several other clauses in the SPA imposed express information-sharing obligations on the parties. The alleged implied terms were not necessary to make the SPA workable, and this was reinforced by a robust entire agreement clause. S did not have an implied duty to co-operate by providing the requested information, either as an aid to interpreting the further assurance clause or as a self-standing implied term. (*Takeda Pharmaceutical Company Limited v Fougera Sweden Holding 2 AB* [2017] EWHC 1995 (Ch))

Notice of warranty claim invalid for failure to comply with notices clause

The High Court recently dismissed a warranty claim under an SPA where notice had not been given in strict accordance with the agreement, even though to do so would have meant service at an out of date address. Additionally, the court commented on the interpretation of certain seller limitations.

The buyer (B) brought a claim against seven management sellers for alleged breaches of management warranties. B attempted to serve warranty notices by courier on the last possible day allowed under the SPA. This was done successfully for all but one of the sellers (S), who had moved house without notifying B. The courier was told by the new occupant of the specified address that S no longer lived there. Instead of leaving the notice at that address, the courier left it with another seller. A seller limitation in the SPA stated that *"No management vendor shall have any liability for a management warranty claim except in circumstances where the purchaser gives notice to the management vendors before..."* the expiry of the time limit for notifying claims. Deemed receipt occurred on delivery. The High Court dismissed the claim on the basis that B had failed to serve notice on all management sellers by the requisite date. Notification of change of address by a party was merely permissive. A party who failed to notify a change of address would take the consequences that a notice might

Interpreting exclusion clauses between sophisticated parties

The Court of Appeal has again reaffirmed that the historic *"contra proferentem"* rule requiring an exclusion clause to be interpreted against the party relying on it now has limited place in commercial contracts negotiated between parties of equal bargaining power. It is only relevant in this context where the wording is ambiguous.

Developers (P) claimed against their project consultant (O), who provided design and development services in relation to the site, for failing to identify asbestos. O relied on an exclusion clause in the contract which stated that *"...Liability for pollution and contamination [is] limited to [£5 million] in the aggregate. Liability for any claim in relation to asbestos is excluded."* P argued that: (i) the exclusion clause was limited to pollution, contamination and asbestos *"caused"* by O; and (ii) negligence was not excluded. The Court of Appeal held that the word *"for"* did not mean *"for causing"* and that claims in negligence were successfully excluded. The clause excluded liability for all claims for asbestos, whether or not

Key lessons

- ❑ **Follow SPA procedures closely:** The judgment shows that warranty notice requirements in SPAs will be applied strictly by the court.
- ❑ **Clear and express wording in seller limitations:** A buyer desiring to establish that the seller limitation in respect of provisions in the accounts only applies in respect of the amount of the provision should cover this expressly in the drafting.

Click [here](#) to read more

take longer to come to its attention. However, if the notice had been left at the original address this would not have affected its validity. The court also commented that a seller limitation in the SPA in respect of any management warranty claim *"to the extent that"* provision was made in the target company's accounts had the effect of barring a claim in its entirety on a matter for which provision had been made in the accounts, regardless of whether or not the provision was sufficient. The effect was that, if the provision was insufficient, the sellers would not be liable for the amount of the shortfall. (*Zayo Group International Limited v Ainger and Others* [2017] EWHC 2542 (Comm))

Key lessons

- ❑ **Clear and unambiguous drafting:** The judgment highlights again the importance of clear and unambiguous drafting of exclusion clauses and that the ordinary and natural meaning will be applied.
- ❑ **Contra proferentem rule less relevant:** It is in line with other recent case law on the diminishing significance of the *contra proferentem* rule.

Click [here](#) to read more

arising from negligence, and covered negligence in advising on the extent of asbestos on site. The *contra proferentem* rule was not relevant, as the clause was not ambiguous or unclear. In any event, it now had a very limited role in the interpretation of commercial contracts negotiated between parties of equal bargaining power. (*Persimmon Homes Limited v Ove Arup & Partners Limited and another* [2017] EWCA Civ 373)

Company law

There have been some particular cases of interest on a range of company law issues

Proper purpose to inspect register of members

The Court of Appeal has upheld an earlier High Court decision that a company did not have to comply with a request under the UK Companies Act 2006 (CA) to inspect or copy the register of members because the request omitted information required by the CA and in any event had not been made for a proper purpose.

The request was made by a non-member (T) who ran a tracing agency to trace lost members in public quoted companies. It did not contain the name and address of individuals with whom T proposed sharing the information, as required by the CA. The Court of Appeal decided that the request was invalid for failing to contain the requisite information and that it had in any event not been made for a proper purpose. The effect was that the company need not provide the information. One reason was that T's purpose was to extract a commission or fee from traced lost members, by not disclosing the asset to which they may be entitled before they agreed to pay the commission, and that this was not a proper purpose. Another was that T should have provided sufficient information about the terms on which the lost shareholders would be reconnected to the company to enable a proper evaluation of the purpose to be

Key lessons

- **Relevant considerations on "proper purpose":** The judgment gives useful guidance for companies on factors to consider when assessing whether or not a request for access to a register of members has a "proper purpose", albeit with different reasoning from the different judges.
- **Generic overarching test:** Helpfully, the Court of Appeal's judgment clarifies that the proper purpose test does not depend on whether the purpose was in the interests of shareholders, which is not mentioned in the Companies Act as a determining factor.

Click [here](#) to read more

made. Only the party requesting access to the register of members could provide this. A device to extract commission in this way before telling lost shareholders the nature or value of the asset which was potentially recoverable was not a proper purpose without disclosure of the full terms on which the lost shareholder would be reconnected to the company. (*Fox-Davies v Burberry Group Plc* [2017] EWCA Civ 1129)

Unanimous consent did not work at inquorate board meeting

The Court of Appeal overturned a High Court decision and decided that administrators appointed at an inquorate board meeting had not been validly appointed, because the principle of unanimous shareholders' consent could not be applied on the facts to validate their appointment.

The applicants were creditors of the company (C) which had been put into administration. D was the sole director, following resignation of his father (R) after R was disqualified from acting as a director. D was registered shareholder of 75% of C's share capital, held on bare trust for R. The remaining 25% was registered in the name of a company (IM) now dissolved. C's administration had been decided on at a board meeting at which D was the only director present, whilst the quorum under C's articles was two. The quorum at shareholder meetings was also two. The Court of Appeal unanimously allowed the appeal and decided that the administrators' appointment was invalid. The Court of Appeal stated that the unanimous consent principle could not apply on the facts. The principle requires the assent of all the shareholders who have

Key lessons

- **Meaning of "member":** The judgment is helpful in confirming the meaning of "member" under Table A and the UK Companies Act.
- **Narrow interpretation of unanimous consent:** The decision gives a narrow interpretation to the question of when the unanimous consent principle can apply.
- **Power of court to order a meeting:** Under the UK Companies Act a director or member can apply to court for a court order to call a meeting of the company if it is otherwise impracticable to do so, and to give a direction that one member shall be deemed to constitute a quorum.

Click [here](#) to read more

a right to attend and vote at a general meeting, not just those who may be available at the time. The principle could not apply where one of the registered shareholders was a dissolved

company that no longer existed, because it was incapable of consenting. C had not become a single member company on IM's dissolution. A "member" includes any registered member, whether alive or dead and, if corporate, whether

subsisting, in an insolvency procedure or dissolved. As IM remained on the register despite its dissolution, C was not a single member company. (*Randhawa and another v Turpin and Hardy* [2017] EWCA Civ 1201)

Parent's duty of care in relation to pollution caused by subsidiary

The Court of Appeal decided that there was an arguable issue to be tried over whether a UK parent company (P) owed and breached a duty of care to individuals in Zambia in respect of alleged pollution and environmental damage caused by a copper mine in Zambia operated by its Zambian subsidiary (S).

The claimants (C) were individuals in Zambia who brought proceedings against P and S in England on the basis of P's domicile in England. They alleged that they had suffered personal injury and damage to property as a result of pollution and environmental damage caused by the mine owned and operated by S. The principal claim against P was that it had breached a duty of care which it owed them through control which it had exercised over S's activities. The Court of Appeal agreed with the High Court that England was the most appropriate forum for claims against S as well as P. This was on the basis that: there was a real issue to be tried between C and P; S was a proper party to that claim; and it was inappropriate to have parallel proceedings. It also looked at wider substantive issues on the potential liability of parent companies of large multi-jurisdictional groups for actions of their subsidiaries. The Court of Appeal decided that C's claim was arguable and there was an issue to be tried between the parties. Depending on the facts it was arguable that a claim might arise in negligence against a parent company out of the operations of its

Directors' breach of duty to exercise powers for proper purpose did not amount to unfair prejudice

The High Court recently dismissed a petition for relief from unfair prejudice under the UK Companies Act 2006 on the grounds that the company's affairs had not been conducted in an unfairly prejudicial way. Despite finding that the company's directors had breached their statutory duty to exercise their powers for a proper purpose, the High Court decided that this had not caused any prejudice to the petitioner.

P was a 19% shareholder in C. P had exercised an option to increase its shareholding to 33%, but C's directors had failed to issue the requisite shares to give effect to this. P had lent substantial sums to C and also had a sales arrangement with C under an exclusive distribution agreement. Disputes arose between P and C's directors. C was in severe financial

Click [here](#) to read more

subsidiary. A duty of care owed by the parent may arise where the parent either has taken direct responsibility for developing, say, a material health and safety policy the adequacy of which was the subject of the claim, or controls the operations that give rise to a claim. S had argued that P was simply a holding company with few staff and no mining expertise and had denied that P had any superior knowledge to S, particularly given that P was not an operating company. However, the Court of Appeal agreed with the High Court these were issues which should be resolved at trial. Material suggesting an arguable claim included a report indicating that oversight of all P's subsidiaries rested within P's board; a management agreement on services provided by P to S; and evidence from a former employee as to P's control over S. (*Lungowe v Vedanta Resources Plc* [2017] EWCA Civ 1528)

Key lessons

- **Potential extension of ambit of parent company's duty of care:** The judgment suggests that it is at least arguable that the ambit of a parent company's possible duty of care for a subsidiary's operations could extend beyond employees to other affected third parties.

Click [here](#) to read more

Key lessons

- **More than unfair behaviour required to establish unfair prejudice petition:** A petitioning shareholder must prove a causal link between the conduct complained of and the prejudice alleged.

Click [here](#) to read more

difficulties and its directors wanted to bring in a third party investor, which they believed was in C's best interests. They circulated by email a proposed written special resolution to disapply pre-emption rights and implement the third party investment. This was sent to all shareholders except for P, and the resolution was passed. C subsequently conducted a private placing and P's shareholding was diluted to 5.3%.

P brought a petition for unfair prejudice. The High Court decided that there had been no breach of the directors' statutory duty to promote the success of the company, as their motivation had genuinely been to keep the company solvent. However, they had breached their statutory duty to exercise their powers for a proper purpose when notifying all

the shareholders except P of the proposed special resolution. Notwithstanding this the unfair prejudice petition was not made out, as the failure to give notice had not caused P any prejudice, not least as P could not have blocked the resolution and it would have passed anyway. (*Watchstone Group Plc v Quob Park Estate Limited* [2017] EWHC 2621 (Ch))

Cross-border mergers: effective date for merger by absorption

The High Court has confirmed that it is possible to specify a past date for participation in profits of the merged entity in the case of a cross-border merger by absorption under the Companies (Cross-Border Mergers) Regulations 2007 (Regulations).

The draft terms of a proposed merger by absorption between a UK company (G) and its German sister company (T, to be dissolved under the merger plan) stipulated that T's shareholder would be entitled to participate in profits of the merged entity from a past date. This pre-dated both the draft terms of merger and the court hearing to approve the merger and pursuant to which it would come into effect. The court decided that there was no breach of Regulation 7(2)(e) of the Regulations, which requires the draft terms of merger to specify the date from which the holding of shares or other securities in the transferee will entitle the holder to participate in profits. The origins of the wording could be traced back to the Third EEC Directive on mergers of public companies. It was clear that the European Commission thought that the date was entirely a matter for agreement between the parties

Key lessons

- **Clear guidance on past effective dates for mergers by absorption:** The judgment gives clarity that a past date for participation in profits works for a merger by absorption under the Regulations. Previous case law has only confirmed this in the context of merger by absorption of a wholly-owned subsidiary.

Click [here](#) to read more

and could, for practical reasons, be a convenient past date. The court also emphasised that the Commission clearly never intended that the date specified in the draft terms of merger should be the same as the date on which the merger would become effective. This was clear because it would otherwise make the specification pointless, and would require the parties to engage in the speculative exercise of guessing a future date which might not turn out to be an accurate prediction, and this would serve no useful purpose. (*In the matter of GET Business Services Limited* [2017] EWHC 2677 (Ch))

Listed companies

A number of rulings by the English and European courts, the FCA and the LSE are of particular interest to listed companies

Adjusting the price of a mandatory bid and interpretation of article 5(4) Takeover Directive

The European Court of Justice (ECJ) has recently considered the discretion conferred to national law by the Takeover Directive to set out circumstances in which the price of a mandatory bid may be adjusted.

The Takeover Directive allows Member States to draw up a list of circumstances in which the highest price for a mandatory takeover bid may be adjusted. National law may also determine the criteria to be applied in such circumstances. The case concerned the legality of a decision by the Italian supervisory body to increase the price of a takeover bid as it considered that there had been collusion between the bidder and one of the sellers. Italian takeover rules allow price adjustments in these circumstances. The argument centred on whether using an abstract legal concept such as collusion meant that

Key lessons

- **Useful clarification:** ECJ takes a pragmatic approach when clarifying the ability of national law to determine price adjustments in a mandatory bid.

Click **here** to read more

Italian law was insufficiently determined for the purposes of the Takeover Directive. The ECJ said that the Takeover Directive must be interpreted to allow national law to make price adjustments on the basis of collusion without having to specify the precise conduct that amounts to it. It was left to the Italian Court to determine whether or not use of the term collusion was sufficiently clear by using methods of interpretation recognised by its national law. (*Marco Tronchetti Provera and Others* [2017] EUECJ C-206/16)

AIM Disciplinary Committee hearings: private the norm and no apparent bias

The Court of Appeal dismissed a claimant's application for judicial review against decisions of the AIM Disciplinary Committee (ADC), despite allegations that the hearing should have been in public.

A nomad, acting as primary regulator and adviser to AIM-traded companies, applied for judicial review against two case management decisions by the ADC. The proceedings were in private and the AIM Disciplinary Procedures and Appeals Handbook states that the ADC "usually conducts hearings in private". A nomad has the right to ask for a public hearing and a nomad requesting a public hearing has to provide advance notice. The Court of Appeal concurred with the High Court in that the decisions of the ADC were rational and fair and could not be impugned. It is up to the ADC whether to hold a hearing in public. No nomad had ever before sought a public hearing of disciplinary allegations against it. The normal rule is to proceed in private. It is unusual for nomads to object to

Key lessons

- **Judicial support for market-led approach:** The judgment supports a market-led approach to AIM regulation.
- **Publicity of hearing:** The judgment took into account third party rights as a consideration when assessing the risks of a public hearing.

Click **here** to read more

privacy. A better reason than "openness is good" would be required to deviate from the norm to a public hearing. Benefits of proceeding in private include that ADC hearings may involve market-sensitive information or unproven allegations and that a possible sanction is private censure or warning. (*Zai Corporate Finance Limited v AIM Disciplinary Committee of the London Stock Exchange* [2017] EWCA Civ 1294)

Private censure and fine for breaches of the AIM Rules for Companies

The London Stock Exchange (LSE) has announced the public censure and fine of £125,000 on a company for breaching Rules 10 (Principles of disclosure), 22 (Provision and disclosure of information) and 31 (AIM company and directors' responsibility for compliance) of the AIM Rules for Companies.

When the AIM Company (M) notified the market of the imminent completion of an acquisition it failed to caveat the notification with details of the risk to completion caused by financing problems. As a result of this failure, the LSE concluded that M had not complied with its disclosure obligations under AIM Rule 10. The LSE found that M had also breached AIM Rule 31 as the directors with knowledge of the financing difficulties did not inform or seek advice from the nominated adviser, instead seeking advice from other advisers. (*AIM Disciplinary Notice: AD 16 dated 5 October 2017*)

Inaccurate and misleading financial reporting

The UK Financial Conduct Authority (FCA) has fined a company (R) £27.3 million for failure to prevent misleading information being released to the market.

The FCA fined R for its breaches of the Disclosure and Transparency Rules (now the Disclosure Guidance and Transparency Rules). R acquired high-value mining assets but failed to account for them correctly when publishing its interim results. The FCA considered that R demonstrated a serious lack of judgment when it decided not to carry out an impairment test when indicators of impairment were present. Had R carried out the test, a material impairment would have been required to be reported to the market. The information R provided to the market omitted important details and R's reporting was therefore inaccurate and misleading. (*FCA Final Notice: Rio Tinto plc 17 October 2017*)

White & Case LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom
T +44 20 7532 1000

whitecase.com

In this publication, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.

This publication is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.

Key lessons

- **Notifications to the market:** AIM Companies must ensure that notifications provide a clear understanding of the matters being disclosed and must, where necessary, be properly caveated.
- **Keeping nomads informed:** AIM companies must keep the nomad informed of developments and seek their advice. Discussing matters with other advisers is not a substitute for seeking nomad advice.
- **Investigation by LSE:** If under investigation AIM companies are required to use due skill and care to ensure that information provided is correct, complete and not misleading.

Click [here](#) to read more

Key lessons

- **Disclosure:** Companies are required to properly consider and report all relevant information relating to possible impairment matters.
- **Higher fines:** The FCA used percentage of market capitalisation (rather than revenue) to determine and yield a higher level of fine to reflect the significant risk of harm that could be caused through investment decisions being made on the basis of incorrect information.

Click [here](#) to read more