VOLUME 8 ISSUE 5

The Lawyers Newsletter for Business Professionals

JANUARY 2014

# IS YOUR COMPANY UP TO CODE? A REVIEW OF THE NEW CORPORATE GOVERNANCE CODE

*Aisha Peters*

The recently published Trinidad and Tobago Corporate Governance Code 2013 ("the Code") aims to enhance business governance and performance, strengthen transparency and efficiency in our local market and improve the overall investment culture in Trinidad and Tobago by its voluntary adoption. In this article, we will provide an overview of the requirements of the Code and why businesses should consider implementing it in their organisations.

The Code espouses five key principles, which are to:

1. Establish a Framework for Effective Governance
2. Strengthen the Composition and Performance of Board and Committees
3. Reinforce Loyalty and Independence
4. Foster Accountability
5. Strengthen Relationships with Shareholders

***Establish Framework for Effective Governance***

This means that every company should be headed by an effective Board, which is collectively responsible for company's long term success. To achieve this, the Code recommends that:

- The Board should establish and make publicly available a clear outline of its roles and responsibilities, including any formal delegations to Management.
- The Chairperson of the Board should be a non-executive Director and preferably an independent Director. Where the Chairperson of the Board is not an independent non-executive Director, the Board should appoint a lead independent Director.
- The Board should demonstrate ethical leadership.
- The Board should ensure that it is supplied with information in a timely manner, in a form and of a quality appropriate to enable it to discharge its duties effectively.
- The Board should take into account the legitimate interests and expectations of all stakeholders.

***Strengthen the Composition and Performance of Board and Committees***

This requires a balance of independence and diversity of skills, knowledge, experience, perspectives and gender among Directors so that the Board works effectively. Some of the suggestions to achieve this are:

- The Board should appoint a sufficient number of independent Directors capable of exercising unbiased judgment, particularly in tasks where there is a potential for conflicts of interest.
- Directors should be selected and appointed through rigorous and formal processes designed to give the Board a balance of independence and diversity of 3
- A Committee with a majority of independent non-executive Directors should lead the Board's nomination process and make recommendations to the Board.
- The Board should ensure that the remuneration of Directors and Senior Management is transparent, fair and reasonable.

***Reinforce Loyalty and Independence***

All Directors should act honestly and in good faith, in the best interest of the company, ahead of other interests. It is recommended that:

- The Board should undertake annually an assessment of its independence, and disclose in the annual report each non-executive Director it considers to be independent.
- All Directors should be candidates for re-election, at intervals of no more than three years, subject to continued satisfactory performance. Members of the Board and Senior Management should disclose to the

*(cont'd on page 2)*

## C O N T E N T S

# IS YOUR COMPANY UP TO CODE? (cont'd)

*(cont'd from page 1)*

Board whether they, directly or indirectly or on behalf of third parties, have a material interest in any transaction or matter directly affecting the company.
- Directors should demonstrate the capacity to commit the time needed to be fully effective in their roles.

***Foster Accountability***

The Board should present an accurate, timely, balanced and understandable assessment of the company's performance, position and prospects. It is recommended that:

- The Board should promote accurate, timely and balanced disclosure of all material matters concerning the company.
- In the annual report, Directors should state their responsibility towards the integrity of the financial reports.
- The Board should report annually to shareholders and stakeholders on the external auditor's involvement in non-audit work and fees paid to auditors.
- The Board should, on an annual basis, verify that the company has appropriate processes that identify and manage potential risks.
- Each company should establish an Audit Committee of the Board.
- Boards should report annually to shareholders on how the company is implementing the Code and explain any significant departure from the Code.

***Strengthen Relationships with Shareholders***

The Board should promote constructive relationships with all shareholders that facilitate the exercise of their ownership rights and encourage their engagement with the company. To fulfil this principle it is recommended that:

- The Board should facilitate the exercise of ownership rights by all shareholder groups, including minority or foreign shareholders and institutional investors.
- The Board should ensure that all shareholders have the opportunity to engage with the company and participate effectively in annual and special meetings.
- During annual and special meetings, the Board should facilitate questioning of external auditors and Senior Management by shareholders, as moderated by the chairperson.

The above represent best practices, some of which are already stipulated in statute, such as the Companies Act which requires Directors to disclose any material interests they have in transactions affecting the company. The Code is not intended to replace existing legislation, but there is scope for the Code to be used to clarify the standards set out in legislation such as the Companies Act, where the statutory provisions are sometimes unclear on the standards to be used.

**Which Companies Are Targeted by the Code?**

Although the Code's principles are meant to be universally applicable to any organization seeking to improve its standards of corporate governance, the detailed recommendations and guidance supporting each principle are targeted at companies with 'public accountability'. By public accountability the Code refers to those companies "*who are or are in the process of filing its financial statements with a securities commission or other regulatory organization for the purpose of issuing any class of instruments in a public market; or it holds assets in a fiduciary capacity for a broad group of outsiders*." Businesses which have no public accountability are still encouraged by the Code to follow the spirit of its principles and, where possible, aim to apply the recommendations.

The Government has indicated its support for and commitment to the Code, a private sector led initiative. The Minister of Finance and the Economy, Hon. Larry Howai, has directed all State Enterprises to adopt and implement the Code.

**Benefits of the Code**

Businesses can derive three (3) primary benefits from adopting the Code and implementing its recommendations. Firstly, lower cost of capital: in a well-governed company performance targets are likely to be achieved and reported to investors. Risks to investors are therefore likely to be reduced and as a result capital can be obtained at lower costs.

Secondly, a lower risk of scandals: the values of corporate governance, i.e. transparency, accountability, fairness, and corporate responsibility are alive throughout the organization. We need not look further than the financial crises and scandals associated with CL Financial and the Hindu Credit Union to accept this.

Thirdly, higher performance of the organisation is expected through enhanced Board involvement, management and decision making.

**Future Impact and Relevance of the Code**

In the future it is expected that many local companies will adopt the Code because it represents the international standard of corporate governance. In this age of globalisation, companies who fail to meet international standards limit their competiveness and their ability to attract international investors. Therefore, adoption of the Code should be seen paramount for any local company who wants to operate and source financing on the global market.

Finally, early adoption of the Code will also make it easier for local companies to comply with some of the new pieces of legislation which have been passed and will soon be passed to promote the financial transparency and accountability of our financial sector.

*Aisha Peters is an Associate in Hamel-Smith's Dispute & Risk Management Department.*

# THE FACE THAT (COULD) LAUNCH A THOUSAND SUITS

*Chris Hamel-Smith, S.C. & David Hamel-Smith*

Celebrities - including entertainers and sportspersons - often have enormous commercial value. Many are paid huge sums to allow their images to be used to promote a range of products and services. Yet, a person (even a celebrity) has no copyright in his face. The copyright in a photograph belongs to the photographer, who is its creator, and not to the person photographed. Why then should a business pay money to a celebrity to use his image? And, what can a celebrity do if someone does so without his permission?

A London Court faced these issues in the recent case of *Rihanna v. Topshop.* Topshop was selling clothes on which a photograph of Rihanna was printed. The company had validly purchased the right to use that image from the photographer, who was the owner of the copyright. Yet, the Court granted an injunction to stop Topshop's activities and ordered them to pay Rihanna's legal costs.

The Court grounded its decision in the law of "Passing Off". This is an intellectual property tort. It is most commonly used to stop one company from "passing off" its products for those produced by another company. This may occur, for example, because the name or packaging used by Company A is too similar to that used by Company B, causing customers to be misled into purchasing Company A's product believing it to be produced by Company B.

To succeed on a Passing Off claim, the Claimant generally has to prove each of the following:
A misrepresentation;

a. By a trader in their course of trade;
b. To prospective customers;
c. Which is calculated to injure the business or goodwill of another;
d. Which causes actual damage to the business or goodwill of the trader bringing the action.

In the *Rihanna* case, the Court arguably extended the traditional scope of Passing Off. It found that - by using her likeness on their clothing - Topshop was misrepresenting to their customers that Rihanna had consented to the use of that image and/or had endorsed Topshop's product, and that this damaged the goodwill which Rihanna has built up in her likeness.

The Jamaican Courts came to a similar conclusion in the case of *The Robert Marley Foundation v. Dino Michelle Ltd.* In that case, the Defendant manufactured and sold t-shirts bearing Bob Marley's image and the words "Bob: 1945-1981". Like in the *Rihanna* case, the Court found them guilty of Passing Off.

In Trinidad & Tobago, our Courts are likely to arrive at the same result. Firstly, the tort of Passing Off has been recognised in this country. If confronted with a similar situation, our Courts would find the Jamaican and London Courts' application of Passing Off to be very persuasive. Secondly, this result is reinforced by the express terms of our *Protection Against Unfair Competition Act*.

Trinidad & Tobago's *Protection Against Unfair Competition Act* creates a statutory tort of "Unfair Competition". It provides very broadly that any act or practice, in the course of industrial or commercial activities, that is contrary to honest practices shall constitute an act of unfair competition. It also sets out a non-exhaustive list of activities that will be considered to be dishonest, including those that would traditionally be caught by the tort of Passing Off. One such listed dishonest practice is any act that causes, or is likely to cause, confusion with respect to a celebrity. As such, the Trinidad & Tobago legislation reinforces the approach used by the Jamaican and London Court to decide the *Marley* and *Rihanna* cases.

Faced with the tort of Passing Off and the possibility of a claim under the *Protection Against Unfair Competition Act*, companies would be well advised not to misuse celebrity images or they will not 'find love in a hopeless case'.

*Christopher Hamel-Smith, S.C. is Partner Emeritus in our Dispute & Risk Management Department. David Hamel-Smith is currently an In-service Trainee with the firm.*

# THE U.K. BRIBERY ACT: ACROSS THE POND TO OUR SHORES

*Dominique Martineau*

*The UK Bribery Act 2010 came into force on July 1, 2011 and has broad jurisdictional scope, in that some bribery offences occurring outside the UK could attract the attention of the UK authorities and affect T&T companies. This article explores why certain T&T businesses should be concerned with the Act and how they may come to offend its provisions.*

Businesses in T&T may not have the UK Bribery Act 2010 ("the Act") on their radars since any legislative changes that occur 'across the pond' generally have no relevance to our doing business in T&T. However, businesses with a UK connection, wherever they do business, cannot and should not ignore the Act, as a finding of liability under certain sections can lead to imprisonment and/or significant fines. However, the commercial organisation will have a full defence if it can show that despite a particular case of bribery, it had implemented adequate procedures to prevent persons associated with it from bribing.

Sections 1 and 2 of the Act have two general offences respectively: section 1 prohibits the bribing of another person, whereas section 2 prohibits the taking of a bribe. Section 6 pertains to the bribing of a foreign public official. Where any of these offences are committed by a body corporate, any senior officer (i.e. a director, manager, or secretary) with whose consent or connivance the bribe was committed, is also liable.

Section 7 of the Act is most relevant to T&T businesses as it applies to:

- a company or partnership incorporated or formed outside of the UK (such as in T&T) but carrying on its business within the UK; or
- a UK incorporated or formed company or partnership carrying out its business outside of the UK (such as in T&T).

It provides that a commercial organisation is liable for failing to prevent bribery; once it can be established that an 'associated' person (an employee, agent or subsidiary) of that 'relevant commercial organisation' bribed another with the intent to retain business or to obtain an advantage in the conduct of business for that organisation. Unless the organisation can demonstrate that it had adequate procedures in place to prevent such conduct, it can be found liable under the Act. A wide net has been cast as to what could constitute a 'relevant commercial organisation' under this section, and the following commercial entities come within its purview:

- A company incorporated in the UK which carries on business in the UK or elsewhere;
- A company wherever incorporated which carries on business or part of a business in the UK;
- A partnership formed in the UK which carries on business in the UK or elsewhere; and
- A partnership wherever formed which carries on a business or part of a business in the UK.

Therefore, a T&T company that conducts only part of its business in the UK through a subsidiary which bribes a third party may be guilty under section 7 of failing to prevent the bribe. Additionally, a UK incorporated company employing a T&T agent who bribes another person in T&T to retain a business contract for the UK company may be caught by the Act. Similarly, a UK company which carries on business in T&T and whose employee bribes a T&T public official or a foreign public official in another country may also be liable.

Inevitably, the impact of section 7 will be far reaching for the world at large and for T&T companies and partnerships locally incorporated or formed but carrying on business or any part of it in the UK. It will also impact T&T companies that are partners, subsidiaries, branches or corporate agents of UK corporations (as is the case with many of our energy companies).

In light of the provisions of the Act, and the fact that it is silent on what in particular constitutes an inducement or advantage, many questions may arise about corporate hospitality and associated business expenditure and whether they will offend the Act. For instance, what happens when a CEO of a T&T branch of a UK business ('CEO A') takes another CEO or Minister ('B') to lunch where they discuss the particulars of entering into a proposed business transaction and CEO A pays for the lunch? Strictly speaking, CEO A is 'wooing' B and by paying, he is offering B an advantage with a view to induce him to do business with CEO A over his competitors; but is this enough to amount to contravention of the Act?

According to the guidelines emanating from the UK, any promotional or other business expenditure which seeks to improve the image of a commercial organisation, or to establish cordial relations, is recognised as an established and important part of doing business. It follows that the incidental provision of a routine business courtesy such as paying the bill following a business lunch or tickets to an event are unlikely to raise concern. Conversely, the provision of a five-star holiday for a foreign public official which is unrelated to a legitimate business purpose is likely to raise the inference of a bribe. In other words, although corporate hospitality or other similar business expenditure can (in some instances) be viewed as a bribe; once it is proportionate and reasonable in the specific circumstances it would comply with the Act.

In light of the Act, T&T businesses with UK connections should expect far reaching and tighter controls coming from their UK counterparts. T&T based entities should take steps to minimise any perceptions of improper payments and revisit and/or institute their bribery compliance programs in conjunction with their overall corporate governance framework. Developing, implementing and demonstrating that procedures are in place to avoid associated persons undertaking such conduct is essential. Proper management

*(cont'd on page 5)*

# 'USE IT OR FACE LOSING IT'… PROTECTING TRADEMARKS THROUGH USE

*Fanta Punch*

In a recently filed claim, ***Fifty-Six Hope Road Music Ltd. v. Raising Cane's USA, LLC*** [(1:13-cv-13110) Massachusetts District Court], Fifty-Six Hope Road Music Ltd. (Hope Road) which manages the estate of deceased reggae singer Bob Marley commenced trademark infringement proceedings against American restaurant chain Raising Cane's USA LLC (Raising Cane).

Both parties have used their marks in relation to similar services; however Hope Road alleges that Raising Cane's use of its trademark in connection with its restaurant services, is confusingly similar to that of its famous trademark ONE LOVE, based on a song made popular by Marley. Hope Road further claims that this has prevented it from entering into third party license agreements or further registrations, and has resulted in the trading on its goodwill and dilution of its brand by Raising Cane.

In the U.S., where this case is to be determined, the trademark law allows for registration based on actual use or intent to use, which is different from the legal position in Trinidad & Tobago. However, it does highlight some interesting issues on the role of use in protecting a trademark as a commercial asset, despite registration.

**Use is not a requirement to registration**

Under Section 35 of the Trade Marks Act, use is not a pre-requisite to registration, although a registered trademark is open to cancellation for non-use or revocation where an aggrieved person can show that the trademark was registered:

- without a real or genuine intention to use it and there has been no intention for a three year period; or
- that there was no bona fide use of the trademark over a five year period

An *aggrieved person*, affected by the non-use of a registered trademark, could seek to have it revoked in circumstances where its trademark application is barred from proceeding due to an existing registered trademark and its legitimate business interests are being impacted.

The law does not automatically put a trademark owner at risk of losing the rights to a registered trademark which has not been used or has had limited use, and as such the burden of proof of the aggrieved party is considerable. However, in the face of compelling evidence of clear non-use or any lack of intention to use a registered trademark, particularly against a background of the aggrieved party's proven use, retaining the rights to a registered trademark becomes more of a challenge.

**Is use necessary?**

Despite the protection afforded by registration, there is a risk that through neglect or absence of use, a trademark may be vulnerable to challenge which may lead to:

- the depreciation of the trademark as a commercial asset;
- the trademark being open to infringement of its brand;
- a third party gaining competitive advantage in the market, establishing its own goodwill which could lead to diminution or even revocation of the rights to a trademark.

For the trademark owner, it is important to carefully consider the strategy behind registration, on an on-going basis in line with changing business objectives, such as:

- For new trademarks of goods and services about to enter the market, it is worth considering registration of goods and services associated with that trademark, even when there are no immediate plans to use those goods and services.
- For established well-known trademarks, as part of a global strategy it may be commercially beneficial to have multi-jurisdictional registrations in countries where there is no use or intent to use as a way to fend off potential infringement claims. However, it is not sufficient to rely on these registrations as over time, the protection afforded these marks may be open to threat.

Whether the rights in trademarks have been obtained through registration or use, or a combination of both, continued use remains integral to the maintenance and protection of those rights.

*Fanta Punch is a Snr. Associate in Hamel-Smith's Intellectual Property practice area. Her e-mail address is fanta@trinidadlaw.com*

# THE U.K. BRIBERY ACT: ACROSS THE POND TO OUR SHORES *(cont'd)*

*(cont'd from page 4)*

and adequate training will be critical, and any detection of improper payments should be investigated to reduce potential legal, regulatory and reputational risks. Businesses will need to carefully consider to whom they provide corporate hospitality and what they seek to obtain from them, and tailor their policies accordingly. Similarly, in order to operate at an international level, local businesses that are not yet affected by the Act should revisit their anti-bribery regimes and ensure that these are well documented and up-to-date with a view to strengthening their corporate governance framework.

*Dominique Martineau is an Associate in Hamel-Smith's Dispute & Risk Management Department.*

The Lawyers Newsletter for Business Professionals

Published by M. Hamel-Smith & Co.
Eleven Albion, Cor. Dere & Albion Streets
Port of Spain, Trinidad & Tobago
Tel: 1(868) 821-5500 / Fax: 1(868) 821-5501
E-mail: mhs@trinidadlaw.com / Web: www.trinidadlaw.com
and intended for limited circulation to clients and associates of our firm.