

IS LINUS CHEUNG FIT FOR OFFICE ?

One would think that a director of a company must, when making a determination for and on behalf of the company, on which he is a senior member of the board of directors, owe a strict duty of fidelity to the company and, as such, he must be seen to act impartially in the best interests of the company.

For a publicly listed company, this concept is of paramount importance because a director of a public company, literally, holds the public's purse strings in his hands.

A director of a publicly listed company must be, and must be seen to be, totally objective in determining the affairs and/or direction of his company.

He must put aside his personal feelings in favour of the public good.

When a conflict arises, one would hope that a director, seeing himself to be in a position of conflict, would recuse himself.

Better, however, would be for a director not to place himself in a position of conflict in the first instance.

Much of the above 6 paragraphs cannot be said to be the case with regard to Mr Linus Cheung, Chief Executive Officer of Cable and Wireless HKT Ltd.

His positive comments and public acts of support, directly and indirectly, in respect of the proposed takeover of Cable and Wireless HKT by the Li Ka Shing Camp -- Pacific Century CyberWorks Ltd -- have coloured the situation to such an extent that he has sent a very strong message to all his shareholders and to the shareholders of Pacific Century CyberWorks Ltd, and to his fellow board members, to the effect that they should play along with merger/takeover plans of Pacific Century CyberWorks.

That Mr Linus Cheung could be correct in his opinion is immaterial: He is supposed to be objective and be seen to be acting in the best interests of his company, putting aside any personal feelings.

Even before shareholders of Cable and Wireless HKT have had an opportunity to vote on the merger/takeover proposals of Pacific Century CyberWorks, Mr Richard Li has cemented a \$HK23-billion deal with Australia's giant, Telstra Corporation Ltd, a deal which will involve Cable and Wireless in the near future, provided that shareholders of Cable and Wireless HKT Ltd voted in favour of Pacific Century CyberWorks's proposals.

The Memorandum of Understanding, signed last Tuesday between Telstra Corporation and Pacific Century CyberWorks, mapped out an arrangement whereby Pacific Century CyberWorks would issue Convertible Notes to Telstra Corporation to the value of about \$HK11.67-billion and Telstra, for its part, would pump in \$HK11.67 billion, in cash, into the coffers of Pacific Century CyberWorks.

In addition, it was agreed between Pacific Century CyberWorks Ltd and Telstra Corporation that some of the businesses and assets of Cable and Wireless HKT Ltd would be merged with entities of Telstra Corporation.

On conversion of the Convertible Notes, Telstra would end up with about 20 percent of the Enlarged Issued and Fully Paid-Up Share Capital of Pacific Century CyberWorks, following the takeover/merger of Cable and Wireless HKT Ltd.

Without question, Pacific Century CyberWorks Ltd needs a great deal of money to pull off its deal to gain control of Cable and Wireless HKT Ltd, and Telstra brought to the table, not just cash, but also some cute Australian ideas, ideas which caught the fancy of the Li Ka Shing Camp.

Mr Linus Cheung, who was not involved in these negotiations (TARGET assumes) and was not consulted (TARGET assumes) -- for what reason should he be consulted? -- came out applauding the signing of the Memorandum of Understanding ' ... *Management* (of Cable and Wireless HKT Ltd) *is very supportive of this deal ...* '.

For what reason should Cable and Wireless HKT be supportive?

For what reason, for that matter, should Mr Linus Cheung be supportive of a deal which, one may suppose, could well result in carving out a piece of Cable and Wireless HKT's Asian telecommunication's Empire and handing it to Telstra Corporation?

But he was supportive and made a public statement to that effect.

Had Mr Cheung been intimately apprised of the details of the talks between Telstra Corporation and Pacific Century CyberWorks and how it would affect Cable and Wireless HKT Ltd, prior to Pacific Century CyberWorks and Telstra Corporation, putting their respective signatures to the Memorandum of Understanding?

Or, is it possible that Mr Linus Cheung wants to keep his job in Cable and Wireless HKT Ltd and, as such, is, as many people maintain, sucking up to Mr Li Ka Shing's Number Two Son?

It may be cruel to assume that Mr Linus Cheung is allowing his personal feelings to interfere with his duty of fidelity to Cable and Wireless HKT Ltd, but it certainly does have the makings of such a scenario.

If it is all a big mistake and Mr Linus Cheung did not mean to send a positive message to his shareholders, then he is unfit for office.

Because such a mistake is inexcusable for the head of company of the size and importance of Cable and Wireless HKT Ltd.

It is held that the fiduciary duties of directors of companies, private and public, are identical with those that apply to the fiduciary duties, held by trustees.

The authority of a director to bind a company as its agent normally depends on the directors, acting collectively as a board of directors; a director owes a duty of good faith to his company.

A single director, therefore, regardless of his rank within his board, will not be an agent of the company with the power to saddle it with responsibility for his acts.

But he shall be a fiduciary of the company, evidenced by his official position as a seat-holder on the board of directors.

It follows, therefore, that directors of companies must be trustees and, as such, they must act in the interests, solely, of the beneficiaries -- the company (owned by the shareholders), the fortunes of which the directors are supposed to guide.

But their duty of fidelity is to the company, alone, not any particular shareholder or any particular group of shareholders.

Directors owe no duty to the individual members of a company or, a fortiori, to a person or entity not yet a member of the artificial personality, known as a limited liability company.

Directors are fiduciaries and must, therefore, display the utmost good faith towards the company in their dealings with it, or on its behalf.

The fact that directors are fiduciaries imposes on them subjective duties of honesty and good faith as well as the objective duty: Not to place themselves in a position where their duties might conflict with their private

interests.

In short, a director must act bona fide -- in what he honestly believes to be in the best interests of his company.

Further, he must exercise his directorial powers for the particular purpose for which they were conferred, and not for some extraneous purpose, even if he honestly believes that to be in the best interests of the company.

In addition, it would be patently wrong -- and perhaps, patently dishonest -- to place himself in a position where there is, or may be seen to be, a conflict between his sworn duties (as a director) and his personal interests.

The argument, that a director's act, or acts, had collateral purposes, would fail under examination if it could be demonstrated that he failed to act bona fide in what the director considered to be in the interests of the company.

It could be held, therefore, that a director's act(s) was in breach of his duty in spite of the fact that it is not shown that he had acted with any conscious dishonesty, if he acted as he did because it was in his own interests, or that of some third party.

If a director exercises his power for purposes other than that of his mandate, as a director, it may be said that he has exceeded his authority and is, therefore, liable accordingly.

As a director of Cable and Wireless HKT Ltd, Mr Linus Cheung is a fiduciary and, as such, he must not place himself in a position in which there is a conflict between his duty (to Cable and Wireless HKT Ltd) and his personal interests.

Good faith must not only be done, but must manifestly be seen to be done; and the law must be such that it will not allow a fiduciary to place himself in a situation in which his judgment is likely to be biased, and then have the fiduciary attempt to escape liability by denying that in fact it was biased.

To be totally fair to Mr Linus Cheung, he has never been in his present situation, whereby the company that he controls is about to be taken over by a financial giant, headed by one of the richest men in the world.

Some sympathy must be felt for Mr Linus Cheung ... but not a great deal, mind you.

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