

CHAPTER 15 THE COMPANY SECRETARY

BACKGROUND

The company secretary plays a fundamentally important role in ensuring a company's good corporate governance. As this is an area which is continually growing and developing to take account of increasingly complex legal, regulatory and best practice requirements, the company secretary's status and role has undergone a quite exponential expansion in order to keep pace with these developments. The importance of the role was recognised by the SCCLR in the Corporate Governance Review,¹ when commenting on the specific issue of ensuring that directors had access to the company secretary, which quoted the definition of the role of company secretary in the Cadbury Report¹ as follows:

The company secretary has a key role to play in ensuring that board procedures are both followed and regularly reviewed. The chairman and board will both look to the company secretary for guidance on what their responsibilities are under the rules and regulations to which they are subject and how those responsibilities should be discharged. All directors should have access to the advice and services of the company secretary and should recognize that the chairman is entitled to the strong support of the company secretary in ensuring the effective functioning of the board.

However, despite this critically important role, both the statute law and non-statutory documents give relatively little explicit guidance as to the role and functions of the company secretary.

PRESENT STATUTORY POSITION

Interpretation

The company secretary, along with a company's directors and managers is given specific statutory recognition under the CO. Section 2 states that: an "officer" in relation to a body corporate, includes a director, manager or secretary'. Consequently, the company secretary is an officer of the company subject to all the provisions of the CO which apply to officers. However, unlike the positions of "director" and "manager", the "secretary" does not merit a separate definition under section 2 of the CO which is somewhat anomalous given the importance of the position in a company's governance.²

¹ CGR Phase II, paras. 12.16-12.19, pp. 37-38.

² Although there is no definition of "secretary" in section 2 of the CO, an amendment to Table A by the Companies (Amendment) Ordinance 2003 added a definition of secretary to mean 'person appointed to perform the duties of secretary of the company'. Regulation 112 of the Model Articles of Association in Table A in the First Schedule to the CO also provides that: 'the secretary shall be appointed by the directors for such term, at such remuneration and upon

Requirement to have a Secretary

Section 154(1) of the CO provides that every company shall have a company secretary. Prior to the introduction of this section in 1984, the CO did not specifically require a company to have a secretary.³ A director of a company may also be the secretary of the company (section 154(1A)) provided that he is not the company's sole director (section 154(1B)). A private company having only one director shall not appoint as its secretary a body corporate the sole director of which is also the sole director of that private company (section 154(4)).

Where the office of company secretary is vacant, or where the secretary is incapable of acting, the assistant or deputy secretary may perform such acts; alternatively, in the absence of an assistant or deputy secretary, any officer of the company, who has been authorised by the directors, may perform the act which would normally be performed by the secretary (section 154(3)).

Residency Requirement

If the secretary is an individual, he shall ordinarily reside in Hong Kong (section 154(2)(a)). If the secretary is a body corporate,⁴ it shall have its registered office or a place of business in Hong Kong (section 154(2)(b)). This is in marked contrast to the statutory position regarding directors where there is no such residency requirement.

Natural Person Requirement

There is no requirement in the CO that a secretary must be a natural person as there are provisions which allow both an individual and a body corporate to be a company secretary (section 154(2)). Again, this contrasts with the position regarding directors where, under section 154A, the directors of companies have to be natural persons unless they are the directors of companies exempted under section 154A(3). However, in the case of listed companies, rule 8.17 of the Main Board Listing Rules and rule 5.14 of the GEM Listing Rules require that the secretaries of listed companies shall be natural persons and shall possess the specified professional qualification or experience.

such conditions as they think fit; and any secretary so appointed may be removed by them. In the case of a non-Hong Kong company, secretary is defined in section 341 of the CO to include "any person occupying the position of secretary by whatever name called."

³ See the CLRC's Second Report, para 7.7.

⁴ Section 2(3) of the CO provides that references to a body corporate or to a corporation shall be construed as not including a corporation sole but as including a company incorporated outside Hong Kong.

PRESENT NON-STATUTORY POSITION

Listing Rules

Professional qualification and experience requirements

Rule 8.17 of the Main Board Listing Rules provides that:

The secretary of the issuer must be a person who is ordinarily resident in Hong Kong and who has the requisite knowledge and experience to discharge the functions of secretary of the issuer and who:

- (1) in the case of an issuer which was already listed on 1 December 1989 held the office of secretary of the issuer on that date;
- (2) is an Ordinary Member of the Hong Kong Institute of Chartered Secretaries, a solicitor or barrister as defined in the Legal Practitioners Ordinance or a professional accountant; or
- (3) is an individual who, by virtue of his academic or professional qualifications or relevant experience, is, in the opinion of the Exchange, capable of discharging these functions.

Rule 5.14 of the GEM Listing Rules lays down similar, but not identical requirements, as follows:

The secretary of the issuer must be a person who has the requisite knowledge and experience to discharge the functions of the secretary of the issuer and who:

- (1) is an Ordinary Member of the Hong Kong Institute of Chartered Secretaries, a solicitor or barrister as defined in the Legal Practitioners Ordinance or a professional accountant; or
- (2) is an individual who, by virtue of his academic or professional qualifications or relevant experience, is capable of discharging these functions.

At present, the position of company secretary is given greater prominence under the GEM Listing Rules than under the Main Board Listing Rules. The "company secretary" is the subject of a separate sub-section in chapter 5 — Directors, Secretary and Corporate Governance Matters under the General Part of the GEM Listing Rules whereas reference to the "secretary" is hidden in the very lengthy basic conditions section in chapter 8 — Qualifications for Listing under the Equity Securities Part of the Main Board Listing Rules.

There is no requirement in the CO for the secretary of a company to have any specified professional qualifications or experience. Consequently, in the case of private companies and unlisted public companies, any persons may be appointed as company secretaries as long as they comply with the requirements in section 154 of the CO.

Compliance officer

The GEM Listing Rules also make specific unique provision for the position of compliance officer which has no equivalent in the Main board Listing Rules.

Rule 5.19 stipulates that every issuer must ensure that, at all times, one of its executive directors assumes responsibility for acting as the issuer's compliance officer. Rule 5.20 further elaborates that the compliance officer's responsibilities must include, as a minimum, the following matters:

- (1) advising on and assisting the board of directors of the issuer in implementing procedures to ensure that the issuer complies with the GEM Listing Rules and other relevant laws and regulations applicable to the issuer; and
- (2) responding promptly and efficiently to all enquiries directed at him by the Exchange.

In a significant number of cases, the role of compliance officer will also be discharged by the Company Secretary.

Code on Corporate Governance Practices

CP A.1.4 states that: 'All directors should have access to the advice and services of the company secretary with a view to ensuring that board procedures, and all applicable rules and regulations are followed.'

ROLE AND FUNCTIONS OF THE COMPANY SECRETARY

Legal Status of the Company Secretary

Legal perception of role

Quite independently of the legal position outlined above, the role and functions of the company secretary have seen quite an exponential growth over the past decade, in terms of both scope and complexity, commensurate with the need for companies to comply with an increasing range of legal, regulatory and corporate governance requirements. This is reflected in the legal perception of the company secretary. In the early case of *Barnett, Hoares and Co v South London Tramways Co*,⁵ Lord Esher MR said: 'A secretary is a mere servant; his position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all ...' However, in addition to this somewhat lowly role as an administrative clerk, the company secretaries of the late 19th century and for much of the first part of the 20th century also tended to double-up in other more important roles such as that of general manager, probably in view of the convenience of combining these roles where appropriate.

Relevant case law

Nearly a century later, two cases decided at roughly the same time indicated the resilience of judicial approaches to the role of company secretary spilling over into management but also acknowledging the increased status of the company secretary as a ministerial and administrative officer.⁶ In the first case, *Re Maidstone Building*

⁵ [1887] 18 QBD 815.

⁶ P Lawton and E Tyler *Division of Duties and Responsibilities between the Company Secretary and Directors in Hong Kong* (April 2001) p 89.

Provisions Ltd,⁷ Pennycuik V-C said: 'So far as the position of a secretary as such is concerned, it is established beyond all question that a secretary, while performing the duties appropriate to the office of secretary, is not concerned in the management of the company. Equally I think that he is not concerned in carrying on the business of the company.'⁸

In the second case, the often quoted *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd*,⁹ Lord Denning MR emphasised that times had changed and that the secretary is no longer a mere clerk but a much more important person, indeed an officer of the company with extensive duties and responsibilities. However, his duties are not, it seems, as rigorous as those of directors. For example, it was emphasised by Rattee J in *Brown v Bennett*¹⁰ that: 'The claim against Mr Sarson is also made under the two heads of breach of fiduciary duty and conspiracy. So far as the former is concerned, it is not, and cannot be, suggested that Mr Sarson owed any fiduciary duty to the company. He was not a director. He was the company secretary ...'

The legal ambiguity of the company secretary's position

In their seminal Research Report¹¹, Philip Lawton and Ted Tyler stated that 'the crux of (their) research depends on the legal parameters of the division of duties and responsibilities of the company secretary *vis à vis* those of the collegiate board and the individual directors. The legal position is somewhat ambiguous despite a number of legal decisions.¹² Although in essence, in the eyes of the law, the secretary is an officer in a ministerial and administrative capacity, by virtue of his office as secretary he has no managerial functions. Any managerial powers will not be derived from his office of secretary under the (Companies) Ordinance, but from some other executive office or powers delegated to him.' Lawton and Tyler went on to contrast the secretary's duties as an officer of the company with specific responsibility for, inter alia, compliance with statutory disclosure obligations under the CO with additional duties performed by the secretary usually

⁷ [1971] 1 WLR 1085, 1092.

⁸ Pennycuik V-C also quoted with approval at 1093 the following passage from Palmer's *Company Law* at para 8.1101: 'The position of secretary in a company has altered out of all recognition during the past 75 years. From being a humble clerk he has become, in most large companies, an officer of the company having important duties and responsibilities and often with considerable influence. He remains, however, in the eyes of the law what he was originally intended to be, namely, an officer in a ministerial and administrative capacity: he has no managerial functions and it would, normally, be unwise for an outsider to assume that he has any managerial powers, which are *prima facie* vested in the directors and any managing directors. In practice, the functions of the secretary often exceed those contemplated by the Act and he is sometimes given considerable management responsibility. It should, however, be realized that this is not his primary function: if a company wishes its secretary to have powers of management, these will be derived not from his office of secretary under the Act but from some other executive office.'

⁹ [1971] 2 QB 711, 716-717 (CA).

¹⁰ [1998] 2 BCLC 97, 106.

¹¹ *ibid* p 90.

¹² See *Palmer's Company Law*, Chapter 8.

CHAPTER 22 FINANCIAL REPORTING

OVERVIEW

In his key-note address at the 16th World Congress of Accountants in Hong Kong in November 2002, the then Prime Minister of China, Mr Zhu Rongji, uttered the memorable words: 'Keep no false accounts.' This short phrase encapsulates the critically important role played by financial reporting in maintaining and enhancing corporate governance standards. The rules governing the contents of accounts and reports are a mixture of statutory requirements in the CO, financial reporting standards issued by either the International Accounting Standards Board ('IASB') or the HKICPA ('HKFRSs') and the Listing Rules promulgated by the SEHK.

While all companies have to comply with the statutory provisions in the CO and financial reporting standards, listed companies also have to comply with the financial disclosure provisions in the Listing Rules. In addition, there is an overlap between the out-of-date statutory disclosure standards in the Tenth and Eleventh Schedules of the CO and much more modern and extensive non-statutory disclosure standards set out in HKFRSs. However, as outlined below, the statutory requirements in the CO will undergo significant reform in the context of the Companies Ordinance Rewrite Exercise.

STATUTORY FINANCIAL REPORTING FRAMEWORK AND DISCLOSURE REQUIREMENTS

Background

The accounting, auditing and reporting requirements in the CO have developed alongside the key features of a company, namely the separation of owners ie, shareholders, from those running the business and the limitation of the financial liability of the owners to the capital they have provided or agreed to provide. One of the principal purposes of preparing annual accounts and directors' reports under the CO is to provide a stewardship report by the directors to their companies' shareholders. At present, the statutory accounting and reporting standards are set out in sections 121 to 129G and 141CA to 141E of and the Tenth and Eleventh Schedules to the CO. The current structure and contents of the accounting provisions in the CO are confusing and out of date, partly as a result of piece meal amendments over a very lengthy period. In addition, the CO currently prescribes the contents of accounts in considerable detail which does not relate well to

the non-prescriptive, but much more comprehensive and up to date, financial disclosure requirements in the HKFRSs.¹

General Provisions as to Annual Returns

All "public companies," ie, companies which are not classified as private companies under section 29 of the CO, are required, under section 109 of the CO, to file with the CR an annual return containing the information required in the section 107 of the CO² together with copies of the company's balance sheet, profit and loss account, the auditors' report on the accounts; and the directors' report are required to be sent with the annual return to the CR (sections 109(3), 129C and 129D). However, the requirement to file audited accounts with the CR does not currently apply to private companies.

Keeping of Books of Account

Under section 121, every company is required to keep proper "books of account" with respect to: all sums of money received and expended by the company; its sales and purchase of goods; and its assets and liabilities. These are matters described as "relevant accounting transactions".³ Every company is required to keep such books of account for seven financial years as this is a requirement under the Inland Revenue Ordinance (section 51C(1)).

The books of account may be kept at the company's registered office but they may be kept wherever the directors think fit and they may even be kept outside Hong Kong.⁴ This contrasts with the provisions concerning the other registers which a company must keep which, with the exception of branch registers (sections 103-106) must be kept in Hong Kong. Section 121(3) requires that a company's books of account must be open to inspection by the directors of the company at all times. However, no other parties can inspect the books.

Profit and Loss Account and Balance Sheet

Section 122 requires the directors of every company to lay a profit and loss account or, in the case of a company not trading for profit, an income and expenditure

1. For example, sections 123 (general provisions as to form and contents of accounts), section 125 (form of group accounts), section 126 (contents of group accounts), section 128 (particulars to be shown in company's accounts in relation to subsidiaries), section 129 (particulars to be shown in company's accounts in relation to companies not being subsidiaries whose shares it holds), the Tenth Schedule and the Eleventh Schedule.

2. This information includes: the company name; the company type; the address of the company's registered office; the date of the return; the particulars of the company's indebtedness; the details of its members and, in the case of a company with share capital, details of the share capital; the details of the directors etc.

3. Under section 344A(9)(a) which concerns "dormant companies", a "relevant accounting transaction" means a transaction which is required by section 121 to be entered in the company's books of account (disregarding any transaction which arises from the payment of any fee which the company is required to pay by any Ordinance).

4. See *Re Fareast Realty Development Ltd* [2002] HKLRD (Yrbk) 139.

account before the company at its annual general meeting. This section does not apply to, inter alia, a company which is deemed to be dormant (section 344A(4)). However, the court may direct the accounts to be laid before some other general meeting of the company if, for any reason, it thinks fit to do so. The "period" mentioned in section 122(1) within which the accounts have to be laid before the company is generally described as "the relevant accounting period". In the case of the first accounts, this dates from the date of incorporation and, subsequently, from the date of the preceding accounts.

The accounts must be made up to a date not earlier than six months before the date of the AGM. In the case of a private company (other than a private company which is a member of a group of companies which includes a public company) and a company limited by guarantee, it must be made up to a date not more than nine months before the date of the meeting. However, the court may for any reason extend these six and nine month periods.⁵ The directors must also cause a balance sheet to be prepared, with the same accounting period as the profit and loss account, which will also be laid before the company at its AGM or other general meeting as specified by the court.

General Provisions as to Contents and Form of Accounts

Section 123 contains the core statutory requirement regarding a company's accounts which is that a company's balance sheet must give a "true and fair" view of the state of its affairs at the end of its financial year and its profit and loss account must give a true and fair view of its profit and loss account for the financial year. However, the section does not apply to, inter alia, certain private companies if, in respect to a financial year, all the shareholders agree (section 141D(1)) and a company which is deemed to be dormant (section 344A(4)).

The balance sheet and the profit and loss account must comply with the requirements of the Tenth Schedule (which are discussed below under the section on the Tenth Schedule). However, as the Tenth Schedule does not, and cannot, provide an absolute standard, compliance with its provisions is not a prerequisite for giving a "true and fair" view. Where compliance with the requirements in the Tenth Schedule and any other provision in the CO would not be sufficient to give a "true and fair" view, it will be necessary to either give additional information or depart from the statutory requirements (with reasons) in order to give a true and fair view of the company's financial affairs (section 123(4)).

Very interestingly, there does not appear to be any case law regarding the enforcement of section 123(6) which provides that a director who fails to take all reasonable steps to secure compliance with this section and other relevant sections of the CO regarding the contents of accounts to be submitted before a company in general meeting commits an offence and is liable on summary prosecution to

5. See *Re Singapore Hong Kong Properties Investment Ltd* (unreported, 1999; HCMP 3844/1999); *Re Kong Tai International Ltd* (unreported, 1999; HCMP 8843/1999); *Re Sino-I.com Industrial Ltd* (unreported, 2000; HCMP 4918/2000); *Re Welko Industrial Ltd* (unreported, 14 December 2000; HCMP 5791/2000), [2000] HKCU 1034.