



Duties & Liabilities of a Director of a Company Incorporated Under the Laws of the Cayman Islands

HIGGS & JOHNSON
Counsel & Attorneys-at-Law



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Preface

This memorandum provides a summary of the duties and liabilities of a director of a company incorporated under the laws of the Cayman Islands. The situation is governed by the Companies Law of the Cayman Islands (the "Companies Law") and the common law so far as it has not been amended by statutory provision. The Cayman Islands' courts would regard the decisions of the English courts in relation to the duties and liabilities of a director as highly persuasive.

STATUTORY DUTIES OF A DIRECTOR

Directors are responsible for ensuring compliance with a number of matters in relation to a company including displaying its name strip, maintaining its minute book, certain registers and proper books of account, reporting and filing requirements. These issues are dealt with in full in a separate memorandum entitled "Continuing Requirements of the Companies Law Following the Incorporation of a Company". Please ask us for a copy if this has not been sent to you.

OTHER DUTIES OF A DIRECTOR

A director's duties to the company can generally be divided into two - firstly the fiduciary duties which arise because of the nature of the holding of office as a director and secondly the duties of skill and care in the performance of the director's duties. The duties can be summarised as follows:

Fiduciary Duties

- A duty to act in what the director *bona fide* considers (and not necessarily what a court may consider) to be the best interests of the company.
- A duty to exercise the powers vested in him for the purposes for which they were conferred.
- A duty to avoid conflicts of interest and of duty and a duty to disclose personal interests in contracts involving the company. This means that a director should declare his interest and abstain in any decision-making process of the company. However, this point is often varied by the company's articles of association.
- A duty not to make secret profits from a director's office.
- A duty of trusteeship of the company's assets.

Skill and Care

In the leading English case of ***Re City Equitable Fire Insurance Co., (1925) Ch 407***, the extent of a director's duties, and the degree of skill and care necessary in the exercise of such duties, were summarised as follows:

- A director need not exhibit, in the performance of his duties, a greater degree of skill and care than may reasonably be expected from a person of his knowledge and experience.
- A director is not bound to give continuous attention to the affairs of the company. His duties are of an intermittent nature to be performed at board meetings

and at meetings of any committee of the board upon which the director is placed. A director is not required to attend all such meetings but he ought to attend whenever he is reasonably able to do so.

- In respect of all duties that, having regard to the requirements of the company's business and the articles of association, may properly be left to some other officer or manager, a director is, in the absence of grounds for suspicion, justified in trusting that officer or manager to perform such duties honestly. (However, if a director continues to monitor the activities of the officer or manager, the director cannot maintain that he did not know what was going on.)

We are of the opinion that the degree of skill and care now required of a director and a professional fiduciary is higher than that stated in the ***Re City Equitable Fire Insurance Co.*** case. Similarly, the activities of a company now commonly require a director to be competent to carry out director functions, to take a greater involvement in, and to be more familiar with, the company's affairs and not merely to confine his activities to attending board meetings.

It should be noted that the above duties are owed by a director to the company upon whose board of directors he serves. The duties are not owed to the individual shareholders, creditors or to any other company within the same group of companies as the company for which he is a director. Although it is outside the scope of this memorandum, it should be noted that the rights of individual shareholders to bring actions against a director are limited under Cayman Islands law.

LIABILITIES OF A DIRECTOR

Generally speaking, directors are not personally liable for the debts, liabilities or obligations of the company except for those debts, liabilities or obligations which arise out of the director's negligence, fraud or breach of fiduciary duty or an action not within the director's authority and not ratified by the company.

If a director is not negligent or fraudulent, complies with his fiduciary duties and acts within his authority, the fact that a decision turns out to be wrong or causes loss to the company is unlikely to result in personal liability for the director. A Cayman Islands court will not review a proper exercise of a director's discretion purely because, as matters turned out, the decision was wrong or caused loss to the company.

If one director is liable to the company for a breach of duty, this will not necessarily mean that the remaining directors are also liable. For example, in the absence of negligence

or fraud, a director will not be liable for a breach of duty by another director of which he was ignorant.

A director will be liable to the company if he has failed to supervise the activities of a guilty director in circumstances where his duty of care obliges him to do so or where he has knowingly participated in or has sanctioned conduct which constitutes a breach of duty. In these circumstances, a comparatively slight degree of participation is sufficient to create liability.

A director may not only be liable to the company but also to the company's shareholders and/or third parties.

Under sections 170 and 171 of the Companies Law, the liquidator of a company is empowered to take action against any past or present director, manager, officer or member of the company if it appears in the course of the winding-up that such person has been guilty of a criminal offence in relation to the company.

POWERS OF A DIRECTOR

The constitutional documents of a Cayman Islands company consist of its memorandum of association and articles of association. The memorandum of association sets out the objects of the company and the articles of association deals with matters related to its internal workings.

The company's memorandum of association may restrict the company's objects. If so, and an action of the company is decided on by the directors which is not within the company's specified objects, the act will be *ultra vires* ("beyond the powers"). The objects of a Cayman Islands company are generally not restricted.

Generally, the company's articles of association authorise the directors to transact the business of the company and to exercise all its powers so long as the powers are not, whether by law or by the articles of association themselves, reserved to the shareholders. If permitted by the articles of association, the directors may delegate any specific function to any one of their number or to committees or to the company's officers but it is recommended that such delegation be considered and approved by the board of directors. In the absence of a valid delegation, no director, officer or other person is empowered to act individually to bind the company.

Under section 27 of the Companies Law, transactions entered into with third parties will not be rendered invalid by virtue of the company's lack of capacity or lack of corporate benefit. These transactions may be ratified by the company's shareholders in general meeting. However, a director may still be held liable for loss or damage to the company by virtue of his unauthorised acts.