

Directors' duties under Guernsey law

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Who is a director?

Section 131 of the Companies (Guernsey) Law, 2008 as amended (the **Companies Law**) states that a director 'includes an alternate director and any person occupying the position of director, by whatever name called'.

This means that it is not only the title, but also the substance of the duties of a relevant person that a court will look at in establishing whether someone is a director. Alternate directors (representatives of a director acting, say, in the appointing director's absence) and non-executive directors are subject to the duties and liabilities of directors. *De facto* directors (who act as directors in fact, even though they have not been properly appointed as such) and shadow directors (people in accordance with whose instructions the directors of the company are accustomed to act) may also be subject to directors' duties in certain circumstances.¹

The Companies Law imposes eligibility requirements: a minor or a person who has been disqualified as a director anywhere in the world cannot be appointed as a director of a Guernsey company. A person who is subject to a disqualification order from another jurisdiction can, however, apply to the Guernsey court to lift the restriction.

Where are the duties and responsibilities of directors set out?

The duties and liabilities of company directors under Guernsey law arise from three sources:

- the English common law duties of directors and obligations imposed by codes of practice
- statutory law (namely, the Companies Law), and
- the company's memorandum and articles of incorporation, which prescribe the scope of a director's powers and duties.

Common law duties and liabilities of directors

Under the common law, directors owe fiduciary duties and certain duties of skill and care to the company of which they are a director. What distinguishes fiduciary duties from duties of skill and care is that the obligation of a fiduciary is one of loyalty to the company; there is no test of competence in assessing whether the duty was fulfilled.

Fiduciary duties

The duty of good faith

A director must act honestly and in what the director considers to be the interests of the company as a whole. The duty is subjective; a director will not be liable for breach of the duty of good faith if the court is satisfied that the director acted honestly and gave consideration to the interests of the company, even if the director's actions were incompetent or arguably unreasonable. However, a director cannot hide behind its subjective honesty and may be found liable if the director failed to consider the interests of the company at all or if a decision is clearly and objectively not in the interests of the company.²

The duty to promote the success of the company

A director's duty is to act in the best interests of the company as a commercial entity. A director must regard the company as a continuing entity and balance the long-term interests against the short-term. Where the company is a member of a group of companies, the interests of the company will not necessarily coincide with the interests of the group.

Although directors do not owe duties to individual shareholders or to the shareholders as a group, in practice, when the company is solvent, the interests of the company will generally be aligned with the interests of the body of shareholders as a whole.

¹ The Companies Law provides that a shadow director will be treated as a director for the purposes of ratification of acts of directors and transactions involving self-interest.

² See *Carlyle Capital Corporation Limited v Conway Others*, Judgment 38/2017 [at 389].

If the company is, or is nearly, insolvent, the directors may be under a duty to act in the interests of creditors, as they then hold the economic interest of the company (see below).

Duty to exercise powers for a proper purpose

This means not only that the director must act in accordance with the company's constitution, but also that the director must exercise its powers for the purposes for which they were intended. In other words the director must follow the spirit as well as the letter of the company's constitution.

No conflicts duty

Historically, a director was under a duty to avoid any actual or potential conflict between its own and the company's interests. A director could be in breach of the rule even if the company had suffered no loss. The Companies Law has lessened the impact of this duty by focussing on disclosure: a director may avoid liability if an actual or potential conflict arises by ensuring that it is disclosed to and approved by the company. The statutory requirements relating to disclosure of directors' interests are outlined below.

The duty to exercise reasonable care, skill and diligence

A director owes certain duties of skill and care to the company. The minimum standard of care for a director is both subjective and objective, that is to say, the conduct of a reasonably diligent person having both the general knowledge, skill and experience which that director has and the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by that director in relation to the company. Thus, while the duties of independent non-executive directors may in some cases be distinguishable from those of executive directors with specific responsibilities and service contracts requiring the high level of skill and judgement implied by those additional arrangements and duties, they are still required to bring to bear reasonable care, skill and diligence in the discharge of their duties.

Statutory duties and liabilities of directors

In addition to the common law duties, the Companies Law places specific duties upon directors, for example to disclose potential or actual conflicts of interest. It also places duties upon the company itself (for example to maintain a register of directors and members) for which a director, as an officer of the company, becomes responsible.

Registration of directors

Every director of a Guernsey company must provide registration details for entry in the register of directors which is kept by the company at its registered office. Each director of a Guernsey company is also required to sign a form of consent and a confirmation of eligibility to be appointed as a director.

The registration details required of a director, which will be a matter of public record, are a director's:

- name and any former name
- address (which may be the director's usual residential address or the service address, usually the company's registered office)
- nationality
- business occupation (if any), and
- date of birth.

For a corporate director the required details are:

- its corporate or firm name and any former such name it had within the preceding five years
- its registered office (or, if it has no registered office, its principal office)
- its legal form and the law by which it is governed, and
- if applicable, the register in which it is entered and its registered number in that register.

Disclosure of directors' interests

Every director must disclose to the board of directors (the **Board**) the nature and extent of any interests (irrespective of whether those interests do or may conflict with those of the company) in any transaction or

proposed transaction with the company, immediately after becoming aware that the director has such an interest, unless the transaction or proposed transaction is:

- between the director and the company, and
- it is to be entered into in the ordinary course of the company's business and on usual terms and conditions.

A director of a company is deemed to be interested in a transaction to which the company is a party, if that director:

- is a party to, or may derive a material benefit from, the transaction
- has a material financial interest in another party to the transaction
- is a director, officer, employee or member of another party (other than a party which is an associated company) who may derive a material financial benefit from the transaction
- is the parent, child or spouse of another party who may derive a material financial benefit from the transaction, or
- is otherwise directly or indirectly materially interested in the transaction.

Any director who fails to comply with such disclosure requirements is guilty of an offence.

A transaction entered into by a company in which a director is interested may be avoided by the company at any time within three months after the date on which the transaction is disclosed to the Board, unless:

- the director's interest was disclosed to the Board before the company's entry into the transaction, or
- the transaction is between the director and the company and in the ordinary course of the company's business and on usual terms and conditions (and therefore does not require disclosure), or
- the transaction is ratified by the members of the company (see Ratification of director's acts by shareholders', below), or
- the company has received fair value for the transaction (the company is presumed to receive fair value if the transaction is entered into by the company in the ordinary course of its business and on usual terms and conditions).

The avoidance of a transaction does not affect the right, title or interest of a person in property which that person has acquired in good faith, for valuable consideration and without knowledge of the director's failure to disclose its interest.

What happens if the company becomes insolvent?

When a company gets into serious financial difficulty, the duty to act in the best interests of the company extends to its creditors. Statute prescribes circumstances in which directors are liable personally to make a contribution to any deficiency suffered by such creditors. The most significant are:

Wrongful trading

A director (including a shadow director) may be guilty of wrongful trading if the company becomes insolvent and that director:

- knew or ought to have concluded (based on the director's actual skill, knowledge and experience and the skill, knowledge and experience that may reasonably be expected of someone in that director's position) that there was no reasonable prospect of the company avoiding an insolvent liquidation, and
- failed to take every step to minimise the potential loss to the company's creditors that the director ought reasonably to have taken.

If found guilty, a director may be ordered to contribute to the company's assets for the benefit of creditors.

There is a defence against wrongful trading if, on becoming aware of there being no reasonable prospect of the company going into insolvent liquidation, the director took action to minimise the potential loss to the company's creditors. A director cannot avoid liability by resigning when that director realises the company is facing financial difficulties.

Fraudulent trading

Any director who is knowingly a party to the carrying on of a company's business with the intent to defraud creditors or for any fraudulent purpose, may be ordered by the court to make a contribution to the company's assets. The liquidator, administrator or any creditor or member of the company may make such an application.

Preferences

The court can set aside a transaction that improves the position of a creditor (or a surety or guarantor for any of the company's debts or other liabilities) in the company's liquidation if: (a) the company was *influenced by a desire* to bring about the improvement; and (b) the transaction was entered into at a time when the company was unable to pay its debts (or became unable to do so as a result of the transaction).

Administration orders

A director of the company, among others, can make an administration order where the company does not, or is likely to become unable to, satisfy the solvency test and where it would be more advantageous for it to survive as a going concern rather than be wound up. Once an administration order has been made, a director may become liable for transactions entered into on behalf of the company, or for representing himself as acting for the company without advising the party to whom such representations are made that the company is being managed by an administrator.

Insurance and indemnity

The Companies Law prohibits a company from exempting or indemnifying a director for any liability in connection with negligence, default, breach of duty or breach of trust in relation to the company or an associated company (whether arising from their own acts or others).

However, the Companies Law does not preclude the company from providing indemnity against third party claims (ie an indemnity against liability incurred by a director to a person other than the company or an associated company) as long as the indemnity excludes fines imposed in criminal proceedings or fines imposed by a regulator.

A company can also purchase insurance protection to cover directors' and other officers' liabilities for negligence, default, breach of duty or breach of trust. The insurance will not cover loss due to fraud or dishonesty, wilful default or criminal behaviour, but it is possible for the company to take out fidelity insurance for its own risks on the individuals it employs.

Ratification of director's acts by shareholders

The Companies Law affords a further protection for a director against liability for negligence, default, breach of duty or breach of trust in relation to the company or an associated company. The shareholders can ratify the director's breach of duty after the event by passing an ordinary resolution. This is the case even where the breach of duty is clear. Where the conduct complained of is that the director exceeded its powers, a shareholder who is 'interested' in the ratification resolution (including the errant director) may vote. Where the conduct amounts to negligence, default, breach of duty or breach of trust, a shareholder who is 'interested' in the ratification resolution cannot vote.

Relief from liability for directors

The Companies Law also provides that the court can relieve a director, in whole or in part, from liability for negligence, default, breach of duty or breach of trust on such terms and conditions as it thinks fit where it appears that the director is, or may be, liable but the director acted honestly and reasonably and, having regard to all the circumstances of the case (including those connected to the director's appointment) the director ought fairly to be excused. Relief can be sought either where proceedings have already been brought against a director or where a director anticipates that a claim will or might be made.

Contacts

A list of contacts can be found [here](#).

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