

Duties of the Company Chairman

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1 Introduction

The position of the company chairman has, in recent years, acquired considerable significance. This note considers the duties of the chairman and whether higher standards may in future be imposed on this officer than on other directors when his or her duties to the company come under scrutiny. The focus is on the position in South Africa, and references to the Companies Act are to the South African Companies Act 61 of 1973, unless otherwise indicated. Developments in Australian and English law are also considered since these three systems share the same basis and similar principles govern the position of the chairman of the board.

I have used the term ‘chairman’ as an indication of the office of the individual who heads a company’s board of directors, rather than ‘chairperson’ which has, in an attempt to be gender neutral, become fairly common.¹

2 Legislation

Company statutes generally do not provide much guidance on the responsibilities of the company chairman. His or her position is not defined in the Acts, although it is recognised in certain provisions. The South African Companies Act authorises any meeting of a company to elect any member to be chairman² and confers certain rights and duties in respect of meetings on him or her.³ The minutes of any meeting of members or directors purporting to be signed by the chairman of that meeting, or by the chairman of the next succeeding meeting, are evidence of the proceedings at that meeting.⁴ However, the Act provides no definition of ‘chairman’. The Australian Corporations Act 2001 contains similar provisions,⁵ and s 370(5) of the English Companies Act 1985 allows the members to elect a chairman if a company’s articles do not provide guidance in this regard.

¹ See also Sir Adrian Cadbury *The Company Chairman* 2 ed (1990) at 2 who suggests that, although ‘chairperson’ is recognised in dictionaries, it remains rather contrived and awkward, particularly when used it in the plural to describe, eg, deputy chairmen.

² Section 191.

³ See, eg, s 192(1) which compels the chairman to adjourn a meeting in certain circumstances; s 195(a) which gives the chair a casting vote; and s 199(4) which confers certain powers in respect of special resolutions.

⁴ Sections 204(3) and 204(4). But see also *Poolquip Industries (Pty) Ltd v Griffin & Another* 1978 (4) SA 353 (W) where the Court indicated that this does not provide the exclusive method of proving a company’s resolution.

⁵ See ss 248E, 248G, and 249U.

3 The Chairman and Company Meetings

The board is not bound to continue with the same chairman for successive meetings, but may from time to time elect the chairman from amongst its members.⁶ But normally it elects a chairman who then, for the duration of his or her term of office, presides over all board meetings.⁷ The standard articles of association usually contain a provision that stipulates that the directors may elect a chairman of their meetings and determine the period for which he or she is to hold office, but if such chairman is not elected, or, if at any meeting the chairman is not present within a specified time after the time appointed for holding the meeting, or is unwilling to act as chairman, the directors present may choose one of their number to be chairman of the meeting.⁸ Article 42 of Table A of the English Companies Act has a similar provision and stipulates further that if only one director is present and he or she is willing to act, that director will be chairman. Only if there is no willing member of the board, do the members present have any say in the matter.⁹

Thus, the primary task of the chairman is to chair the company's board and to control company meetings. The chairman's role in this regard was succinctly described by the Supreme Court of New South Wales in *Colorado Constructions Pty Ltd v Plusus*:¹⁰

'It is an indispensable part of any meeting that a chairman should be appointed and should occupy the chair. In the absence of some person (by whatever title he be described) exercising procedural control over a meeting, the meeting is unable to proceed to do business. This may perhaps require some qualification if all present are unanimous. And, in a small meeting, procedural control may pass from person to person according to who for the time being is allowed by the acquiescence of those present to have such control. But there must be some person expressly or by acquiescence permitted by those present to put motions to the meeting so as to enable the wish or decision of the meeting to be ascertained.'

The chairman's conduct at the meeting must indicate that he or she is actually exercising procedural control over it. This is done by, for example, nominating who is to speak, dealing with the order of business, putting questions to the meeting, declaring resolutions carried or not carried, in due course asking for any general business, and declaring the meeting closed. In *Kelly v Wostenholme*¹¹ these matters had been dealt with at the meeting by the company accountant and not by the director who alleged to have been the chairman. The Supreme Court of New South Wales found that whatever he had claimed at the meeting and on paper, he was not acting as chairman of the meeting and accordingly did not have a casting vote.¹²

⁶ Cadbury op cit note 1 at 9.

⁷ See also Christopher Doyle *The Company Secretary* 2 ed (2002) at 82.

⁸ See, eg, Table A rule 40 & Table B rules 39-40 of the South African Companies Act.

⁹ See further Paul L Davies (ed) *Gower & Davies' Principles of Modern Company Law* 7 ed (2003) at 366.

¹⁰ (1966) 2 NSW 598 (SC NSW) at 600, quoted with approval in *Kelly v Wostenholme & Ors* (1991) 4 ACSR 709 (SC NSW) at 712.

¹¹ *Supra* note 10.

¹² At 712. See also *Woonda Nominees Pty Ltd & Others v Chng & Others* (2000) 34 ACSR 558 (SC WA) at 564-5 where this approach was approved.

As was stated earlier, it is mostly left to a company's articles of association to provide for the powers and duties of the chairman.¹³ These duties are distinct from the duties owed by a director.¹⁴ Clearly the chairman primarily has procedural authority when chairing meetings of directors or members. In that capacity, the chairman owes a duty to the meeting and not to the board of directors, even if he or she is a director. He or she must see that the business of the meeting is efficiently conducted and that all opinions are fairly heard. This may involve snap decisions on points of order, motions, amendments and questions. The validity of resolutions may turn on the correctness of the chairman's rulings in this regard.¹⁵

The chairman has specific duties with regard to the orderly conduct of meetings.¹⁶ These typically include demanding a poll,¹⁷ and conducting it. A 'poll' means that voting takes place taking into account all the voting rights attaching to members' shares in accordance with relevant legislation.¹⁸ In *Link Agricultural Pty Ltd v Shanahan & Others*¹⁹ the Australian Court of Appeal held that the purpose of the powers conferred upon a chairman with respect to the conduct of polls, was to facilitate the voting and counting of votes in order that the will of the majority of members should be reliably ascertained, and that whether or not there was an error in a chairman's ruling depended on whether it was made in good faith and for that purpose.²⁰

The adjournment of a meeting is the suspension of its business with the object of resuming it at a later time. At common law, the chairman has no general right to adjourn a meeting if there are no circumstances preventing its effective continuance.²¹ But the chairman may adjourn the meeting in certain circumstances, for example, when it so disorderly that no business can be transacted; for the taking of a poll; or in order to facilitate the transaction of the business.²² It is usually provided in the articles that with the consent of the

¹³ See, eg, *Woolworths Ltd v Kelly* (1991) 4 ACSR 431 (CA NSW) at 445; (1991) 22 NSWLR (CA) 189 at 225.

¹⁴ *Australian Securities & Investments Commission v Whitlam* (2002) 42 ACSR 407 (SC NSW) at 448 in [144]-[145]. See also par 4 below.

¹⁵ *Gower* op cit note 9 at 366.

¹⁶ *National Australia Bank Ltd & Others v Market Holdings Pty Ltd (in liq) & Others* (2001) 37 ACSR 629 (SC NSW) at 644-5. On the chairman's duties at meetings generally, see JG van der Merwe, WG Geach, MK Havenga & S Lombard (eds) *South African Corporate Business Administration* (looseleaf, 1995-) at 28.7-28.8.

¹⁷ In *The Second Consolidated Trust Ltd v Ceylon Amalgamated Tea & Rubber Estates Ltd & Others* [1943] 2 All ER 567 (ChD) the Court confirmed at 569 that the chairman's discretion to demand a poll is not unlimited, but may only be exercised if he or she finds it necessary to determine the sense of the meeting on the matters before it.

¹⁸ See, eg, ss 193-196 of the South African Companies Act which regulate the voting rights of shareholders and preference shareholders; the determination of voting rights; and exceptions as regards voting rights in existing companies. Also see s 198(1) of the Act which nullifies any provision in the company's articles which excludes the right to demand a poll at a general meeting on any question other than the election of a chairman of the meeting or the adjournment of the meeting.

¹⁹ [1999] 1 VR 466; (1998) 28 ACSR 498 (CA).

²⁰ At 480; 511.

²¹ *National Dwellings Society v Sykes* [1897] 3 Ch 159; *John v Rees & Others* [1970] Ch 345 at 379; *Jonker v Ackerman* 1979 (3) SA 575 (O) at 576; *Byng v London Life Association Ltd & Another* [1990] 1 Ch 170 (CA) at 188; [1989] 1 All ER 560 (CA) at 577.

²² For example, to obtain certain information or to secure the attendance of an official whose presence is necessary: Van der Merwe et al op cit note 16 at 29.13; see also *Byng v London Life Ltd* supra note 21 at 188; 577.

meeting at which a quorum is present, the chairman may adjourn a meeting from time to time and from place to place.²³

In *Byng v London Life Ltd*,²⁴ the Court confirmed that a court may overturn the chairman's decision to adjourn or dissolve the meeting, but only if it was entirely unreasonable in the circumstances. The power to adjourn must be exercised in good faith for the purpose of facilitating the meeting and not as a ploy to prevent or delay the taking of a decision to which the chairman objects.²⁵ The chairman's exercise of the common law power must be reasonable.

The chairman's duties also include the power to allow a vote by proxy.²⁶ There is, at common law, no right to appoint another to act and vote on one's behalf. But the South African Companies Act in s 189 gives this right to every member entitled to attend and vote at a company meeting. The company's articles of association usually stipulate the limits within which the proxy may act.²⁷ Where the chairman acts as proxy, special considerations come into play, because certain duties arise that are owed to the appointor and not to the company under the general fiduciary obligation. It has been suggested that there is potential for a conflict of interests between the fiduciary duties a chairman owes in his or her capacity as proxy, and the general duties owed to the company as director in these circumstances. This was considered by the New South Wales Court of Appeal in *Whitlam v Australian Securities & Investment Commission*.²⁸ The Court held that if a member directs a proxy who is also a director to vote in a way that the director believes is not in the interests of the company, the director will generally, as the member's fiduciary, be obliged to act in that way. This will usually not be in breach of the director's duties to the company, because, even in voting their own shares, directors do not generally owe a duty to act in the interests of their company.²⁹ The Court held as follows:

'The primary judge was correct to say that a director does not cease to be a director because he or she chairs a meeting of members; and indeed the circumstance that a director is acting as chairman or in any other role does not necessarily mean that he or she is not at the same time exercising a director's powers or discharging a director's duties. But he or she *might* not be doing so: not everything a director does that affects his or her company is an exercise of a director's powers or a discharge of (or even governed by) a director's duties. In particular, in our opinion the primary judge was wrong to make the general assertion that "The failure of any director appointed as proxy to vote in accordance with the instructions of the member appointing him or her is in breach of duty *qua* director."

²³ See Table A, art 41; Table B, art 41 of the South African Companies Act. Section 192 of the Act provides for the compulsory adjournment of company meetings at the request of members.

²⁴ *Supra* note 21.

²⁵ See also *Gower* *op cit* note 9 at 367.

²⁶ *Wall v Exchange Investment Corp* [1926] 1 Ch 143 (CA) at 146.

²⁷ See, eg, Table A, arts 49-52; Table B, arts 50-53.

²⁸ [2003] 57 NSWLR 559 (CA) at 600, discussed by James Edwards & Corinne Campbell 'Whitlam v Australian Securities & Investment Commission' [2003] NSWCA 183: What the Decision of the Court of Appeal Means for Directors Acting as Proxies' (2003) 21 *Company & Securities LJ* 457.

²⁹ See also *North-West Transportation Co Ltd v Beatty* (1887) 12 App Cas 589 (PC) at 593 where Sir Richard Bagally confirmed that 'every shareholder has a perfect right to vote ... although he may have a personal interest in the subject matter opposed to or different from the general or particular interests of the company'.

The Court of Appeal also pointed out that the fiduciary duty that a chairman owes in his or her capacity as proxy is not owed to the general body of members, but is owed to the particular member who appointed the director as proxy.³⁰

If the duty of a person appointed as proxy to vote in a particular matter is regarded as merely to properly cast the vote on behalf of the appointing member, the problematic issues surrounding dual duties fall away. The proxy is then seen as only the medium through which effect is given to the intention of the shareholder. His or her function is purely administrative and no exercise of judgment is required of him or her, nor, indeed, is it allowed. In as far as the proxy who is also a director is concerned, his or her duties to the company would be met if it is ensured that the meeting proceeds in an orderly manner and that members who are entitled to vote are given the opportunity to do so.³¹ The duty to act honestly and in the interests of the company in this situation requires only that the director fulfil the proxy function duly and efficiently. I think that this is the correct approach. When directors vote as proxies, they are actually exercising another person's, or other persons', voting rights and not their own. It can therefore be argued that they need not be convinced that the vote is correctly cast.

It is immaterial whether or not the chairman is described as such. But, once the position of chairman is disputed, it cannot be assumed that the person exercising procedural control is the chairman, especially in view of the importance that the casting vote of the chairman could have.³² In such circumstances a good case could be made out that the board is not properly constituted for the purposes of a meeting.

4 The Chairman as Director

A chairman's duties as chairman and those owed in his or her capacity as director are not mutually exclusive. Nor does the chairman cease to be a director because he or she chairs a meeting of members.³³ And, although the chairman has certain duties regarding the procedure at meetings, he or she may also have wider responsibilities which affect both his or her fiduciary obligations and the duty of care.³⁴

4.1 Fiduciary Duties

Like all company officers, the chairman has a duty to act in good faith for the benefit of the company as a whole.³⁵

³⁰ At 601.

³¹ See also Edwards & Campbell op cit note 28 at 461.

³² *Woonda Nominees (Pty) Ltd v Chng* supra note 12 at 567.

³³ *ASIC v Whitlam* supra note 14 at 449 in [148], confirmed on appeal in *Whitlam v ASIC* (2003) 57 NSWLR 559 (CA).

³⁴ *Australian Securities & Investment Commission v Rich & Others* (2002) 44 ACSR 341 (NSW) at 354.

³⁵ Doyle op cit note 7 at 95. On directors' fiduciary duties generally, see MS Blackman 'Companies' in: WA Joubert (founding ed) *The Law of South Africa* vol 4 part, 2 First Reissue (1996) at 178ff; MS Blackman, RD Jooste & GK Everingham *Commentary on the Companies Act* vol 2 (looseleaf 2002-) at 8.29ff.

The decision by the New South Wales Court of Appeal in *Woolworths v Kelly*³⁶ concerned the validity of the variation of a pension scheme set up by the directors for some of the company's senior executives. The Court pointed out that the nature of a director's fiduciary duties to his or her company flows from the office as director, but that the content of the duties will or may be affected by the powers and opportunities which, as a director, he or she has. A person who is a chairman of the board of directors has additional rights and duties, and additional opportunities. It is usually the function of a chairman to determine, or at least to exercise a significant influence upon, the agenda of the meetings of the board. He or she is in a position to ensure that proposals are brought forward for consideration by the directors at their meetings. This may, in a particular case, affect the content of fiduciary duties which the chairman owes to the company.³⁷ The Court held that the variation of the pension scheme had been influenced by the position of the chairman of the board. The suggestion that it be entered into had originated with him and had been brought to the board by him.³⁸ Although there was no indication of impropriety, in a practical and real sense he was able to bring the matter before the board because he was its chairman. His position and influence in the company was such that it could be inferred that suggestions made by him or proposals brought forward to the board by him would be apt to receive favourable consideration.³⁹ The Court concluded that his duty as a director and as chairman of the directors was to ensure that the company, in entering into engagements affecting its assets, gave away no more than it was for its benefit to give. That duty was in conflict with his personal interest in obtaining the benefits which would accrue to him under the proposal for the variation of the pension scheme which he sought. He should therefore have obtained those benefits in the proper way, by obtaining the consent or approval of the company to the proposed scheme, or by such means as were provided in the company's articles of association.⁴⁰

4.2 Duty of Care

As early as 1901 the English courts gave an indication of the possibility that a company chairman might have duties of care and skill additional to those of other directors. In *Dovey & the Metropolitan Bank (of England and Wales) Limited v John Cory*, Lord Davey found that although ordinary directors were not bound to examine entries in the company's books, '[i]t was the duty of the general manager and (possibly) of the chairman to go carefully through the returns from the branches, and to bring before the board any matter requiring their consideration'.⁴¹ And in *Re City Equitable Fire Insurance Co*, the Court stated that in order to establish the duty that a person appointed to the board

³⁶ Supra note 13.

³⁷ (1991) 4 ACSR 431 (CA NSW) at 445; (1991) 22 NSWLR (CA) 189 at 225.

³⁸ (1991) 22 NSWLR (CA) 189 at 226.

³⁹ Ibid.

⁴⁰ At 228. The Court then found that, on the facts, proper disclosure had been made to the board of directors as provided for in the company's articles.

⁴¹ [1901] AC 477 (HL) at 493.

of a company undertakes to perform, it is necessary to consider not only the nature of the company's business, but also the manner in which the work of the company is in fact distributed between the directors and the other officials of the company, provided that this distribution is reasonable in the particular circumstances.⁴² This was confirmed in what is now the leading authority on the duty of care and skill in England, *Re Barings plc (No 5); Secretary of State for Trade & Industry v Baker (No 5)*.⁴³

South African company law recognises that the extent of a director's common law duty of care and skill depends to a considerable degree on the nature of the company's business and on any particular obligations assumed by or assigned to him.⁴⁴

In Australia, directors owe a duty of care and skill at common law and in equity.⁴⁵ They also have a statutory duty of care and diligence under s 180(1) of their Corporations Act. This section provides that a director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they were a director or officer of a corporation in the corporation's circumstances and occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.⁴⁶ The duties imposed on directors by statute are regarded as essentially the same as those under common law.⁴⁷ In determining whether a director has breached the statutory standard of care and diligence, a court will have regard to the company's circumstances and the director's position and responsibilities within the company.⁴⁸

The Supreme Court of New South Wales had the opportunity to consider the duties of the chairman of the board specifically in the context of the duty of care in *AWA Ltd v Daniels trading as Deloitte Haskins & Sells & Others*.⁴⁹ The Court said:⁵⁰

'The third division of function is between the directors and the chairman of the board of directors. The chairman is responsible to a greater extent than any other director for the performance of the board as a whole and each member of it. The chairman has the primary responsibility of selecting matters and documents to be brought to the board's attention, for formulating the policy of the board and promoting the position of the company. In discharging his or her responsibilities the chairman will cooperate with the managing director if the two positions are separate or otherwise with senior management ...'.

⁴² [1925] 1 Ch 407 at 427.

⁴³ [2000] 1 BCLC 523 (CA).

⁴⁴ *Fisheries Development Corporation of SA Ltd v Jorgensen* 1980 (4) SA 156 (W) at 157F, confirmed in *Howard v Herrigel NNO* 1991 (2) SA 660 (A) at 678; *Philotex (Pty) Ltd v Snyman* 1998 (2) SA 138 (SCA) at 144B.

⁴⁵ *Re HIH Insurance Ltd (in prov liq) and HIH Casualty & General Insurance Ltd (in prov liq); ASIC v Adler & Others* (2002) 41 ACSR 72 (SC NSW) at 166.

⁴⁶ Section 180(1) is a civil penalty provision: s 1317E(1). Once a declaration has been made, ASIC may seek a pecuniary penalty order or a disqualification order: ss 1317G and 206C.

⁴⁷ *Sheahan v Verco* (2001) 37 ACSR 117 (SC SA); *Daniels v Anderson* (1995) 37 NSWLR 438 (SC NSW) at 603; *Australian Innovation Ltd v Petrovsky* (1996) 21 ACSR 218 (FC Aus) at 222.

⁴⁸ *Re HIH Insurance Ltd* supra note 45 at 167.

⁴⁹ (1992) 7 ACSR 759 (SC NSW).

⁵⁰ At 867.

The Court also pointed out the sensitivity of the chairman's role in situations where the offices of chairman and chief executive officer are not separate.⁵¹ These observations were not called into question on appeal.⁵²

These comments were considered in the recent decision in *ASIC v Rich*.⁵³ One.Tel Limited, a company listed on the Australian Stock Exchange, was placed into liquidation in July 2001. The Australian Securities and Investments Commission (ASIC) sought relief of various kinds against the company's three executive directors and its non-executive chairman of directors for breach of their statutory duty of care. In particular, ASIC contended that the non-executive chairman, because he held the positions of chairman of the board and the finance and audit committee, and also 'by reason of his high qualifications, experience and expertise relative to the other directors' had special responsibilities and was subject to a higher standard of care and diligence than the other non-executive directors.⁵⁴ The chairman filed a notice of motion seeking to strike out ASIC's statement of claim on the grounds that there was no legal basis for the claim. The Court refused the application, holding that ASIC had a reasonable cause of action.⁵⁵ Because of the nature of the proceedings, the Court did not finally determine the issues before it, nor did it make any finding against the chairman. It did, however, indicate that one director, with particular skills or experience, may be subject to a higher duty of care and diligence than other board members in certain circumstances.⁵⁶

The Court considered the legislative history of the Australian duty of care and concluded that the word 'responsibilities' in s 180 did not refer only to specific tasks delegated to the relevant director, through the articles or by resolution or otherwise: 'It is a wider concept, referring to the acquisition of responsibilities not only through specific delegation but also through the way in which work is distributed within the corporation in fact, and the expectations placed by those arrangements on the shoulders of the individual director'.⁵⁷ It also indicated that the chairman should, amongst other things, have required that the board be given better information about cash, creditors and debtors; that monthly management accounts be supplied to the board; that other specified information be provided in board papers; that he should have convened board meetings at least fortnightly, and made sure that they were substantial meetings in which the directors came to understand the Group's true financial position; that he should have required a properly functioning audit committee and internal

⁵¹ Ibid. See also the discussion in par 5 below.

⁵² *ASIC v Rich* supra note 34 at 354 in [59]. See *Daniels v Anderson* (SC NSW) supra note 49; (1995) 16 ACSR 607 (CA NSW). The decision by the Court of Appeal is widely regarded as a landmark decision on directors' duties of care and skill.

⁵³ Supra note 34. For an in-depth discussion of the decision, see John S Keeves 'Directors' Duties – *ASIC v Rich* – Landmark of Beacon?' (2004) 22 *Company & Securities LJ* 181.

⁵⁴ At 342 in [4].

⁵⁵ At 361.

⁵⁶ See also Charles Rosedale & Alison Groves 'Does a Chairman Have a Higher Duty of Care?' [2003] *International Commercial & Company LR* N-56 at 57.

⁵⁷ At 352.

review of the Group's financial systems and information; and that he should even have personally assessed the quality and timeliness of the information provided to the board.⁵⁸

5 Corporate Governance Reports and Company Law Review Initiatives

Two developments in Australia subsequent to the decision in *ASIC v Rich* gave further prominence to the specific role of the chairman. They are the Australian Stock Exchange ('ASX') Corporate Governance Council's *Principles of Good Corporate Governance and Best Practice Recommendations* and the Royal Commission Report on *The Failure of HIH Insurance*.

The ASX *Corporate Governance Principles* were released in March 2003 and are, with the exception of a principle relating to the existence and composition of the audit committee, discretionary rather than mandatory. The second principle requires listed companies to have a board of an effective composition, size and commitment to adequately discharge its responsibilities and duties. In order to implement this principle, it is recommended that the chairperson should be an independent director and that the roles of chairperson and chief executive officer should not be exercised by the same individual. The Commission further recommends that the chairperson is responsible for leadership of the board, the efficient organisation and conduct of the board's function and the briefing of all directors in relation to issues arising at board meetings.⁵⁹

The need for independent directors, as well as the requirement that a majority of the board and the chairperson be independent, were emphasised. A fairly restrictive definition of independence is embodied in the *Best Practice Recommendations*, requiring independent directors to be independent of management and free of any relationship which could (or could reasonably be perceived to) interfere with the exercise of unfettered judgment. For example, to be independent, a director must not be a substantial shareholder (or an officer of such a shareholder), should have been employed in an executive capacity or have been a principal of a material professional adviser or consultant within the last three years, or should be a material supplier or customer.⁶⁰

The HIH Group, one of Australia's largest insurance companies, was placed in liquidation in 2001. This was probably Australia's largest corporate failure at the time,⁶¹ and led to the establishment of the HIH Royal Commission with the mandate to inquire into the reasons for and the circumstances surrounding the failure of the companies. The Commission's Report, *The Failure of HIH Insurance*, published in 2003, includes comments on the role and responsibilities

⁵⁸ At 348.

⁵⁹ Recommendation 2.2 ('Commentary and Guidance').

⁶⁰ See also Charles Rosedale & Karen Brown 'Corporate Governance Duties' [2003] *International Company & Commercial LR* N-94.

⁶¹ *Idem* at N-94.

of the chairman in its discussion of corporate governance practices.⁶² The Commissioner, Owen J, supported the view that the roles of the chief executive officer and the chairperson were best kept separate⁶³ and suggested that the chairman has a general responsibility to oversee the functioning of the board and to ensure that all matters properly to be considered by the board are in fact brought before it. Crucial to this responsibility is control of the agenda for board meetings. The chairman should have extensive involvement with the chief executive in order to be appropriately familiar with what is happening in the company. He or she must retain sufficient detachment and avoid excessive interference with day-to-day operations which are the preserve of management and not of non-executive directors. Conversely, the chairman must be ready, willing and able to intervene decisively as and when necessary. The chairman should further ensure that the views of all directors are heard and not stifled by the conduct of others during deliberations and that board meetings achieve the purposes for which they are intended, and should take a lead in reviewing the composition, effectiveness and performance of the board.⁶⁴

In the United Kingdom,⁶⁵ it is envisaged that the model to be used for regulating directors' duties of care and skill will be that of s 214 of their Insolvency Act 1986 in relation to wrongful trading. The assessment of what the director should have done or known will thus be based on what a reasonably diligent person having both the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company as well as the general knowledge that that director has. The crucial difference between the statutory formulation and that of the Court in *Re City Equitable Fire Insurance Co*⁶⁶ is that in the latter the director's subjective level of skill sets the standard required of the director, whereas under the statutory formulation the director's subjective level does so only if it improves upon the objective standard of the reasonable director.⁶⁷

Davies indicates that although executive and non-executive directors may be on the way to becoming subject to a uniform and objective duty of care, what the discharge of that duty requires in particular cases will not be uniform.⁶⁸ The statutory formulation in s 214 recognises that what is required of the director

⁶² I have not had access to the Report itself but have relied on the comments on it by Rosedale & Brown supra note 60.

⁶³ At 109; see idem at N-95.

⁶⁴ At 117, 118; see ibid. The conclusions drawn by Commissioner Owen have been criticised for not placing enough emphasis on a majority of independent directors: see Jim Psaros 'HIH: The Importance of an Independent Board' (2004) *Australian Corporate News* 149.

⁶⁵ The Department of Trade and Industry ('DTI') initiated a three-year company law review project in 1998 to advise on a complete revision of company law. The consultations were concluded with a *Final Report* in 2001, and the Government's response was published in a White Paper, *Modernising Company Law* in 2002. The DTI subsequently confirmed its commitment to the revision of company law generally, but deemed it of greater importance first to draft a post-Enron Bill before the anticipated Companies Bill comes into being. See generally Brenda Hannigan *Company Law* (2003) at v-vii.

⁶⁶ Supra note 42.

⁶⁷ See *Gower* op cit note 9 at 435.

⁶⁸ Ibid.

will depend on the functions which have been assigned to him or her,⁶⁹ so that there will be variations, not only between executive and non-executive directors, but also between different types of executive director and non-executive directors, and between different types and sizes of company. Also, the imposition of an objective duty of care does not require a directorship to be regarded as a profession. But even non-executive directors must as a minimum take reasonable steps to place themselves in a position to guide and monitor the management of the company. The days of wholly inactive directors are therefore numbered. Directors remain entitled to leave a duty in the hands of some other official and are in the absence of grounds for suspicion, justified in trusting that official to perform the duty honestly. Delegation is allowed, provided that there are adequate control systems in place.

Most reviews of corporate governance have pointed out that it is preferable to separate the roles of chairman and chief executive. In England, the Cadbury Committee recommended that, given the importance and particular nature of the chairman's role, it should in principle be separate from that of the chief executive.⁷⁰ Sir Adrian Cadbury⁷¹ advances three main arguments for separating the roles: First, different mixes of ability are required for the two posts; second, putting the two positions together concentrates too much power in the hands of one person; and third, the combination makes it more difficult for the board to carry out its supervisory function.

In South Africa, too, it has been suggested that there should be a clearly accepted division of responsibilities at the head of a company to ensure a balance of power and authority, so that no individual has unfettered powers of decision-making, and that the chairperson should preferably be an independent non-executive director.⁷² The King Committee's recommendation that the functions of the chief executive officer and the chairman of a company should be separated,⁷³ has been enforced by the market in respect of all companies listed on the Securities Exchange.⁷⁴ Where the roles of the chairperson and chief executive officer are combined, the King Committee recommends that should be either an independent non-executive director serving as deputy chairman or a strong independent non-executive element on the board and that any decision to combine the roles should be justified each year in the company's annual report.⁷⁵ The board should appraise the performance of the chairperson on an annual basis, or on such other basis as the board may determine. If the roles of chairman and chief executive officer are combined, the independent deputy chairman will play a lead part in the evaluation process.⁷⁶

⁶⁹ Section 214(5).

⁷⁰ See Sir Adrian Cadbury *Committee on the Financial Aspects of Corporate Governance* (1992) in par 4.9.

⁷¹ Cadbury op cit note 1 at 98.

⁷² See Institute of Directors in Southern Africa *King Report on Corporate Governance for South Africa* (2002) at 52.

⁷³ At 54.

⁷⁴ See par 3.84 of the *Listings Requirements* of the JSE Securities Exchange, South Africa.

⁷⁵ *King Report* op cit note 72 at 53.

⁷⁶ *Ibid.*

6 Conclusions

When dealing with outsiders, the position of the chairman of the board of directors differs little from an ordinary director and, in the absence of a specific mandate or authorisation by the company in the articles or otherwise, he or she usually has no additional powers by virtue of the chairmanship.⁷⁷ But internally the chairman has specific procedural functions and powers in addition to the responsibilities usually attributed to directors.

The compensation nowadays paid to directors bears a measurable relationship to the work expected from the bearer of that office and is no longer a modest honorarium.⁷⁸ This reflects the community's view that more is expected from directors than in the past. The chairman in particular is responsible to a greater extent than any other director for the performance of the board as a whole and of each of its members. He or she has the primary responsibility of selecting matters and documents to be brought to the board's attention, for the formulating of the policy of the board, and for promoting the position of the company.⁷⁹ The potential to influence the other board members is inherent to these functions.

Over the years the courts have provided clear guidelines on the principles relating to directors' fiduciary duties. These duties have traditionally been assessed rather more strictly than directors' duties of care and skill with due regard to the director's position in the company and the surrounding circumstances.⁸⁰ The director's position as chairman of the company will therefore be a determining factor when his or her exercise of fiduciary responsibilities are considered. It has become generally accepted that the law relating to the duty of care and skill has evolved and that a more demanding duty is now required than that which was previously imposed.⁸¹ When this duty is assessed, the circumstances of the case and the particular functions undertaken by the director should also be considered. This allows, as Hannigan shows, accommodation within the same legal standard of the directors of companies both large and small.⁸²

Recent corporate governance reports have clearly indicated the important function of the modern company chairman in management structures. The

⁷⁷ HS Cilliers, ML Benade, JJ Henning, JJ du Plessis, PA Delpont, L de Koker & JT Pretorius *Corporate Law* 3 ed (2000) at 174.

⁷⁸ *AWA v Daniels* supra note 49 at 865.

⁷⁹ *Idem* at 867 where it is also suggested that in discharging these responsibilities, the chairman ought, where necessary, to cooperate with the managing director, if the two positions are separate, or otherwise with senior management. See also Blackman op cit note 35 at 8.204.

⁸⁰ See also *Howard v Herrigel* supra note 44 at 678.

⁸¹ See, eg, *Norman v Theodore Goddard (a firm)* [1991] BCLC 1028 (CLD); *Bishopsgate Investment Management Ltd v Maxwell (No 2)* [1994] 1 All ER 261 (ChD); *Re D'Jan of London Ltd* [1994] 1 BCLC 561 (Ch); Michele Havenga 'The Business Judgment Rule – Should We Follow the Australian Example?' (2000) 12 SA Merc LJ 25 at 27.

⁸² See Hannigan op cit note 65 at 301ff who discusses the decisions in *Re Barings plc* supra note 43, *Re Continental Assurance Co of London plc* [2001] All ER 229 (ChD), and *Re Park House Properties Ltd* [1997] 2 BCLC 530 to illustrate this point in respect of the managing director of a multi-million pound banking company, the non-executive director of an insurance company, and the teenage director of a family company carrying on business in a limited way.

decision in *ASIC v Rich* shows that a director with particular skills may be judged more harshly in certain circumstances. It also indicates that when the director whose duties are being assessed, is the chairman, it may be found that he or she had more onerous duties than the other directors. In larger public companies this could well, in my view, be the more likely finding.
