Corporate Governance and the Regulation of Conglomerates

Questions & Answers

CHAIR – ROGER DRUMMOND: Thanks, Rob. I know we've passed our planned finishing time but I just wonder whether there are any questions that you'd like to put to our panel. John?

JOHN STUMBLES: I have a question regarding the issue of the extent to which you can modify the content of the fiduciary duty by contract; and if you look at the cases which have been spoken of today, it seems to me that the Court is adopting various approaches. In the Russell McVeigh case, you see an approach which focuses on the content of the duty, real and likely breach of the confidentiality requirement. The case which I always find some degree of comfort in is Kelly v Cooper, the case about the agent in the Bahamas, an estate agent, and he was acting for two vendors of adjacent property and the Privy Council said that everyone knows that estate agents act for multiple vendors and he wasn't in a position of conflict.

I'm wondering what the panel thinks about this approach, which way the Courts are going to go. Is it going to be this ad hoc approach in which they focus on content or imply some duty or alternatively say that, in the cases of at least some fiduciaries, you have a specific list of identifiable duties and no more, for example custodians. So I would welcome some comments on that because it comes up quite a lot in practice.

ROB McINNES: I drew the short straw on that one. Well, I think, to some degree, the New Zealand Court of Appeal has set out on that course already, actually, because I don't think they went quite so far in Russell McVeigh as to say that everybody knows that real estate agents act for everybody and are often quite aggressive about it but I think, in essence, what they were saying is that everybody knows in New Zealand that there are only half a dozen top-flight tax lawyers and we just have to take notice of that and come up with a sensible law that fits.

I think, in the beginning of your question, you said you wondered about the ability to effectively contract out of these rules by consent. I think, in principle, that ought to be possible. I think it's always been the case, in equity, that a beneficiary is able to waive breaches by the trustee. I think it's always been the case in company law that breaches of duty by a director can be waived by the company in general meeting and I can't see any reason in principle why a client ought not, either at the beginning of a retainer or at the beginning of somebody else's retainer, contract out of these rules too which is, I guess, one of the reasons why in my, "Helpful hints for lawyers" overhead, I suggested that you could well think about just going to the client and asking him, "Do you mind," because I think it will work.

BOB BAXT: I don't agree - I don't disagree in the context of professional relationships and I wouldn't want to comment on the New Zealand corporate law situation but we have a problem in Australia. We have specific statutory duties. You can't get clients to over-ride the statute. There's just no way possible. The

statute is passed by Parliament. It's only Parliament or a Court, under section 131(7)(s) that can do that. So it's a real problem. We've got the Whitehouse case, John, which of course said that the directors could extricate themselves from potential obligations. But, again, I don't think that that tackles the problems that sections 180 to 183 now pose for us.

CHAIR - ROGER DRUMMOND: Any other questions or comments? I've just a practical one I'd like to put to Bob which I think does present real problems and that's the situation where there is an irreconcilable conflict between the company that the director has been appointed to and the nominating company that's appointed him as a director and I just wonder if perhaps we might get Rob to comment on what the director should do in those circumstances; perhaps ie the funds management/investment bank situation.

BOB BAXT: Thanks, Roger. In my paper - and I apologise that I didn't spend a couple of minutes talking about this - I've set out a little bit of a discussion on what the Courts have said and what I, for what it's worth, believe might be done by directors in these conflict situations. It's very, very useful to note that a judge who is now going to have a very real say on this issue of conflicts, Owen J, in a case in Western Australia called Fitzsimmons v The Queen, had some things to say about directors could do in these conflict situations. David Ipp who, again in Western Australia, had this classic case in a case called Permanent Building Society and Wheeler where the director, facing a conflict, couldn't vote on a particular transaction affecting the company, did nothing. didn't tell the board anything about it, and Ipp J was very critical of the director in that particular situation, so the director couldn't just bury his head in the sand.

There are also cases under insolvent trading provisions of the Australian law where the Courts - Standard Chartered Bank v Antico and a case called Byron v Southern Starr - where the judges have said, "Look, there are certain things the directors can do. They can ask for a special board meeting to deal with this matter. They can refer the matter to auditors. That raises questions of confidentiality. They could even go to the Australian Securities and Investment Commission if they felt that there was a situation which needed to be dealt." Could the director resign in that situation? Well, the Courts are saying, "Well, that may not be the solution that is available in the first place," and some of them have been so naive as to suggest, "Well, they shouldn't have accepted appointed in the first place." It doesn't help you once the problem has arisen.

But in the paper, as I said, I've gone through these various alternatives that are being suggested. The point that Richard makes about the FSRA, I think, is a very, very important one and does create a real problem for us in terms of, if we don't allow the group to be looked at in the context of structuring the way things are done, we have a major issue that I don't think our law grapples with satisfactorily.