

# Guide to the duties and responsibilities of the directors of a Jersey private company

## Overview

The board of directors, often called 'The Board' has a fundamental role in managing a limited company and is responsible for the governance and operation of the business. The Board should bring specialist skills to the top team and it is always good to have a mixture of personalities and styles so that there is a good diversity of ideas involved in managing the business.

## Private company requirements

When reading this guide you should think about how each of the directors of your business is contributing to the management of the company and discharging their responsibilities as a director. Every private company must have at least one director and a Company Secretary.

**Director** is defined as "a person occupying the position of director, by whatever name called". On this basis, **anybody** who acts as a director (whether or not formally appointed as one) has the duties and responsibilities of a director.

**Company Secretary** – appointed by the directors of a firm as responsible for ensuring that firm's legal obligations are complied with. Duties include recording minutes of the meetings, keeping statutory record books, drafting and execution of agreements, contracts, and resolutions.

If a firm has only two directors, one may act as its secretary; but a sole director may not.

## Who can be a director?

Directors may either be individuals or companies registered as corporate directors. However, please note that the individuals who are directors of corporate directors can still be personally liable as directors, if in practice they act as the directors of the underlying company.

The following persons may not act as directors:

- an individual who is less than 18 years old;
- an interdict (i.e. somebody who is mentally unwell); or
- a person who has been disqualified from being a director.

## The duties of a director

When an individual becomes the director of a limited company they are subject to various duties which regulate their behaviour towards the company:

### **Duty to act in good faith and with due care**

A director, in exercising his powers and discharging his duties, must:

- act honestly and in good faith with a view to the best interests of the company;
- exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.; and
- exercise his powers for the purposes for which they were granted and in accordance with the company's Memorandum and Articles of
- A director has a position of trust, and so must not take a personal profit from any opportunities arising from his directorship (and must pay over any such profit to the company).
- If a director breaches his duty to act in good faith and with due care as explained above, this will not be treated as a breach under the Companies Law if the company is solvent and all of the company's

shareholders approve the director's

## **Duty to disclose conflicting interests**

A director has a duty to disclose to the company any direct or indirect interest he has in any transaction to be entered into by the company which materially conflicts with the interests of the company. For example, this could be a conflicting interest as a director or shareholder of another company involved in the proposed transaction.

The template Articles of Association in Part B allow for a director who has disclosed his conflicting interest to vote and be counted in the quorum at the relevant board meeting considering the transaction.

## **Duty to find a suitable company secretary**

The directors have a duty to find a suitable company secretary. Every company must have a company secretary, although a sole director of a company cannot also be the company secretary.

## **Miscellaneous duties of a director**

### **Oversee the duties of the Company Secretary**

Appoint an appropriate person to be a Company Secretary. Ensure that the duties of the Company Secretary are carried out correctly as they are listed below.

### **Accounts**

Every company must keep accounting records which are sufficient to show and explain the transactions of the company and disclose with reasonable accuracy, at any time, the financial position of the company.

### **Tax Returns**

The directors need to ensure that the annual corporation tax return is completed and submitted. It is recommended that this be carried out by a tax accountant on behalf of the company.

## **Auditors**

The directors and or shareholders may at any time appoint auditors to examine the accounts and prepare a report following their examination. However, for a private company, this is optional and there is no legal requirement to appoint auditors until the company meets certain criteria.

## **Annual return**

Every company must (before the end of February in every year after its incorporation) deliver to the Companies Registry an annual return together with a filing fee. The annual return should include details of the company's shareholders and their respective shareholdings.

## **Other liabilities of a director**

As well as having liability for any breach of the duties described above, directors can also be liable in the following situations.

### **Breach of warranty of authority**

A director is responsible for conducting the business of a company in accordance with its Memorandum and Articles of Association. Where a director acts outside of his authority, a third party dealing with a director will have a direct right of action against him for breach of warranty of authority.

### **Tortious or criminal liability**

A director is an agent of the company. Therefore, where a director instructs a company to commit a tort (a legal wrong) or a crime (such as tax evasion) he will be personally liable as well as the company, even though the tort or the crime was committed by the company rather than the director.

### **Unlawful distributions**

The Companies Law requires that before a company pays

any distribution or dividend to its shareholders, the directors give a statement of solvency regarding the company's expected financial position for the next 12 months. A director may be liable for failure to follow the authorisation procedure required by law.

## **Acting while disqualified**

A director who has been disqualified by the courts and in breach of that order, acts as a director or takes part in the management of a company, will be criminally liable and personally responsible for the liabilities of the company incurred during that time.

## **Acting as a director during insolvency**

Where a director's personal property has been declared to be *en désastre* pursuant to the Bankruptcy (Désastre) (Jersey) Law 1990, he must immediately resign any directorship he has, or may become criminally liable.

A director may be liable for wrongful trading when he knows (or is reckless about the fact) that the company is likely to go into insolvent liquidation and he fails to take action to minimise the potential loss to the company's creditors. Where a company is insolvent and it appears that any business of the company was carried on with an intent to defraud creditors, or for a fraudulent purpose, a director who was knowingly a party to the fraud may be personally or criminally liable.

As there are other situations relating to the insolvency of a company where a director may be personally liable, it is recommended that any director of a company which may be likely to become insolvent seek legal advice.

## **Indemnity**

The Companies Law generally does not allow for a company to provide an indemnity to its directors. However, there are certain exceptions, including an indemnity for any liabilities incurred by a director in successfully defending civil or criminal proceedings and

directors and officers' liability (D&O) insurance.

## **Relief for directors**

Under the Companies Law, the court has power to relieve a director of liability in proceedings (or expected proceedings) for negligence, default, breach of duty or breach of trust against a director. Any relief by the court would be provided on the basis that it appears that the director is or may be liable in those proceedings, but that he has acted honestly and having regard to all the circumstances of the case, he ought fairly to be excused.

## **The duties of a company secretary**

The Company Secretary is responsible for ensuring that the company satisfies the following duties.

### **Statutory books**

Every company must keep a register of its shareholders (known as members) including the following details:

- each shareholder's name and address
- the number and class of shares held by each shareholder (including details of whether the shares are fully paid up or not); and the date on which each shareholder became or ceased to be a shareholder.

Every company must keep a register of its directors and secretary, including the following details:

- the name and address of each director and the secretary;
- the nationality, date of birth and business occupation of each director; and
- the date on which each director and the secretary became, or ceased to be, a director or the secretary

### **Minutes**

Every company must prepare and record minutes of all proceedings at meetings of its shareholders (known as general meetings) and meetings of its directors (known as board meetings) in its company books.

### **General Meetings**

Every company must hold an annual general meeting for its shareholders (in addition to any other meetings that year). However, companies may avoid the requirement to hold an annual general meeting if this is approved by all of the shareholders.

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