
REAPPRAISING THE STATUS AND ROLE OF THE COMPANY SECRETARY IN CONTEMPORARY CORPORATE PRACTICE

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INTRODUCTION

The role of the Company Secretary in contemporary corporate practice cannot be overemphasised, particularly with the professionalisation and the legalisation or statutory recognition of the office of Company Secretary in most jurisdictions of the world. He occupies a strategic position in the corporate set up and is a principal officer whose duties transcend general administrations, such that he is today rightly regarded as the 'life-wire' of the company. The Company Secretary has also been regarded by Their Lordships in the Supreme Court of Nigeria as the 'compliance officer' of the company². All these are positive developments and indeed a departure from the hitherto notional conception of the Company Secretary as a mere clerical or secretarial staff of the company. It may be timely to assert therefore, that despite the nomenclature, the role of a Company Secretary is neither clerical nor secretarial in nature, nor is he a 'mere servant' of the company as he was conceived in the 19thC.³ These developments are, no doubt, a product of technological advancement and industrialisation, that have brought with them a phenomenal expansion in the corporate sector. Attendant on this also is the growing demand for specialists or professionals in almost every facet of the corporate environment; and the Company Secretary is one such professional whose duty is to ensure compliance with the various statutory and regulatory instruments, as well as effectively coordinate the administrative structures of the company.

Alluding to this all-important role of the Company Secretary, the erudite Master of the Rolls, *Lord Denning*, has postulated in the landmark English case of

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2 See the Nigerian case of *Okeowo v. Migliore* (1975) 11 SC 138

3 Cf. the case of *Barnett Hoars & Co v. South London Tramways Co.* (1887) 18 QBD 815, Per Lord Esher, where the Secretary was regarded as a 'mere servant' of the company.

Panorama Development (Guilford) Ltd. v. Fidelis Furnishing Fabrics Ltd.¹
that:

Times have changed. A company Secretary is a much more important person nowadays than he was in 1887² He is an officer of the company with extensive duties and responsibilities.... 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

The present writers agree intoto with His Lordship's postulation, save to stress that the Company Secretary has never, at any point in time, been 'a mere clerk', though this has been the notion among a vast majority of the society who equate him with the office typist or confidential secretary - a notion which is false in its entirety as it is misguided. **Lord Parker** has also stated that because of his enormous duties and responsibilities, the Company Secretary has risen as an 'organ' of the company.³

Professor Gower has further argued that the Company Secretary has graduated as an 'organ' of the company with enormous power and authority in the administrative sphere deriving substantially from the Act and the company's Articles of Association.⁴ Being an organ or principal officer of the company, he stands in similar fiduciary relations to the company as the directors.⁵ In this wise, **Professor Bakibinga** has asserted that the Company Secretary is "entrusted with the task of ensuring that the documentation of the company is accurate and orderly and the necessary requisite returns are made to the Companies Registry...."⁶ Accordingly, one can understand that all these are not the job of a mere clerk or a typist. It is therefore apposite that the role and status of the Company Secretary in the management of the company be properly defined, understood and appreciated. This is precisely what this paper sets out to address.

1 (1971) 2 QB 711 at 716-717; 3 WLR 440 at 443; 3 AER 16. See also Davies, P.L., ed.: *Gower's Principles of Modern Company Law*, 6th ed., (London: Sweet & Maxwell, 1997) pp. 198-199.

2 See note 2, *Supra*.

3 See *Daimler Co. Ltd. v. Continental Tyre & Rubber Co.* (1916) 2 AC 307 HL.

4 See Davies, P. L., *Op. Cit.*, p. 199.

5 Under the Nigerian Companies and Allied Matters Act, Chapter 59 Laws of the Federation of Nigeria, 1990, S. 297 (herein written as LFN, 1990), the Company Secretary owes no fiduciary duties to the Company, a position the present writers do not support.

6 See Bakibinga, D.J.: *Company Law in Uganda* (Kampala: Fountain Publishers, 2001) p. 121.

APPOINTMENT OF A COMPANY SECRETARY

By the provisions of **Section 293** of the Nigerian Companies and Allied Matters Act¹ every company shall have a Secretary.

*The Board of Directors is responsible for the appointment, remuneration and removal of the Company Secretary.*² The terms and conditions of appointment are usually stated in the instrument of appointment. Company Secretaries have to be very disciplined and organised as they hold key positions in the company. They are expected to have thorough knowledge and understanding of their subject as they may have to deal with complex legal and administrative situations. Excellent command of English language (or the official language used in drafting statutes as well as in business transactions in the country), both written and oral is important. At the same time ability to understand and analyse complex and technical issues are salient. It may not be out of place to add that as coordinator of the relations between Management and the Shareholders on the one hand, and, Management and employees on the other hand, he needs possess high level wisdom and wit, and accordingly act with tact and intelligence. All these are qualities the Board of directors responsible for the appointment of the Secretary usually scout for in candidates for the office.

A director may also be appointed the Secretary of the company, but a sole director cannot be appointed Secretary under the Act.³ Furthermore, where a document is, by regulation, to be executed by a Director and the Secretary, the same person acting in both capacities cannot validly execute same.⁴

A company may be appointed the Secretary of the company. However, the Act prohibits a company from having as its Secretary a corporation the sole director of which is a sole director of the company. Conversely, a company is prohibited from having as its sole director a corporation the sole director of which is the Secretary to the company.⁵

1 Cap. 59 LFN, 1990, which is in pari materia with S. 178 of the Uganda Companies Act, 1961, Chapter 110 Laws of the Republic of Uganda 2000, and S. 283 of the English Companies Act, 1985.

2 See S.178 & Art. 110.(Uganda C/A) See further S. 296 CAMA

3 ibid.

4 S. 294 CAMA; S. 180 & Art. 112 C/A (Uganda) & S. 284 of the English Companies Act, 1985.

5 S. 179 & Art. 111

QUALIFICATION OF A COMPANY SECRETARY:

As noted earlier, because of the professionalisation (i.e. recognition of the professional status) of the office of Company Secretary, most jurisdictions of the world now provide qualifications for appointment as Company Secretary. This is especially so of public companies.

For instance, under the English Companies Act, 1985,¹ it is provided that in the appointment of a Company Secretary the directors shall take all reasonable steps to ensure that a person for the office '*is a person who appears to them to have the requisite knowledge and experience to discharge the functions of Secretary of a company*'. Such a person may also possess previous experience as Secretary of a company or should be a member of a profession or professional body.

Under the Nigerian Law,² in addition to the foregoing, a person shall not be appointed as Company Secretary of a public company unless he is a member of any of the following professional bodies:

- i. A Legal Practitioner (within the meaning of the Legal Practitioners Act, 1975, i.e. a Lawyer duly called to the Nigerian Bar)
- ii. A member of the Institute of Chartered Accountants of Nigeria (ICAN)
- iii. A member of the Institute of Chartered Secretaries and Administrators of Nigeria (ICSAN or CIA)³
- iv. A person who has been the Company Secretary of a Public Company for at least three years of the five years immediately preceding his appointment.
- v. A Firm of any of the above professional bodies.

It is interesting to note that while no special qualification is required for directorship of a company, the special requirements specified above must be met in the appointment of a Company Secretary. This is but a statutory recognition of the enormous responsibilities and professional status of the Company Secretary.⁴ It is here opined that countries of the world should design corporate governance policies and laws aimed at also professionalizing the secretaryship of private

1 Section 286, which is in pari materia with Section 295 of the Nigerian Companies and Allied Matters Act, 1990, but the CAMA still provide special qualifications for Public Companies

2 S. 295, CAMA

3 In India he must be a member of the Institute of Company Secretaries of India (ICSI) as required by the Company Secretaries Act, 1980, and the Companies Act, 1956.

4 See Davies, P.L., Op. Cit., p.198

companies as well, and extend same to the directorship of companies. This would, no doubt, go a long way in repositioning companies for greater productivity and enhanced output necessary for the transformation of national economies.

DUTIES OF A COMPANY SECRETARY:

The Company Secretary is entrusted with enormous responsibilities as an officer of the company. *Gower* posits that the Company Secretary differs from directors in that he has no responsibility for corporate policy other than mere implementation of those policies as designed by the Board.¹ With due respect to the Learned author, the present writers hold a contrary view, which is justified by the fact that in contemporary corporate practice, the Company Secretary as a principal officer and an indispensable organ of the corporate entity, with his multidisciplinary background is involved in major decision-making which transcend his traditional administrative roles to such intricate issues as the formulation of long and short term corporate policies and programmes, including the exploration of expansion opportunities. As noted earlier, it is for this far reaching function that he has come to be regarded as the 'Corporate Development Planner.'

Some of the scheduled duties of the Company Secretary include the following:

i. **General Administration:** The Company Secretary as the '*chief administrative officer*'² of the company is responsible for the general administrative affairs of the company. He oversees the day to day running of the company administration, and is responsible for signing contracts on behalf of the company such as contracts of employment (staff employment), procurement (e.g. ordering cars and machineries)³ as well as debentures (loan agreements), etc. It is salient to stress that although he is the Chief Administrative Officer of the company, he cannot borrow money or execute a debenture deed without the authority of the Board of Directors,⁴ nor can he strike out from or insert a name in the Register of Members without due approval.⁵

ii. **Custodian of company documents:** The Company Secretary performs

1 See *Davies, P.L., Id.*, p.199

2 See the dictum of Salmond, L.J. in *Panorama Development (Guilford) Ltd.* case, *Supra*, n. 3; and S. 298 (i) (d) CAMA

3 *Panorama Development (Guilford) case*, *Supra*, per Denning, L.J.

4 *Re: Cleadon Trusts Ltd.* (1939) Ch. 286.

5 See *Re: Indo China Steam Navigation Co.* (1917) 2 Ch. 100.

the statutory role of maintaining or keeping the custody of documents of the company such as the register of members, register of directors, minutes books, books of account, register of debentures, contract agreements, etc.¹ It is from him that Certified True Copies (CTCs) of documents such as contract Agreements and Resolutions (of the Board or of the General Meeting) are obtained.² Also, subject only to the Articles of Association of the Company, it is the Company Secretary that is the custodian of the company Seal, and in whose presence the Seal is to be affixed.

- iii. **Servicing Meetings:** The Company Secretary, unless the Act or the Articles otherwise provide, is responsible for issuing notices and summoning meetings (General & Board Meetings) of the company in consultation with the Board of Directors. He is also responsible for taking down the minutes of the meeting, drafting the resolutions of the meeting as well as attending to other secretarial needs of the Meetings³. In *Re: State of Wyoming Syndicate*,⁴ it was held that the Company Secretary cannot summon a General Meeting without consultation with or approval of the Board of Directors.
- iv. **Making Returns:** The Company Secretary is regarded as the **Compliance Officer** of the company.⁵ He makes sure the company complies with all relevant Laws and Regulations, as well as the company's Memorandum and Articles of Association. He also makes necessary Returns to the Registrar of Companies⁶ by updating the company's file in the Companies Registry.⁷
- v. **Legal Representation:** The Company Secretary represents the company in Court in the event of any litigation and is responsible for prosecuting, defending or discontinuing actions on behalf of the company. In *Daimler Co. Ltd. v. Continental Tyre & Rubber Co.*⁸ it was held that although he is an officer of the company, he cannot, however, commence or defend litigation in the company's name without the authority of the Board of Directors or of the General Meeting.

1 SS. 298 CAMA (Nigeria) & 201 C/A (Uganda)

2 See Davics, P.L., ed., Op. Cit., p. 198.

3 S. 298 (1) (a) CAMA

4 (1901) 2 Ch. 431.

5 See Okeowo v. Migliore, Supra, n.1

6 Or Registrar General as he is called in Nigeria. S. 298(1)(c) CAMA

7 i.e. the Corporate Affairs Commission.

8 (1916) 2 AC 307. See also *Edington v. Dumber Steam Laundry Co.* (1903) 11 SLJ 117.

vi. **Corporate Development Planning:** Company Secretaries, with their multidisciplinary background and rigorous training attained in law, management and finance, are involved in major decisions such as formulating long and short term corporate policies and programmes. They are also involved in accounting and finance functions as well as designing and managing staff pension schemes. They explore expansion opportunities; arrange collaborations, reconstructions, amalgamations or mergers and acquisitions (in the event of corporate insolvency), joint ventures within and outside the country, etc. For these reasons, they are regarded as *corporate development planners*.

vii. Other responsibilities of the Company Secretary include incorporation of a new or subsidiary company, acting as internal Legal Adviser and Representative, acting as the Public Affairs Manager, process inter-corporate loans and investments, takes care of company's tax planning, tax management and tax returns, etc.

Like every other officer of the company, the Company Secretary binds the company by his action and is required to act in good faith in the best interest of the company, to exercise due care, skill and diligence in the performance of his duties and to keep and give (whenever required) a comprehensive account of his stewardship to the company. He is however precluded under **S. 298(2) CAMA** from exercising any powers vested in the directors without the authorisation of the Board. He is entitled to be remunerated as may be provided in the Articles or in any special contract respecting his employment.

FIDUCIARY DUTIES OF THE COMPANY SECRETARY

Like all principal officers of the company, the Company Secretary, occupying a strategic position of trust and confidence, is subject to the same fiduciary duties as directors of the company.¹ He is consequently obliged to carry out his duties in line with the demands of these fiduciary duties. However, it is apt to state from the outset that under the Nigerian Companies and Allied Matters Act, the Company Secretary shall not owe fiduciary duties to the company save when he is acting as an agent of the company.²

1 See Keenan, D., Op. Cit., p. 293.

2 S. 297 CAMA

With respect, the position under the Nigerian Law is outdated as it follows the 19thC principle as enunciated by Lord Esher, M.R. in *Barnett Hoars & Co. v. South London Tramways Co.*¹ by which the Company Secretary was regarded as a 'mere clerk'. But as Lord Denning, M.R. noted in *Panorama Development (Guilford) Ltd. v. Fidelis Furnishing Fabrics Ltd.*², and rightly too, times have changed and the Company Secretary is today a much more important officer of the company than he was conceived in the 19thC. Today he is a principal officer, an organ of the company, and should therefore be subject to similar fiduciary duties as the directors. We therefore call on the Nigerian Law Reform Commission, and indeed other jurisdictions still retaining this antiquated notion, to initiate a process of reviewing this and other such outdated provisions in the Act, so as to bring them in line with good corporate governance principles and policies. A synoptic discourse of these duties may be apt:

i. DUTY TO ACT UBERIMAE FIDEI (IN UTMOST GOOD FAITH):

The Company Secretary is obliged to act honestly and in good faith in the best interest of the company. In other words the Company Secretary have a duty to act on the basis of what he considers to be for the economic advantage of the corporate entity or are reasonably incidental to the carrying on of the business of the company. This duty arises principally from the *fiduciary nature* and character of the Principal-Agent relationship existing between the company and the Company Secretary, the latter also regarded as *trustees* of the company. The import of this duty is that the Company Secretary is not to allow his personal interest to come in conflict with the interest of the company in his activities in the company's behalf.³ In *Moore v. Bessler Ltd.*,⁴ the company was held liable for the acts of the Company Secretary and Branch Manager for using a document amounting to deceit. Thus he must act honestly, not receive bribe, and avoid any unauthorised or secret profit.⁵

Note that the Company Secretary may be liable for breach of duty if he allow his personal interest to take precedence or come in conflict with the interest of the company, unless a full disclosure of the transaction was made to the company

1 Supra

2 Supra

3 *Guinness, Plc v. Saunders* (1990) 2 AC 633 (HC)

4 (1944) 2 AER 515. Cf. *Ruben v. Great Fingall Consolidated*, infra, n. 49 (liability was personal on the Secretary for the forgery of the Share Certificate).

5 See *I.T. Palmer of Nig. Ltd. V. Julio Fonseca* (1946)18 NLR 49.

and the company approved of same in a General Meeting.

ii. DUTY OF CARE AND SKILL:

The Company Secretary is obligated or bound to act with every reasonable degree of care, skill and judgment in his transactions for and on behalf of the company as may be required in the circumstances. He is required to bring his vast professional and managerial training to bear in the discharge of his duties, especially in handling the complex legal and administrative issues attendant on his office. Accordingly, where the Company Secretary acted recklessly or negligently in the conduct of the affairs of the company, such Company Secretary shall be held personally liable for any resultant loss to the company or to a third party with whom he transacted.

iii. DUTY TO ACCOUNT:

It is a sine qua non to every business relation that appropriate accounts be kept and rendered, and Company Secretary are obligated by law to render accounts of their stewardship to the company whenever called upon to do so. As a corollary to this duty, where the Company Secretary was involved in some secret deal in the course of his duty as such, he may be liable to make accounts of such secret deal to the company. Thus, the Company Secretary may be called upon to account in the same way as was the director in **Industrial Development Consultants v. Cooley**;¹ where the director claiming to be sick resigned from the company at a short notice to enable him utilise the opportunity to acquire a contract he was hitherto negotiating for the company. He got and executed the contract personally. The company successfully sued for an account of the profit therefrom, the Court holding that the director acted in breach of duty and must account.

In **Panorama Development (Guilford) Ltd. v. Fidelis Furnishing Fabrics Ltd.**² the Company Secretary was held accountable for fraudulently ordering self-drive cars for his own use though ostensibly for the business of the company.

REMOVAL OF COMPANY SECRETARY

The Company Secretary is usually appointed by the Board of Directors, subject

1 (1972) 2 AER 162. See also *Regal (Hastings) Ltd v. Gulliver* (1942) 1 AER 378.

2 *Supra*. See also *Re: Morvah Consols Tin Mining Co., McKay's Case* (1875) 2 Ch. D. 1.

only to the Articles of Association of the company, and is accordingly removable by the Board.

By Section 296¹ the *Board of Directors has powers to remove the Company Secretary*. He may be so removed before the expiration of his term of office. However, the Act prescribes the formalities to be followed in removing the Company Secretary from office, and the tenets of fair hearing shall be observed in effecting such removal, especially where the removal is predicated on some allegations against him – criminal, tortuous or otherwise. Accordingly, the Secretary is obliged to be given notice of the allegation and required to enter a defence or resign his office within seven (7) days from the date of service of such notice.² But if he fails to enter a defence or to resign within the prescribed period, the Board may go ahead and have him removed from office and a report thereon made to the next General Meeting.³ However, if he enters a defence which the Board considers unsatisfactory, the Board may remove him from office and report to the next General Meeting, particularly if the removal is predicated on fraud or gross misconduct. If however the allegation is not based on fraud or gross misconduct, the Company Secretary shall not be removed by the Board without the prior approval of the General Meeting, though it may suspend him and report to the next General Meeting.⁴

It is instructive to note that by the provisions of section 296(4) of the Nigerian Act, where the suspended Secretary is ultimately removed from office with the approval of the General Meeting, the removal may take effect from such time as the General Meeting may determine. It is also salient to stress that the Company Secretary may also sue for damages for breach of contract if the contract is contained in a document separate from the Articles of Association of the company.

LIABILITIES OF THE COMPANY SECRETARY

The Company Secretary as an integral organ of the company carries with him the privileges and liabilities appurtenant to this exalted office. Accordingly, he

1 CAMA; See also Art. 110 of the Ugandan Companies Act Cap. 110, LRU, 2000.

2 S. 296(2) CAMA

3 S. 296(3)CAMA

4 S. 296(3) (a & b) CAMA

not only enjoys the bounties of the office but also takes with him the liabilities incurred from his actions and inactions. Whether such liabilities will attach to him personally, or to his office and therefore borne vicariously by the company, will depend essentially on the nature and extent of the wrong and the circumstances of the case. In any case, it is instructive to note that under the Ugandan Companies Act, **section 206** expressly renders void any provision (whether contained in the Articles or otherwise) exempting the Company Secretary or indeed any officer from liability for any negligence, default, breach of duty or of trust of which he is guilty in relation to the company.

a) Liability of the Company for acts of the Company Secretary:-

The Company Secretary as an organ or principal officer of the company binds the company by his actions and transactions for and on behalf of the company, and the company may be liable for such acts of the Secretary; provided that the Secretary acted within the scope of his authority, actual or ostensible, administrative or otherwise. In *Moore v. Bessler Ltd.*,¹ the company was held liable for the acts of its Secretary and Branch Manager for using documents in a manner amounting to deceit. The basis of the liability here stems from the ordinary principles of agency, that an agent who acted on behalf of a principal, binds the principal by his transactions. The position is the same where although the Secretary had no authority but he was *held out* as having the authority to act and thereby caused a third party to believe reasonably that the Secretary had authority to deal in the transaction;² or where the company *ratified* the acts of the Secretary.³ In any of these situations the company would be estopped from denying the authority of the Secretary, and would be held liable for his acts.

b) Personal liability of the Company Secretary to the Company and third parties:-

The Secretary may also be personally liable to the company where he acts as an agent of the company but he makes secret profits or allow his personal interest to conflict with that of the company, or appropriates confidential information he obtained from the company for his personal or egoistic benefits.⁴ In other words, where he acts in breach of his fiduciary duties to the company he may

1 *Supra*, n. 36

2 See *Lukan v. Ogunsusi* (1972) 5 SC 40 at 43-45. See also *Trenco Ltd. v. African Real Estates Ltd.* (1978) 4 SC 9at 26.

3 *Wilson v. Tunman* (1843) 6 Man. & G. 236

4 S. 297 CAMA

be held personally liable to the company. Thus, in *Panorama Development (Guilford) Ltd. v. Fidelis Furnishing Fabrics Ltd.*¹ the Company Secretary was held accountable for fraudulently ordering self-drive cars his own use though ostensibly for the business of the company.

Furthermore, the Company Secretary may be personally liable to third parties for any fraud attendant on the dealings between them even though, it was purportedly entered into in the company's name or behalf. Thus, in *Ruben v. Great Fingall Consolidated*,² liability was held by the House of Lords, not to attach to the company, but to the Company Secretary - Mr. Rowe - who had issued a Share Certificate on which he affixed the seal of the company and forged the signatures of two directors and also counter signed the document as secretary thereof.

Notwithstanding the foregoing, the Company Secretary, like every other officer of the company, is required to be *indemnified* against any liability incurred by him in prosecuting, continuing or defending any proceedings on behalf of the company.³

In conclusion, the Company Secretary is, in contemporary corporate practice, a very important officer and an indispensable organ of the company, whose role and status transcends the age-old notional conception of him as a 'mere clerk' or secretarial assistant. He is today a person entrusted with enormous responsibilities (being the life wire of the company) that his office and status has become professionalized and statutorily recognised in most countries of the world. His duties however goes far beyond those discussed in this work, and will continue to expand in scope with time, even as the world becomes more and more global, industrial and technologically driven.

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1 Supra, n. 3. See also *Re: Morvah Consols Tin Mining Co., McKay's Case* (1875) 2 Ch. D. 1.

2 (1906) AC 439 HL

3 Art. 136, Table A & S.405, Companies Act, Uganda