

## Duties of Executive and Non Executive Directors

### Directors of Companies

Directors of companies whether public or private have various responsibilities towards their companies, breach of which may not only be detrimental to those companies and their shareholders but also may lead to civil and criminal liability of the individual director concerned.

#### “Executive and Non Executive Directors”

Executive and Non Executive Directors have the same responsibilities in law. An “Executive Director” is a director who has separate responsibilities within the company as an Executive.

The role of a non executive director has a positive contribution to making and ensuring that the board fulfils its main objectives. He can exercise an impartial influence and bring to bear experience gained from other fields; executive directors would therefore be well advised to consider the appointment of such directors to serve alongside them.

### Powers of Directors

Directors derive their power from the Articles of Association and the Memorandum of Association.

Directors must exercise their powers collectively and majority decisions will prevail.

### Duties of Directors

The duties of directors are owed to the company as a whole. Their duties and responsibilities arise both out of common law and out of statute and can be classified as follows:-

- Fiduciary duty to act honestly and in good faith;
- Duty to exercise skill and care; and
- Statutory duty

Directors should bear in mind that breach of these duties may result in their being judged unfit to be concerned in the management of a company and lead to their disqualification as directors.

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## **Fiduciary Duty**

Four separate rules have emerged:-

- i) Directors must act in good faith in what they believe to be the best interests of the company. Generally speaking, the interests of the company are to be equated with the interests of its members as a whole. As between different groups of shareholders, the directors must act fairly.
- ii) Directors must exercise their power only for the purpose for which they were granted.
- iii) Directors must not place themselves in a position in which there is a conflict between their duties to the company and the personal interest or duties to others.
- iv) Directors must not fetter their discretion by agreeing, either with one another or with third parties, how to vote at future board meetings. However, that does not prevent them from committing the company to a contract which requires further action at subsequent board meetings.

## **Duty of Skill and Care**

Responsibilities of directors include taking reasonable steps to ensure that the company's assets are properly collected, safeguarded, insured and invested, and that all payments are supported by proper documentation.

Directors are required in the performance of their duties:-

- To exhibit such a degree of skill as may reasonably be expected from a person with their knowledge and experience, and
- To take such care as an ordinary person might be expected to take on their own behalf.

In applying these standards no distinction is to be drawn between executive and non executive directors.

- Executive directors should devote their time and energy to company matters in accordance with the terms of their contract. In most cases this will require them to devote all their working time.
- Non executive directors are not required to give continuous attention to company affairs. However, they should familiarise themselves with the company's affairs including its financial position and should attend meetings of the board whenever they are reasonably able to do so.
- Were a director, whether executive or non executive, has a particular skill for example he is a qualified accountant, he should exhibit the skill or ability reasonably expected from a person in that profession.

## **Statutory Duty**

Company law imposes a number of duties on directors for example the preparation of the Annual Financial Statements.

## Duty to Employees

As an employer the company must comply with the requirements of employment law. The directors, being in charge of the management of the company's affairs, should have this in mind when dealing with employment matters.

## Duties in relation to Auditors

With the exception of companies exempt from audit, it is the duty of the company in general meeting to appoint auditors for each financial year.

Auditors of a private company are deemed to be reappointed each year if an elective resolution not to reappoint auditors annually is in force.

Auditors have a statutory right of access at all times to the company's books, the accounts and vouchers and to require from the officers and from the company such information as is necessary for the performance of their duties. Directors must therefore ensure that the auditors have adequate information for the performance of their duties.

## Equal standards of care

A board of directors acts as a whole and although some of its members may be given additional powers by the articles or by resolution, the general duties and responsibilities are the same for each director. There is no distinction between the position of executive and non executive directors. If a breach of duty is to be attributed to a board on the basis that all of its members were present at a meeting which had approved a wrongful act, then the liability of each director is joint and several and no allowance is made for the fact that some are part timers and may have acquiesced in a situation which they did not fully understand: *Re Lands Allotment Co. (1894) 1 Ch 616 63 LJ Ch 291 CA*. For these purposes the directors are in the same position as trustees of a fund and may be held liable for knowledge of wrongdoings in relation to dealings with its property: *El Ajou v Collar Land Holdings plc (1994) 2 All ER 685 1 BCLC 464, CA*. Higher duties are owed by those who are employed under service contracts or because of professional skill.

## Remuneration of Non Executive Directors

Non executive directors should be adequately compensated for the time that they spent on the company's business. It is important that the non executive directors should not be reliant on the company for a significant part of their income otherwise their independence may be jeopardised.

If a non executive has an executive appointment elsewhere, he may be required to pay the fees he receives to the employing company. There is an implication that if a person is engaged full time elsewhere he should not be permitted to sit part time on the board of a different organisation and not be separately remunerated. Whether the service contract with their principal employer allows him this flexibility is a question of fact rather than law.

If the director is a partner in a professional firm there is usually an obligation to account for any earnings and benefits to the partnership.

***Please note this is for client information only and should not be relied upon as a legal interpretation. Where appropriate, legal advice should always be taken.***