



Ethics of a Company Secretary

Who is a Company Secretary?

Black's Law Dictionary defines a company secretary as an officer charged with the direction and management of that part of the business of the company concerned with keeping records, official correspondence, giving notices, countersigning documents etc. This officer holds ostensible authority to carry out certain legal and administrative duties and may also make binding representations for the Company. In times past, the company secretary was seen as an administrative officer, however, the role of the company secretary has changed dramatically, Lord Denning, M.R. in a revolutionary judgement declared, "...but times have changed, a company secretary is a much more important person nowadays than he was in 1887. He is an important officer of the company with extensive duties and responsibilities. This appears not only in the modern Companies Act but also by the role which he plays in the day-to-day business of companies. He is no longer a mere 'clerk'. The global financial and economic crisis led to stringent rules and more focus on compliance which in turn led to the enhanced role of the company secretary. Simon Osborne the Executive Director of the Institute of Chartered Secretaries and Administrators states convincingly that *the increased focus on corporate governance is pointing to a renewed recognition, and greater visibility, of the company secretary, who has become the primary point of information and influence between the executive management and the board. The company secretary is now required to be more outward-looking, interacting with major shareholders, proxy advisers and regulators, and being increasingly strategic – bringing a wider understanding of business and the economic context in which their organisation works.*

Company Secretary and General Counsel

There is a trend towards combining the role of the Company Secretary with that of General Counsel. Ian Maurice of Egon Zehnder observes that a quick study of the top 100 companies ranked by market capitalisation listed on the London Stock Exchange (FTSE) shows that in just over 40 percent of the companies the role of General Counsel and Company Secretary is combined, while the other 60 percent have different individuals filling the two roles. He argues that in times of increasing complexity it might not be reasonable to expect one individual to have the breadth of skills to fulfill the tasks of a General Counsel and a Company secretary. He thereafter concludes that there is a move towards a separation of the roles.



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According to Voltaire with great power comes great responsibility. The position of Company secretary makes an individual privy to confidential information which brings along with it certain rules of conduct.

Section 297 of the Companies and Allied Matters Act provides that:

A secretary shall not owe fiduciary duties to the company, but where he is acting as its agent he shall owe fiduciary duties to it, and as such shall be liable to the company where he makes secret profits or lets his duties conflict with his personal interests, or uses confidential information he obtained from the company for his own benefit.

By the provision above, the Company Secretary as an agent is prohibited from making secret profits. Secret profit is profit made without the knowledge and consent to the person whom the fiduciary duty is owed. A company secretary as an agent is entitled only to an agreed remuneration and commission. If profit has been made by a company secretary as an agent then there is an obligation of full disclosure. The English Court of Appeal in **FHR EUROPEAN VENTURES LLP v MANKARIOUS** [2013] EWCA Civ 17 held that the burden of proving that

full disclosure rests on the agent; the principal does not have to prove a lack of disclosure. Where full disclosure had not been made, the agent is obliged to disgorge the secret profit, that is to say, he must pay it over to his principal - irrespective of whether the principal has suffered any financial loss. The principal's claim to disgorgement of the profit is based, not on damages having been suffered, but on a profit improperly made. Thus, the principal does not have to prove that the purchase price had been inflated by the amount of the agent's secret commission.

Regarding conflicts of interest there are several scenarios where a conflict of interest might exist for a company secretary. For example a company secretary of an organisation might set-up his own private practice and might use it to siphon money from the company or divert the company's clients. These acts should be avoided as they are against the company secretary's fiduciary duties and Rule 10 b of the Rules of Professional Conduct states that it is unprofessional conduct to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this rule, a lawyer represents conflicting interests when in respect of one client of whom he presently contends the interests of that client touch or concern confidences of another

client to whom the lawyer at the same time, owes a duty of service.

Finally, company secretaries should avoid using confidential information obtained in the course of their duties for their personal benefit. Such confidential information include minutes of board meetings, confidential letters and e-mails, records of company transactions. Rule 26 of the Rules of Professional Conduct states that it is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and it extends as well to his employees; and none of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without the client's knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

Conclusion

Company secretaries should observe high ethical standards to reduce corporate scandals. This will in turn enable shareholders, directors and the society at large benefit from the emerging codes of corporate governance.