

WHAT HAPPENS WHEN GOOD GOVERNANCE BREAKS DOWN?

LESSONS TO LEARN IN THE TRUST SECTOR

PRESENTED BY
KEVIN CLEREY

BRITISH COLONIAL HILTON
THE BAHAMAS

25 OCTOBER 2011

Clerey Associates
Switzerland
www.clerey.com

WHAT HAPPENS WHEN GOOD GOVERNANCE BREAKS DOWN?

LESSONS TO LEARN IN THE TRUST SECTOR

Why does Governance matter to me? What is good practice?

Trust me, I know what I'm doing (but I didn't write it down!)

What about Managed Trust Companies? Don't I just do as I'm told?

The Regulator's view and the consequences of failure

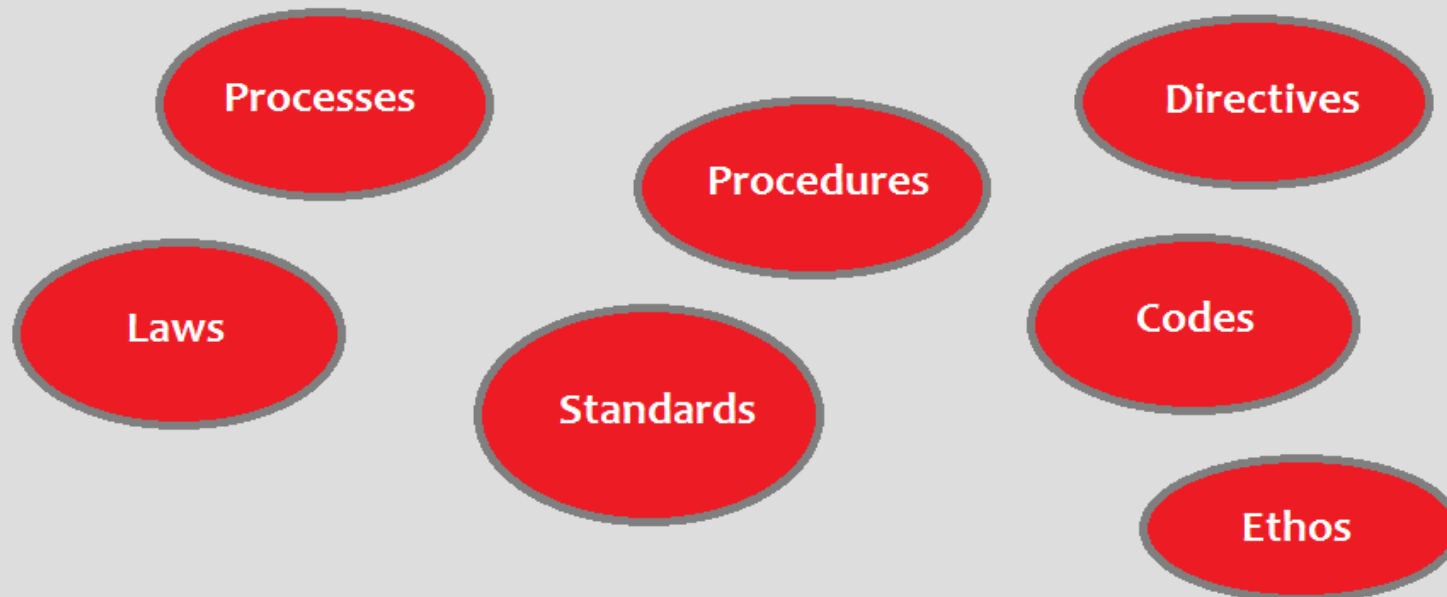
What lessons can we learn from the failings of others?

WHAT HAPPENS WHEN GOVERNANCE BREAKS DOWN?



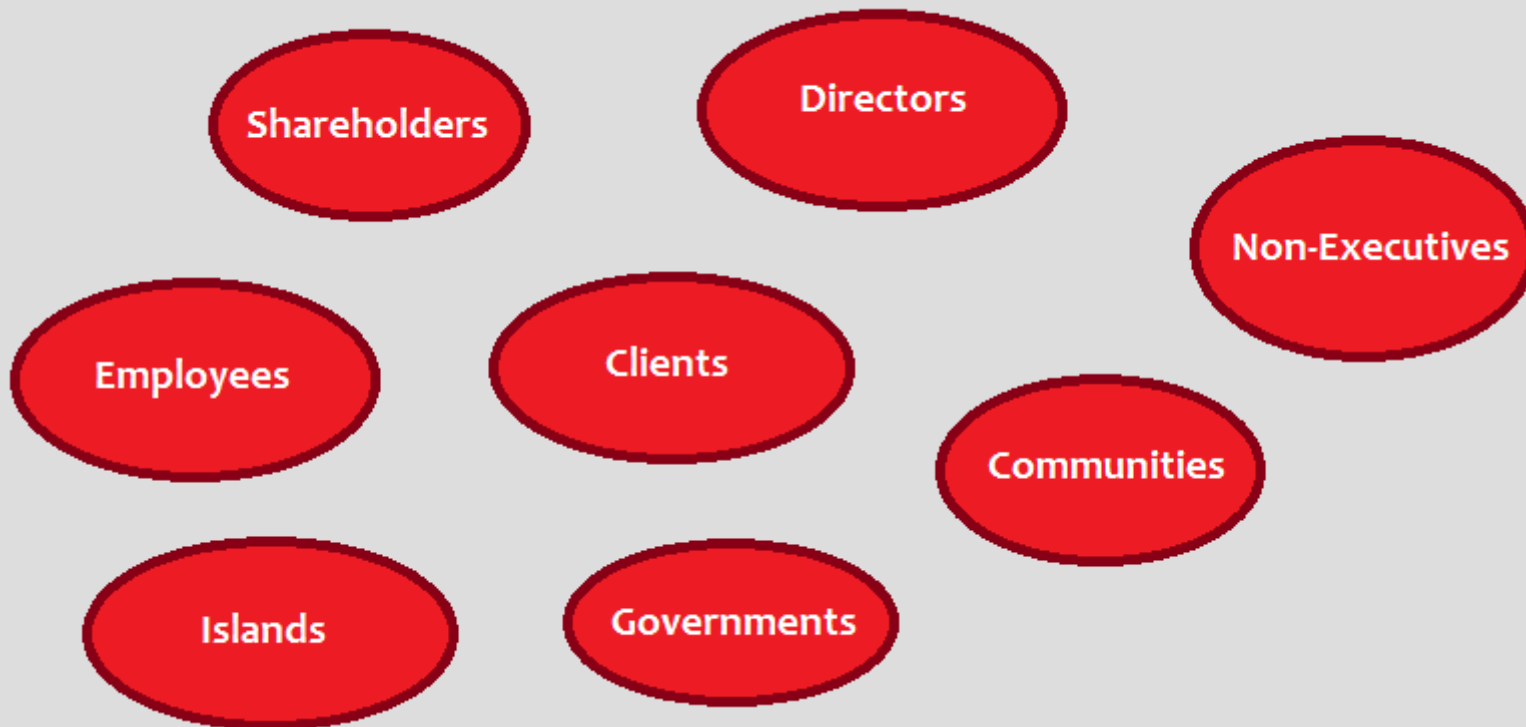
BUT WHAT IS “GOVERNANCE” AND WHY DOES IS MATTER?

“Corporate governance refers to the processes, structures, and information used for directing and overseeing the management of an organisation” *(The Central Bank of The Bahamas)*



BUT WHAT IS “GOVERNANCE” AND WHO DOES IT AFFECT?

The duties and responsibilities of a company transcend its daily activities and commercial interests



HOW IS GOOD GOVERNANCE IMPLEMENTED AND MAINTAINED?

Government initiatives

Cadbury Report (UK) & Sarbanes Oxley (USA)

The Edwards Report (Channel Islands + Isle of Man)

Government regulation & Codes of Practice

Bank and Trust Companies Regulation Act 2000

Supervisory and Regulatory Guidelines 24 March 2011

Corporate policies & controls

Directives, Procedures, Best Practices, Internal & external audits

Professional standards and training

STEP, ICSA, In-house, IT platform

Strategy and planning

Management resources and investment; budgeting

*Clerey Associates
Switzerland
www.clerey.com*

THE BAHAMAS SUPERVISORY & REGULATORY GUIDELINES 2011

(25 pages and 8,269 words)

Effective Governance

“Promotes the general stability and successful functioning of the overall financial system”

Board of Directors

“Should exercise leadership, enterprise, integrity, independence, and judgement in directing the (company's) affairs”

“May delegate authority to management, but not its ultimate responsibility”

Management

(Inter alia) implement the strategic plan; keep the board informed; maintain the risk management system; ensure clear reporting lines

Risk Management

16 different risks; comprehensive annual review; ensuring the adequacy of the governance platform; annual certification to The Central Bank

*Clerey Associates
Switzerland
www.clerey.com*

SO GOOD GOVERNANCE IS AN ABSOLUTE MUST – BUT HOW DO WE MAKE IT HAPPEN?

The top down approach, but how much do management really engage?

Great platform for Policies & Directives, but too much to absorb.....

Lovely Compliance manual, but rarely visited.....

Check lists – great for leading people through the processes, but bad for instilling knowledge

Involve the team members

Team leaders to be engaged at every level and at each step

Avoid the temptation to over-delegate

Engage the team members in the deliberation process

(Does everyone understand the issue, the reasons and the solution?)

Promote use of “real” trustee and board meetings

Promote discussion and openness

Use Acceptance Committees

“Directive of the week!”

Put the essentials of trust business back into the heart of the organisation

*Clerey Associates
Switzerland*

www.clerey.com

TRUST ME – I KNOW WHAT I'M DOING

(but I didn't write it down!)

The daily challenge - get the transaction done; meet the deadline; Job Done! (er..no!)

File notes – a valuable administrative tool, or a bureaucratic nuisance?

A record of a verbal instruction or an envisaged transaction

Time, date, description of the job, attached exhibits, delegates, issues raised, internal discussions held, deadlines, actions taken, signature, date

Minutes v Resolutions

LAERSTATE - “if management is carried out outside board meetings, one needs to ask who was managing the company by making decisions and where”

Minutes - a record of discussions and decisions at a meeting

Resolutions – a record of decisions taken

	Advantages	Disadvantages
Minutes	Includes discussions, votes, dissensions, decisions => full record	Requires a properly convened meeting. More time and effort
Resolutions	Focuses on matter in hand => record of decision and date	Inadequate for major items of business. Lack of detail / deliberation

KEEPING MINUTES IS YOUR INSURANCE POLICY

Some case law to bear in mind

Re Reynolds (NZ) - no minutes or resolutions kept, no file notes made, no accounts. Verdict: tantamount to a breach of trust => trustees liable*

Re Rabaiotti Settlement (Jersey) – court demanded sight of the minutes, file notes and written records to reach a correct conclusion

Turner v Turner (England) – no evidence that the trustees considered the documents in question. They simply signed when told to.

Modern legal precedents generally now support the right of trustees to keep their deliberations confidential from beneficiaries => including minutes

Summary

Limit to material events; append attachments where appropriate; demonstrate the business is understood and the arguments/benefits are weighed; if one beneficiary is favoured, state reasons; record deliberations and dissensions; keep succinct; keep chronologically and separate

**reversed on appeal, but only owing to special factors*

Clerey Associates
Switzerland

www.clerey.com

MINUTES AND FILE NOTES – IS BACKDATING EVER ACCEPTABLE?

Backdating: *dating a document with a date earlier than its creation*

Effects of dating a document

- Informs the reader when it was written/created (a letter, file note etc.)*
- Gives the document an effective legal date (a contract, trust deed etc.)*
- Enables a series of documents to be catalogued correctly & chronologically*

Variants of backdating

- Drafting a document to infer an event occurred earlier than reality*
- Replacing a lost document with a “replica” of the first*
- Creating a record of an event some time after the event itself (file note)*
- Using terminology such as “with effect from” or “effective date”*

Correct practice **CONFIRMED APPROVED AND RATIFIED**

- Use descriptive narrative rather than “effective date” or equivalent*
- Ensure that the true dating cannot be misconstrued*
- Never try to re-do or replicate a mislaid document*
- Never sign a document that is backdated*

MANAGED TRUST COMPANIES – DON'T I JUST DO AS I'M TOLD?

- Direction v Discretion -

Benefits of MTCs

Economical; stepping stone; piggy back on provider's skills & standards

Pitfalls

Owner's interests v provider's interests

Providers – servants or masters?

Owner unawareness of the required standards (non regulated v regulated)

Provider doesn't have the proprietorial interest

Income has to be divided between owner and provider

Lower returns tempt providers to over-delegate

Remoteness of Principal and his advisors

Some considerations

ADMIN AGREEMENT

Who has the fiduciary responsibility?

Is the owner a trust professional – or a bank, for example?

*Who knows best – who should and who does
make the decisions?*

Where does the buck stop? – and where does the mud stick?

*Clerey Associates
Switzerland
www.clerey.com*

MANAGED TRUST COMPANIES – DON'T I JUST DO AS I'M TOLD?

- Real life scenarios -

Switzerland and The Bahamas – some real life scenarios

- CH owned BAH registered trust company with BAH admin
Modus operandi, information flows and reporting, KYC issues
- Bahamas registered trust company with CH admin
Admin agreement (BAH → CH!), due diligence, time difference
- Swiss provider using Bahamas support services
Incorporating a registered agent, information flows, branding
- Joint trustees
Joint ≠ Sharing, why joint trusteeship? hurdles to overcome
- Swiss trust company with Bahamas law trusts
BAH nexus issue, lack of knowledge, reputational risk

THE REGULATOR'S VIEW - AND THE CONSEQUENCES OF FAILURE

Objective of The Central Bank of The Bahamas

“to promote and maintain the safety, soundness, and integrity of the Bahamian banking and financial system and of each institution within the system; while promoting confidence in the financial system through the implementation of policies and standards that are in keeping with international best practices for supervision and regulation.”

Objective of The Guernsey Financial Services Commission

“to regulate and supervise financial services in Guernsey, with integrity and efficiency, and in so doing help to uphold the international reputation of Guernsey as a finance centre.”

Objective of The Cayman Islands Monetary Authority

“to enhance the economic wealth and reputation of the Cayman Islands by fostering a thriving and growing, competitive, and internationally recognised financial services industry, through appropriate, responsive, cost-effective and efficient supervision

Clerey Associates
Switzerland
www.clerey.com

THE REGULATOR'S VIEW - AND THE CONSEQUENCES OF FAILURE

Monitoring and Supervision - Powers and Duties

Approvals and revocations; inspections; information requests; scope of audits; amend licence conditions; new business suspension; require officer removal; permanent disqualification; court compulsion to act; appointing receivers.

Benefits accruing to Licensees

Badge of respectability

Client comfort

Inspections identify issues

Promotes common standards and platforms

Encourages industry collaboration

Enhances value of professional qualifications

Provides platform for international standards

WHAT HAPPENS WHEN GOVERNANCE BREAKS DOWN?



WHAT LESSONS CAN I LEARN FROM THE FAILINGS OF OTHERS?

Great names and their downfalls – the reasons

Lehman Brothers: *cosmetic accounting gimmicks, loss of investor confidence, share price collapse*

Bernard Madoff Investments: *investor fraud; Ponzi scheme*

News of The World: *phone hacking scandals; destroyed reputation*

Swissair: *poor director oversight; disastrous investments; complacent business ethos; political conflicts of interest*

Parmalat: *allegations of fraud and money laundering; debts of €14.3bn; Europe's biggest bankruptcy. (2011 Parmalat name lives on)*

Barings & UBS: *speculative investing by one man; poor controls + oversight*

AIG: *inadequate liquidity in 2008 crisis; largest quarterly US loss \$61.7bn*

Enron: *wilful corporate fraud and corruption by CEO*

WorldCom: *accounting frauds; bogus income; bankruptcy
(now MCI)*

*Clerey Associates
Switzerland
www.clerey.com*

WHAT LESSONS CAN I LEARN FROM THE FAILINGS OF OTHERS?

The two key killers - Reputational and Financial

Reputational - the new killer

*News of the World destroyed by loss of reputation – one man
Influences: internet; TV; Twitter; documentaries; 24hr news
Your name; your family's name; your company's name; your
island's name; your career - you're toast!*

Financial fraud - the traditional killer

Enron, WorldCom etc.

*Influences: poor controls; no segregation of duties; concentration
of power; KYC failings; aggressive & manipulative clients;*

*Mitigate the risks: check for complacency - in yourself, your colleagues,
your boss; planning for growth? - recruit and train now!; know your
colleagues beyond the office; check out the mavericks; listen to whistle
blowers; enforce 2 week holidays; equip your compliance
team and ensure direct line to MD; open plan office;
centralise accounting; mandate reviews.....*

*Clerey Associates
Switzerland
www.clerey.com*

SOME FINAL THOUGHTS.....

Do you set your own standards - or are they set for you?

How do you assess your partners - do they share your ethos?

Is your approach to company management truly hands on?

When you identify a weakness, what do you do about it?

How do you instil the right standards in your employees?

Do you fully understand your clients' objectives and activities?

Do you fully understand every aspect of your business?

“It takes 20 years to build a **reputation** and five minutes to ruin it.
If you think about that, you'll do things differently.”

(Warren Buffett)

Clerey Associates
Switzerland
www.clerey.com