

Duties of directors of a Jersey company – A practical guide

Directors' duties generally

Statutory and common law duties

Under Article 74(1) of the Companies (Jersey) Law 1991 (the **Companies Law**), a director of a Jersey company must:

- (a) act honestly and in good faith with a view to the best interests of the company; and
- (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

These statutory duties are a codification of common law fiduciary duties of directors and include duties:

- to act in good faith
- to exercise powers for a proper purpose
- to act with diligence
- to account for profits

The common law duties continue to be relevant when interpreting the duties under Article 74(1). In the ordinary course, directors owe their duties to the company (only).

The Companies Law defines a director as “a person occupying the position of director, by whatever name called” and therefore there is scope for persons other than those appointed to the board being subject to directors' duties, as shadow directors. It should also be noted that the Companies Law does not distinguish between executive and non-executive directors or between the director holding the position of chairman and the other directors; all are subject to the same duties.

Authorisation and relief

Article 74(2) of the Companies Law allows all of the shareholders to authorise or ratify an act or omission, provided that the company will be able to discharge its liabilities as they fall due immediately following the breach. So shareholder authorisation or ratification will only be effective when the company is (or will be) cashflow insolvent immediately following the breach.

Article 212 of the Companies Law provides that the Royal Court may relieve a director of liability in proceedings for negligence, default, breach of duty or breach of trust against the director. Any relief would be given on the basis that it appears to the Royal Court that the director has acted honestly and having regard to all the circumstances of the case, he or she ought fairly to be, either wholly or partly, excused.

Disclosure of interests

Under Article 75 of the Companies Law a director must disclose to the company the nature and extent of any direct or indirect interest in a transaction entered into or proposed to be entered into by the company (or by a subsidiary of the company) which to a material extent conflicts or may

conflict with the interests of the company. A company's articles of association may allow an interested director to vote and count in a quorum at board meetings so long as the interest has been disclosed.

Indemnities and insurance

Under Article 77 of the Companies Law a company may give an indemnity to directors in certain limited circumstances, including for liabilities incurred by a director in successfully defending civil or criminal proceedings. A Jersey company may also pay for directors' and officers' liability insurance. A company's articles of association may provide that present and former officers shall be indemnified out of the assets of the company in so far as the Companies Law allows and that the directors may authorise the purchase of insurance in respect of directors' liabilities.

Directors' duties as company approach insolvency

Where a Jersey company is in financial difficulty, the directors are subject to additional duties and potential liabilities. The directors may be required to take steps to minimise losses of the company's creditors. Commencing an insolvency proceeding may be in the best interests of creditors if the Company has no reasonable prospect of trading through financial difficulties. Furthermore, the directors may become personally liable for the debts of the Company in circumstances of wrongful trading.

Summary of insolvency processes

If a company becomes unable to meet its debts as they fall due, the principal insolvency processes are:

- Insolvent winding up (a **Creditors' Winding Up**) under the Companies Law. This procedure (despite its name) may be commenced only by the insolvent company passing a special resolution.
- A declaration by the Court that the property of the insolvent company is en désastre (a **Désastre Declaration**) under the Bankruptcy (Désastre) (Jersey) Law 1990 (the **Désastre Law**). This procedure which be initiated by the insolvent company or by a creditor and involves liquidation of the company's assets to meet its liabilities followed by dissolution.
- A just and equitable winding up. The Court may order the winding up of a Jersey company on 'just and equitable' grounds under the Companies Law. The remedy is discretionary and has been applied flexibly by the Jersey courts.

Insolvency appointees can, on a Creditors' Winding Up or following a Désastre Declaration, challenge any transactions entered into by a company at an undervalue or as a preference.

Wrongful trading

If in the course of a Creditors' Winding Up or following a Désastre Declaration it appears that a director of the company:

- (a) knew that there was no reasonable prospect that the company would avoid a creditors' winding up or the making of a declaration under the Désastre Law; or

(b) on the facts known to him or her was reckless as to whether the company would avoid such a winding-up or the making of such a declaration,

the Court may order that the director be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company arising after that point.

The Court may not make such an order for the director to be personally liable if it is satisfied that he or she took reasonable steps with a view to minimizing the potential loss to the creditors of the company from the time when the director knew that there was no reasonable prospect of avoiding insolvency.

Other consequences

The Court, if it is satisfied that a director is 'unfit', may order the disqualification of a director so that without leave of the court he or she may not be a director of or in any way, directly or indirectly, concerned with or take part in the management of a company including, from Jersey, in a company incorporated outside Jersey. In order to justify a disqualification order the behaviour must be serious.

Shareholders may have a claim against directors for breach of duty to the company in certain circumstances and creditors may bring certain common law claims regarding the management of companies.

Practical steps

To help ensure compliance with his or her duties and to minimise any risk of personal liability as the company approaches insolvency, a director should:

- Ensure that regular board meetings are held to review finances and, for instance, the options available for the company to trade out of difficulty and / or raise finance
- On an ongoing basis, obtain management accounting information on cash flows and liabilities of the company including timetabling critical points for raising additional funds
- Ensure that the company takes professional advice, for example, from lawyers and accountants in respect of the current financial position of the company and how to minimise losses to creditors, as well as whether the company will breach any financial covenants in its finance documents
- Ensure that the company liaises with major creditors and, if possible, negotiates waivers and amendments in relation to existing finance documents
- Ensure that, where possible, the company negotiates with creditors, for instance, to delay payments or to cap any liabilities or termination
- Ensure that the company reviews and pursues potential sources of funding and capital
- Ensure that the company avoids, as far as possible, incurring fresh liabilities that it may be unable to meet
- Check the terms of directors' and officers' insurance

- Ensure that careful minutes of board meetings are made and that records are kept of all advice that is received and all steps taken, as this will be evidence of the actions taken by the directors with a view to minimising potential losses to creditors
- Ensure that if a director dissents that their dissent is noted; a dissenting director may consider resigning but resigning or ceasing to be involved in the company's management will not release a director from any existing personal liability and may not satisfy the requirement to take reasonable steps to minimise potential loss
- Regularly consider whether the company should immediately cease to trade and commence insolvency proceedings if this is the only way to minimise loss to its creditors

Fraudulent trading

Under the Companies Law and the Désastre Law, a director may be found to be personally liable for fraudulent trading if, after the commencement of a Creditors' Winding Up or désastre, it appears that the company's business has been carried on with intent to defraud creditors or for a fraudulent purpose. This action requires fraud to be proved, which is a high burden of proof, and in practice wrongful trading actions are more common.

How can Dickinson Gleeson help?

Dickinson Gleeson's partner-led approach provides clients with tailored and pragmatic advice in a time and cost efficient manner.

For more information concerning directors' duties, please contact either Edward Scott (edward.scott@dgadvocates.com) or Craig Swart (craig.swart@dgadvocates.com).

This briefing is intended to give a summary of Jersey law and practice in this area. It should not be relied on as legal advice.