

27th June 2002

NON-EXECUTIVE DIRECTORS REVIEW

by DEREK HIGGS, ESQ.

NOTE by RT.HON. LORD HOWE OF ABERAVON, CH, QC

For what they may be worth, I offer two modest observations on the topic which you have to consider.

The first is to refer you to the three quotations set out on the Annex. I do not commend them for verbatim consideration or anything like that – but simply to illustrate the most important point which emerges, in my view, from the recent (and continuing) fashion for Codes of Conduct expressed in increasingly mountainous detail, whether for Members of Parliament, Parish Councillors, Special Advisors or Ministers of the Crown. A quarter of a century has elapsed since I delivered a Lecture, published under the title, “Too much law?” – and nobody has taken much notice. Today the question mark can certainly be removed from the title.

The other point concerns the difficult problem that arises in connection with any substantial British company with a multinational or global trading presence – namely the need to have an internationally representative board and yet to have a sufficiently powerful and numerous UK based hard-core, who can be mobilised at short notice (and in the knowledge that they all understand the UK working environment) to handle some suddenly emerging crisis in the company.

This last point emerges from my own experience of a situation in which the board of just such a company, meeting abroad (in fact in the Far East) as they did at least once a year, were there told by their chairman that he had proceeded – without prior consultation – a long way towards a merger with our principal American competitor. In order to prevent this going any further, it was urgently necessary (as you may imagine) for the British NEDs (working as a group together in the UK – and supported by their executive colleagues) to confront the chairman and, in the result, to secure his early resignation and replacement – without, as it happened, any adverse media publicity. One other key factor in this procedure had been the quality of leadership given by the senior and most experienced of the UK based NEDs.

Thereafter, and as the company became increasingly multinational and global (with an increasing number of overseas NEDs), there was a risk that the “home guard” might have shrunk below the point where such an operation could be effectively handled.

Perhaps there is a marriage to be made between my two points by observing how difficult it would be to codify a board structure, which would readily adapt to the kind of situation that I have described.

This note would not, I think be improved by adding to its length.

A handwritten signature in black ink, consisting of a stylized, cursive 'J' followed by a series of loops and a final flourish.

ANNEX

“There are three great domains of human conduct. The first is where our actions are limited or forbidden by law. Then there is the domain of free personal choice. But between these two is a third domain, that in which there is neither law nor unfettered freedom. This is the domain of “obedience to the unenforceable”, where people do right although there is no one and nothing to make them do right but themselves.”

Lord Moulton, c.1920

“Manners are more important than laws. Upon them, in a great measure the laws depend. The law touches us but here and there, and now and then. Manners are what vex or smooth, corrupt or purify, exalt or debase, barbarize or refine us, by a constant, steady, uniform insensible operation, like that of the we breathe in. They give their whole form and colour to our lives. According to their quality, they aid morals, they supply them, or they totally destroy them.”

Edmund Burke, Letters on a Regicide Peace
Letter 1, 1796

“I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes ... Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; ... while it lies there it needs no constitution, no law, no court to save it...”

And what is this liberty? What is the spirit of Liberty? I cannot define it. I can only tell you my own faith. The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men – and women”.

Judge Learned Hand, Speech in Central Park
New York City, 21st May 1944