

FUNCTIONS OF THE COMPANY SECRETARY

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INTRODUCTION

To be or not to be. That may have been a question haunting Hamlet. And the question haunting the law makers of today appears to be, to include or not to include the functions of the company secretary in the Companies Act. While the existing Companies Act, 1956 (the Act) in India (as also the Companies Act, 1985 in England) do not list out the functions of the secretary, there have been attempts over the last decade or so to include the same in the Act. The Companies (Amendment) Bill, 2003 and the Concept Paper on Company Law introduced in 2004 are among the most recent attempts. Any attempt at modernising the Company Law to make it contemporaneous with the present milieu will be incomplete unless the functions and role of the secretary are defined and laid out in the statute book.

PRESENT POSITION IN LAW

Section 2(45) of the Act defines a secretary as "...an individual appointed to perform ministerial and administrative duties." The definition was first amended in 1974 by the Companies (Amendment) Act, 1974 wherein the word 'purely' before ministerial and administrative was dropped so as to enlarge the scope of the functions of the secretary. The notes on clauses read, "the scope of the functions and duties of a secretary has increased considerably under modern conditions and the Court of Appeal (in England) also has held that it is no longer true that a secretary is a purely ministerial officer of the company (Notes on clauses 2(vii)(b)). This was perhaps the first recognition of the growing importance and significance of the profession of company secretaries. Section 2 (30) of the

Act includes secretary within the meaning of officer and section 5 includes secretary within the meaning of 'officer in default'. There are several other instances in the Act where the importance of the secretary has been highlighted.¹

JUDICIAL PRONOUNCEMENTS

The company secretary profession began on a humble note in the late 19th century. There have been many instances of the courts viewing the secretary as a mere clerk or even servant. The following decisions are noteworthy:

The secretary as a servant of the company is bound to carry out the duties assigned to him. [*K A Krishna v. Indo Union Assurance Co Ltd.* (1944) 14 Comp Cas 10 (Mad)].

A secretary as such has no authority to bind the company by contract or to make representations as to the company's affairs, so as to induce people to take shares. [*Barnett Hoares & Co v. South London Transways Co. Newlands v. National Employers, etc. Association* (1885) 53 LJ 242; *Diwan Chand v. Gujranwalla Sugar Mills Co* (1937) 7 Comp Cas 203 (Lah) : AIR 1937 Lah 644].

The secretary of a company has no general authority to make representations to induce persons to take shares in a company; so that a person who is induced to take shares in a company by a fraudulent misrepresentation, not authorised by or known to the officers of the company is not entitled to maintain an action against the company for the rescission of the contract, or for damages for such misrepresentation. [*Newlands v. National F A Assurance Co.*]

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1. See section 215 of the Act regarding signing of annual accounts and section 159-161 regarding signing of annual returns

A secretary has no authority to register a transfer until it is passed by the company's directors. [*Chinda Mines v. Anderson* (1905) 22 TLR 27; *Re Indo China Steam Navigation Co.* (1917) 2 Ch 100]. He can certify a transfer, but if he does so fraudulently, the company will not be liable. [*George Whitechurch v. Cavanagh*].

A secretary cannot strike a name off the register of members. [*Wheatcroft's case* (1873) 29 LT 324].

Ordinarily the functions of a secretary would be ministerial and administrative and he would have no authority to bind the company by entering into contracts or other commitments on its behalf. [*Lakshmiratan Cotton Mills Co Ltd. v. Aluminium Corpn of India Ltd.* AIR 1971 SC 1482 : (1971) 1 SCC 671].

All this entirely changed with the landmark decision delivered by Lord Denning MR in *Panorama Developments (Guildford) Ltd. v. Fidelis Furnishing Fabrics Ltd* (1971) 3 All ER 16 (CA) : "But times have changed. A company secretary is a much more important person nowadays than he was in 1887. He is an 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. He regularly makes representations on behalf of the company and enters into contracts on its behalf, which come within the day-to-day running of the company's business. So much so that he may be regarded as held out as having authority to do such things on behalf of the company. He is certainly entitled to sign contracts connected with the administrative side of a company's affairs, such as employing staff, and ordering cars, and so forth. All such matters now come within the ostensible authority of a company's secretary...Whatever the position of a company's secretary may have been in 1887, it has altered a great deal from what it was then. At the end of the last century a company secretary still occupied a very humble position, very little higher, if any, than that of a minor clerk. Today, not only has the status of a company secretary been much enhanced, but that state of affairs has been recognised by the statutes....." This undoubtedly was a landmark judgement that transformed the role of the secretary from a mere clerk to an important officer. Concurring with the judgment, Salmon J., emphasized that the secretary is the chief administrative officer of the company and in respect of matters concerned with administration, he has ostensible authority to sign contracts and do all things within the ambit of administration. Interestingly, the name of the

institute in the UK was also changed to "Institute of Chartered Secretaries and Administrators" to reflect the new and re-defined role of the secretary.

Today, as an officer of the company at the centre of the decision making process, the Company Secretary is in a powerful position of influence. The Company Secretary assists and guides the directors in their pursuit of profit and growth and needs to act with integrity and independence to protect the interests of the company, its shareholders and its employees. Today's Company Secretary plays a pro-active and central role in the governance of the company far beyond the traditional role of a compliance officer.

Despite the varying nature of the functions discharged by the secretary (ranging from corporate law compliance to fiscal and accounting matters, from personnel management to legal affairs, from corporate communication to corporate governance), no attempts were actually made to codify/define/list out the functions of the company secretary in the changed milieu.

COMPANIES BILL, 1997 AND COMPANIES (AMENDMENT) BILL, 2003

The first attempt to list out an illustrative set of functions of the secretary in the Act was made in the Companies Bill, 1997, based on the recommendations made by the expert committee set up to re-draft the Company law in India, of which Dr. K.R.Chandratre, Past President of the ICSI, was also a member. That attempt was still born as was the second attempt made in the Companies (Amendment) Bill, 2003. The functions listed in the Bill were on the following lines:

- (a) to convene board and general meetings as per the directions of the chairman of the Board or any director as provided in the articles of association of as directed by the Tribunal
- (b) to maintain the record of minutes of the meetings of the Board or shareholders and to ensure that the minutes book is duly dated and signed by the chairman of the meeting
- (c) to issue certificates relating to securities and to attend to applications for transfers or splitting of scrips or issue of duplicate shares
- (d) to keep in his custody the company seal and all deeds and documents relating to property and other documents vesting the company any valuable rights
- (e) to obtain approvals from the Board, general meetings, the Government and such other

authorities as required under the provisions of the Act

- (f) to attend to any other duty he may be assigned by the Board or any other director or general body of shareholders

The functions listed above were supposed to be illustrative, but nonetheless, were myopic and did not do justice to the multi-faceted role displayed by the company secretaries. Viewed from that angle, it is good that the Bill never saw the light of the day. What it did however, was to focus on the need to define the secretary's functions/role.

Concept Paper

The concept paper on the Companies Bill released by the Ministry of Company Affairs on 4 August 2004, has also not been clear on the topic and as with many other instances, stated that the company secretary in whole time employment shall, inter alia, perform the functions as maybe prescribed. [Section 87 (2)]. Interestingly, it maybe noted that section 87 dealing with the appointment of company secretary is in Chapter XII dealing with appointment of managerial personnel.² Is it a taste of things to come that the secretary is being clubbed with the managerial personnel? One may have to wait and watch.

It is suggested that as and when the functions of the secretary are prescribed by the government, the ICSI should be consulted in the whole process. What can be a significant aid to the government and the ICSI in the whole process of framing the functions is the large quantum of material available on the subject from the most authoritative sources in England and India. These would be of great use in at least providing the broad contours for the purpose. A look at some of the sources:

Halsbury's Laws of England³ : Short of managerial functions his powers and duties extend to the whole field of administration of the affairs of the company, so that an outsider dealing with him may assume that functions and duties other than managerial, are normally within the ambit of the secretary's powers

unless there be circumstances to show that they are limited in respect of particular matters. (This read in conjunction with the assertion of Salmon J in *Panorama*, establish beyond all doubt that corporate administration is a core area of the professional functioning of the secretary. The designation of Chief Administrative Officer (CAO) may not be out of place).

Palmer's Company Guide⁴ : "...he will be present at all meetings of the company and of the directors and will take proper minutes of proceedings, he will issue under the direction of the Board all notices to members and others that may be requisite; he will conduct all correspondence with shareholders in regard to calls, transfers, forfeiture and otherwise, and will keep the books of the company or such of them as relate to the internal business thereof, e.g., the register of members, the share ledger, the transfer book, the register of mortgages, etc. He will also make the necessary returns to the Registrar of Companies"

The Institute of Chartered Secretaries and Administrators, England⁵ : In a pioneering effort, has brought out a well-researched Guidance Note on the subject and has classified the role of the company secretary as 'Core duties' and 'Additional Duties'.

CORE DUTIES

Board Meetings

Facilitating the smooth operation of the company's formal decision making and reporting machinery; organising board and board committees meetings (e.g. audit, remuneration, nomination committees etc.); formulating meeting agendas with the chairman and/or the chief executive and advising management on content and organisation of memoranda or presentations for the meeting; collecting, organising and distributing such information, documents or other papers required for the meeting; ensuring that all meetings are minuted and that the minute books are maintained with certified copies of the minutes and that all board committees are properly constituted and provided with clear terms of reference.

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2. It would be interesting to note that Chapter headings are a useful aid to interpretation of statutes and can be used to throw light on the importance of the matter on hand
 3. 4th Edition, Volume 7
 4. 36th Edition
 5. Guidance Note on Role of Company Secretaries, available at www.icsa.org.uk
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General Meetings

Ensuring that an annual general meeting is held in accordance with the requirements of the *Companies Act* and the companies' Articles of Association; obtaining internal and external agreement to all documentation for circulation to shareholders; preparing and issuing notices of meetings, and distributing proxy forms; trying to prepare directors for any shareholder questions and helping them create briefing materials; overseeing the preparations for security arrangements.

At meetings, ensuring that proxy forms are correctly processed and that the voting is carried out accurately; co-ordinating the administration and minuting of meetings.

Memorandum & Articles of Association

Ensuring that the company complies with its Memorandum and Articles of Association and, drafting and incorporating amendments in accordance with correct procedures.

Stock Exchange Requirements

Monitoring and ensuring compliance with the Yellow Book requirements (as well as the City Code) and supervising the implementation of the model code and/or the company code for dealing in the company's securities, as appropriate, managing relations with the Stock Exchange through the company's brokers; releasing information to the market; ensuring the security of unreleased price-sensitive information; making applications for listing of additional issues of securities. (If the company is quoted on an overseas stock exchange, the Company Secretary will also be responsible for monitoring and ensuring compliance with that exchange's regulations and procedures)

Statutory Registers

Maintaining the following statutory registers:

- members;
- company charges;
- directors and secretary;
- directors' interests in shares and debentures;
- interests in voting shares;
- debenture holders (if applicable).

Statutory Returns

Filing information with the Registrar of Companies to report certain changes regarding the company or to

comply with requirements for periodic filing. Of particular importance in this regard are:

- annual returns;
- accounts;
- amended Memorandum & Articles of Association;
- returns of allotments;
- notices of appointment, removal & resignation of directors and the secretary;
- notices of removal or resignation of the auditors;
- change of registered office;
- resolutions in accordance with The Companies Act.

Report & Accounts

Co-ordinating the publication and distribution of the company's annual report and accounts and interim statements, in consultation with the company's internal and external advisers, in particular, when preparing the directors' report.

Share Registration

Maintaining the company's register of members; dealing with transfers and other matters affecting share-holdings; dealing with queries and requests from shareholders.

Shareholder Communications

Communicating with the shareholders (e.g. through circulars); arranging payment of dividends and interest; issuing documentation regarding rights issues and capitalisation issues; maintaining good general shareholder relations; maintaining good relations with institutional shareholders and their investment committees.

Shareholder Monitoring

Monitoring movements on the register of members to identify any apparent 'stake-building' in the company's shares by potential take-over bidders; making appropriate inquiries of members as to beneficial ownership of holdings.

Share and Capital Issues and Restructuring

Implementing properly authorised changes in the structure of the company's share and loan capital; devising, implementing and administering directors' and employees' share participation schemes.

Acquisitions, Disposals & Mergers

Participating as a key member of the company team established to implement corporate acquisitions,

disposals and mergers; protecting the company's interests by ensuring the effectiveness of all documentation; ensuring that due diligence disclosures enable proper commercial evaluation prior to completion of a transaction; ensuring that the correct authority is in place to allow timely execution of documentation.

Corporate Governance

Continually reviewing developments in corporate governance; facilitating the proper induction of directors into their role; advising and assisting the directors with respect to their duties and responsibilities, in particular compliance with company law and, if applicable, Stock Exchange requirements; counselling them when preparing presentations and memoranda; While on the topic of corporate governance, it would be relevant to note the special role that the secretary plays in this emerging paradigm. The Committee headed by Sir Adrian Cadbury had observed that the secretary is like an impartial civil servant offering advice to the Board of Directors on procedures and responsibilities. It noted, "the company secretary has a key role to play in ensuring that board procedures are both followed and regularly reviewed. The chairman and the board will look to the company secretary for guidance on what their responsibilities are under the rules and regulations to which they are subject and on how those responsibilities should be discharged. All directors should have access to the advice and services of the company secretary...it should be *standard practice for the company secretary to administer, attend and prepare minutes of board meetings.*"⁶ (Emphasis supplied). The secretary would be a source of advice to the to board...and the is responsible to the board for ensuring compliance with the various Rules and Regulations.⁷ The ICSA has also issued a separate guidance note on the Corporate governance role of the company secretary highlighting the unique role played in that context and also factoring in the recommendations of the various expert committees constituted in England on the subject.

Non-Executive Directors

Acting as a channel of communication and information for non-executive directors.

Company Seal

Ensuring the safe custody and proper use of any company seals.

Registered Office

Establishing and administering the registered office; attending to the receipt, co-ordination and distribution of official correspondence received by the company, sent to its registered office; ensuring the provision of facilities for the public inspection of company documents.

Company Identity

Ensuring that all business letters, notices and other official publications of the company show the name of the company and any other information as required by the statutes and that company name plates are displayed in a conspicuous place.

Subsidiary Companies

Ensuring that procedures are in place for the correct administration of subsidiary companies and that correct information is given to the holding company; maintaining a record of the group's structure.

General Compliance

Monitoring and laying in place procedures which allow for compliance with relevant regulatory and legal requirements, particularly under the Companies Acts including legal requirements on retention of documents; retaining the minimum set of records required for commercial reasons; ensuring that procedures are in place to allow adequate historical archive to be maintained.

The Company Secretary may not be personally involved with all areas of compliance and 'ensuring compliance' may be read as ensuring that satisfactory arrangements are in place to secure compliance.

ADDITIONAL DUTIES

In addition, the Guidance Note also lists out certain additional duties of the Company Secretary. These are as follows:

Legal

- Commercial law, Intellectual property, Pensions law
- Contracts negotiation, Litigation Data protection
- Contract drafting, Conveyancing, Consumer credit

6. Para 4.25 of the Cadbury Committee report

7. Para 4.27 *ibid*

- Contract vetting
- Property management
- European Community law

Accounting/Finance

- Payroll Financial management Credit control
- Taxation, Treasury/Management accounting
- Financial accounting Project finance
- Internal audit, Corporate finance

Personnel & Employee

- Employment law, Other employee benefits
- Profit share schemes, Pensions administration
- SAYE schemes & trusteeship
- Personnel administration
- Employee and executive share option and performance related pay schemes

Compliance with Financial Services Act

- Compliance with the Financial Services Act 1986
- Compliance with Financial Services Authority (FSA) and Self-Regulatory Organisations (SRO)rules

General Administration

- Insurance administration, Risk management
- Facilities management, Premises administration
- Office administration, Information and computer systems
- Charitable donations, Political donations

General Management

- Strategic planning, Corporate planning
- Directorships of group subsidiaries, Liaising with professional advisers

Most Company Secretaries could probably add to the above list, particularly where their company's business is subject to further specific external regulation. As a general rule, Company Secretaries of small to medium-sized companies are more likely to be involved in a wider range of administrative duties than their counterparts in larger companies.

As can be discerned from the above, the ICSA Guidance Note is thorough, elaborate and exhaustive and truly reflects the entire gamut of work discharged by the modern day company secretary. Ideally, the Guidance Note may be taken as a starting point for framing the functions of the secretary in the Indian context and suitable modifications may be made to cater to the unique circumstances and facts prevailing in India.

Irani Committee Report

Dr. J J Irani Committee report released earlier this year by the Ministry of Company Affairs has designated the Company Secretary as " Key Managerial Personnel" along with Chief Executive Officer/Managing Director and Chief Finance Officer. This is one small step as a proposal but a giant leap for the profession of Company Secretaries, elevate as it would the secretary to an exalted position.

CONCLUSION

It is hoped that the Government will in right earnest begin the process of consulting the ICSI and other concerned as it embarks on the task of describing the role and functions of the company secretary. Although the Act is applicable as a whole to all companies, it would be appropriate if two sets of functions are prescribed one, viz., one relevant to listed and public companies and the other to unlisted and private companies. The functions may also be reviewed at regular intervals so that the changes brought about due to technological advances and amendments to the legal framework may also be factored in. The fast changing global regime and the emerging paradigm require that the role of the secretary be clearly delineated.