You, a guide to directors’ duties in the UK & Ince, in any case
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You, directors’ duties & Ince, in any case
Do the duties apply to all types of directors?

The general duties apply to all the directors of a company.

The definition of ‘director’ includes any person who occupies the position of director, by whatever name called (section 250 CA 2006). This means that it includes ‘de facto directors’, or persons who act as if they are directors and are treated as such by the board but who have not been validly appointed. The general duties therefore apply to shadow directors where and to the extent that they are relevant of applying (section 170(5) CA 2006).

Similarly, the CA 2006 makes no distinction between executive and non-executive directors, except in very limited circumstances, so it is important that non-executive directors equally understand their duties to the company on appointment.
To whom are the duties owed?

The duties are owed to the company (section 170(1) CA 2006) and so only the company will be able to enforce them. The decision to start proceedings against a director would be a decision for the board, or in an insolvency situation, the liquidator. In certain circumstances, and subject to certain provisions, an individual shareholder can bring a claim for a breach of duty on behalf of the company (known as ‘derivative actions’).

What are the duties of a director?

A director has a number of duties as set out below.

The duties are cumulative, so where more than one duty applies in any given matter, the directors must comply with each applicable duty.

Duties of a director under the Companies Act 2006

Duty to act within powers (section 171 CA 2006): a director must act in accordance with the company’s constitution and only exercise powers for the purposes for which they were given. If used for a different purpose, a director will exceed their authority and be liable for breach of duty. A company’s constitution is given a wide meaning for these purposes and includes the Articles of Association, special resolutions and any shareholders’ agreement.

Duty to promote the success of the company (section 172 CA 2006): a director must act in the way they consider, in good faith, would be most likely to promote the “success” of the company for the benefit of its members as a whole.

In doing so, a director must have regard (amongst other matters) to six specified factors:

- The likely consequences of any decision in the long term;
- The interests of the company’s employees;
- The need to foster the company’s suppliers, customers and other trading partners;
- The impact of the company’s operations on the community and the environment;
- The desirability of the company maintaining a reputation for high standards of business conduct; and
- The need to act fairly as between the members of the company.

Although the duty to promote the success of the company as a whole is the primary concern for a director, the consideration of the factors listed above is also mandatory. The list of factors is not exhaustive, but it highlights the key areas of importance that directors need to consider.

Please note: this duty is subject to any enactment or rule of law requiring directors in certain circumstances to consider or act in the interests of the creditors of the company (section 172(3)). Therefore, the duty is displaced when the company is insolvent or is threatened with insolvency (see section 7 below).

Duty to exercise independent judgment (section 173 CA 2006): a director must exercise independent judgment and make their own decisions. This duty will not be breached by a director acting in accordance with the company’s constitution or in accordance with an agreement already entered into by the company that restricts the future exercise of the directors’ discretion.

The government has said that the duty does not prevent a director relying on advice, provided the director exercises their own judgment in deciding whether or not to follow such advice.

Duty to exercise reasonable care, skill and diligence (section 174 CA 2006): a director must exercise the care, skill and diligence which would be exercised by a reasonably diligent person, with both:

- The general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company (this is an “objective” test); and
- The general knowledge, skill and experience that the director actually has (this is a “subjective” test).

The expected standard is therefore measured against both an objective and subjective test. In applying the test, particular attention must be paid to the functions or specialist knowledge of a particular director, including their specific responsibilities and the circumstances of the company. For example, if they are an accountant, then a higher subjective standard may have to be met.

Duty to avoid conflicts of interest (section 175 CA 2006): a director must avoid situations in which they could have or would have a direct or indirect interest, which may conflict or conflicts with the company’s interests. That applies, in particular, to the exploitation of property, information or opportunity, and it is immaterial whether or not the company could take advantage of the property, information or opportunity.
This duty will not be infringed if:

- The situation cannot reasonably be regarded as likely to give rise to a conflict of interest, e.g. a director could exploit a business opportunity if the company has declined the opportunity and the decision to decline such opportunity was bona fide, fully informed and properly taken; or
- If the situation has been pre-authorised, such authorisation can be given in the Articles of Association, by specific shareholder resolution or by the other independent directors who are not conflicted.

Duty not to accept benefits from third parties (section 176 CA 2006): a director must not accept any benefit from a third party which is given because they are a director or because they do (or does not do) anything as a director. ‘Benefit’ is not defined but the government has said it is to have an ordinary dictionary meaning of ‘a favourable or helpful factor, circumstance, advantage or profit’. The duty will not be infringed if a director’s acceptance cannot reasonably be regarded as likely to give rise to a conflict of interest.

How long do the duties last?

The general duties will start when a person becomes a director of a company and will end when they resign.

However, the CA 2006 provides that the duty to avoid conflicts of interest (section 175) and the duty not to accept benefits from third parties (section 176) continue to apply after a person ceases to be a director if:

- The duty to avoid conflicts of interest will continue to apply as regards the exploitation of any property, information or opportunity of which they became aware when they were a director (see section 4 below).
- Duty not to accept benefits from third parties (section 176 CA 2006): a director must not accept any benefit from a third party which is given because they are a director or because they do (or does not do) anything as a director. ‘Benefit’ is not defined but the government has said it is to have an ordinary dictionary meaning of ‘a favourable or helpful factor, circumstance, advantage or profit’. The duty will not be infringed if a director’s acceptance cannot reasonably be regarded as likely to give rise to a conflict of interest.

Other duties and responsibilities

As mentioned above, in addition to the general duties codified in the CA 2006, there are certain duties that arise under case law such as:

- Duty of confidence in respect of confidential information: the company’s affairs must be kept secret and not disclosed to anyone without just cause; and
- Duty to consider or act in the interests of creditors: this will apply when the company is insolvent.

It should be noted that this guide only covers duties owed by a director to the company. Directors have many other duties, both under the CA 2006; such as the duty to deliver accounts, and obligations regarding loans made by the company to the director and duties relating to a wide variety of other laws and regulations, such as insolvency and health and safety and environmental legislation. An examination of these additional provisions are beyond the scope of this guide.
What are the consequences of a breach of duty?

The potential consequences of a breach of duty for a director include:

- Payment of damages;
- Setting aside of the transaction;
- A claim for restitution or account of profits;
- Restoration of company property held by the director;
- Termination of a director’s service contract;
- The grant of an injunction to restrain a breach of fiduciary duty;
- Disciplinary proceedings brought by an applicable regulator; and
- In some cases, criminal proceedings and disqualification.

Can a director obtain any relief from liability?

If a director has breached their duties, the following help may be available:

**Ratification** - section 239 CA 2006 regulates the decisions of the members of the company to ratify the conduct of a director amounting to negligence, default, breach of duty or breach of trust in relation to the company. Please note that any decision by a company to ratify conduct by a director amounting to negligence, default, breach of duty or breach of trust in relation to the company must be passed by the necessary majority by disregarding votes in favour cast by the director (if they are a member of the company) or any person connected with such director (section 239(4)).

**Ower of court to grant relief** - section 1157 CA 2006 provides that where proceedings for negligence, default, breach of duty or breach of trust are brought against a director, the court may relieve them from liability if the court considers both that:

- The director has acted honestly and reasonably; and
- Considering all the circumstances of the case, they ought fairly to be excused.
A director may also apply to the court for relief where they have reason to expect that a claim may be made against them (section 1157(2) CA2006).

Indemnity – check the company’s Articles of Association or any contract with the company for any indemnity provisions. Under section 232 CA 2006, a company will not be able to exempt a director from any liability for negligence, default, breach of duty or breach of trust in relation to the company. However, the company may indemnify the director against defence costs, or costs incurred in an application for relief under section 1157 (above), provided that the director repays the costs if they are unsuccessful.

Insurance – check if the company has any relevant insurance. A company is permitted to purchase insurance for its directors against any liability attaching to them in connection with any negligence, default, breach of duty or breach of trust by them in relation to the company of which they are a director (section 233 CA 2006).

Are there any further considerations as a result of COVID-19?

As stated above, directors are under a duty to act in a way which they consider is in good faith and likely to promote the “success” of the company. The definition of “success” is likely to take on a slighter different meaning during this time. Directors will need to balance the long-term success of the company with decision making to be made in the short term.

As explained, where directors know or ought to know that the company is or is likely to become insolvent, their duties shift to a duty to protect the interest of the creditors.

Under the wrongful trading provisions, a director can also be personally liable to contribute to the assets of a company if they allow the company to continue to trade when they knew or ought to have known, that there was no reasonable prospect of the company avoiding insolvency, and failed to take every step possible to minimise losses to creditors, with a resultant worsening of the company’s financial position.

Due to the Covid-19 pandemic, the Government has passed ‘The Corporate Governance and Insolvency Act 2020’, which has temporarily suspended the wrongful trading rule until 30 September 2020 (effective retrospectively from 1 March 2020). Now, in assessing what contribution (if any) a director is to make to a company’s assets when considering possible liability for wrongful trading, the court is to assume that the director is not responsible for any worsening of the financial position of the company or its creditors during the relevant period. This gives directors some comfort to continue to trade without the risk of incurring liability in the event that the company becomes insolvent.

This suspension also does not apply to a range of financial services companies.

Directors would be wise to consider the following in order to mitigate the risk of any personal liability – directors should:

• Hold regular board meetings and ensure that such meetings are minuted to provide evidence of decision making;
• Engage with lenders, customers and suppliers;
• Seek and act on appropriate advice from professional advisers, such as lawyers and insolvency practitioners; and
• Check insurance policies in order to understand the scope of cover during the pandemic and ensure that there is D&O cover in place.

As changes in this area are fast paced, please visit our COVID-19 online resource page on our website to see any changes which may affect the duties of a director.
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