

The duties, responsibilities and liabilities of directors

Responsibilities

The board of directors of a company is primarily responsible for:

- determining the company's strategic objectives and policies;
- monitoring progress towards achieving the objectives and policies;
- appointing senior management;
- accounting for the company's activities to relevant parties, e.g. shareholders.

Appointment

The first directors of a company are appointed at the time of its registration. Subsequent appointments are governed by the company's articles of association. Typically the articles will provide for the board of directors to fill any casual vacancies or to appoint additional directors up to the maximum number specified by the articles.

On appointment a new director will be asked to provide certain personal information (i.e. full name, address and any other directorships held) to be included in form 288(a) which he/she will be required to sign to signify consent to act as a director. The director will be reminded to acquire the share qualification (if any) specified in the articles. Additionally, the director will be required to disclose any interests in shares or debentures in the company and will be invited to give a general notice of any interests in contracts involving the company.

On a practical note the new director should make sure that he/she receives: a copy of the company's memorandum and articles of association; details of the business and affairs of the company, e.g. recent board minutes and management accounts; and the statutory reports and accounts for the past two years.

Powers

The directors are generally responsible for the management of the company and they may exercise all the powers of the company. However, the extent of

their authority may be constrained by the Companies Act, the articles of association or a shareholders agreement. For example, articles of association often include provisions and restrictions on borrowing by the company.

Generally, the directors must act collectively as a board to bind the company. However, the articles usually entitle the board to delegate powers to individual directors as considered appropriate. In practice individual directors will normally carry out many of the company's activities.

Duties

Statutory Duties

- a director must not put himself in a position where the interests of the company conflict with his personal interest or his duty to a third party;
- a director must not make a personal profit out of his position as a director unless he/she is permitted to do so by the company;
- a director must act bona fide in what he/she considers is in the interests of the company as a whole, and not for any collateral purpose.

Many of the duties and obligations of a director are mandated by the Companies Act 1985. Others are governed by the Insolvency Act 1986 and the Company Directors' Disqualification Act 1986.

Directors are responsible for making sure that the company fulfils its statutory duties. Generally, the company secretary will be responsible for the performance of most of the duties imposed by the Companies Act. Consequently, the directors should ensure that the secretary is competent to discharge those duties properly.

Directors may be liable to penalties if the company fails to carry out its statutory duties. However, they may have a defence if they had reasonable grounds to believe that a competent person had been given the duty seeing that the statutory provisions were complied with.

The main statutory responsibility falling on directors is the preparation of the accounts and the report of the directors. It is the responsibility of the directors to ensure that the company maintains full and accurate accounting records. This includes the preparation of a

balance sheet and a profit and loss account for each financial period of the company, and the presentation of these to shareholders and, subject to various exemptions, the filing of the accounts and report of the directors with the Registrar of Companies.

In addition to the above, on an individual level, directors have a responsibility to disclose to the board their interests in dealings with the company, in particular in respect of the following:

- an interest in a contract with the company;
- interests in shares or debentures of the company;
- dealings in options of the shares of the company.

Duty of skill and care

- Directors are expected to display a certain amount of skill and exercise reasonable care in the performance of their work.

Liabilities

Directors may incur personal liability, both civil and criminal, for their acts or omissions in directing the company.

It is beyond the scope of this paper to list all the various matters for which directors can be held to be liable. However, directors should be aware of the effects of the Company Directors' Disqualification Act 1986, which could lead to the disqualification from acting as a director of a company for a period of between two and fifteen years, and the Insolvency Act 1986 which gives rise to the possibility of directors being made personally liable for the company's debts.

Company Directors' Disqualification Act 1986.

The circumstances in which an application may be made for the disqualification of a director are as follows:

- the director has been guilty of three or more defaults in complying with companies legislation regarding the filing of documents with the Registrar of Companies during the preceding five years;
- he or she is, or was, a director of a company that has at any time become insolvent and that his/her conduct as a director of that company makes him/her unfit to be concerned in the management of a company;
- the director is found to be guilty of wrongful or fraudulent trading as defined in the Insolvency Act 1986 (see below).

Insolvency Act 1986.

Wrongful Trading: If a company has gone into insolvent liquidation and before that liquidation took place a director knew, or ought to have known, that there was no reasonable prospect that the company could avoid the liquidation, then the court may declare that the director make a personal contribution to the company's assets.

However, the director will not be made personally liable in circumstances where he/she can show that he/she took every step prior to the liquidation to minimise the potential loss to the company's creditors.

Fraudulent Trading: Under this heading the court may also require a director to make a contribution to the company's assets if, in the course of the winding up of a company, a director was knowingly a party to the carrying on of the company's business with the intent to defraud the creditors.

Recommendation.

This paper is only a brief summary of the duties, responsibilities and liabilities an individual will assume on being appointed a director of a company. On such first appointment it is strongly recommended that more detailed information is obtained (see below under Further Information). In larger companies, however, the company secretary will be able to give appropriate guidance.

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