

Your Role and Duties as a Company Director

1. Who owes the duties?

Management of a company's business is vested in its directors. Directors include:

- ♦ persons who have been validly appointed as a director in accordance with the Companies Act 1985
- ♦ someone who acts as a director even if his appointment was invalid or where he had not been appointed at all (de facto directors)
- ♦ someone in accordance with whose directions or instructions the directors of a company are accustomed to act (shadow directors)

2. What are the duties?

The duties of the directors will be defined by the Board. Directors must act in the best interest of the company at all times. The duties are owed to the company and not the shareholders. Directors' duties are said to be of a fiduciary and statutory nature and have to be carried out with a degree of skill and care. In carrying out his duties a director must not abuse his position. Certain activities such as substantial property dealings, payment of compensation for loss of office or a grant of long service contracts without prior approval of shareholders, are all subject to specific rules which must be adhered to.

In carrying out his duties, a director need not exhibit a greater degree of skill than may be reasonably expected from a person of his knowledge and experience. A greater degree of skill and care is expected from experienced businessmen than amateurs. A director cannot, however, excuse himself from being involved in the proper management of the company's affairs. This means that each individual director is, for example, responsible for ensuring that the company complies with certain Companies Act requirements for the filing of documents and keeping records.

3. Directors' Liabilities - the risks

As a general rule directors will have no liability to third parties under common law or for tortious acts done by the company. Personal liability may be incurred as follows:-

Personal Liability

Directors may be liable on contracts made between the company and third parties in the following circumstances:

- ♦ if a director is a signatory of a cheque, promissory note or order for money or goods which incorrectly refers to the Company's name
- ♦ if a director does not make it clear he is contracting as an agent of the company
 - ♦ if a director exceeds his authority
 - ♦ if a director acts as a director before incorporation of the company
 - ♦ if a director personally guarantees performance

Breach of Statutory Requirements

Liability may also arise under the following statutory provisions:-

- ◆ Companies Act 1985 (as amended). There are a considerable number of duties under the Companies Act which a director must perform or ensure are performed. They include filing documents at Companies House; ensuring accounts and annual returns are prepared and filed, and also maintaining the company's statutory books. Failure to comply can result in officers of the company being responsible to pay default fines and in some cases imprisonment. Persistent failure to comply with the requirements of the Companies Act regulations can result in disqualification of a director.

- ◆ Insolvency Act 1986. This act contains provisions to prevent malpractice by directors both before and during liquidation. A director will be liable to make personal contributions to the company's assets where the director has been or is guilty of wrongful or fraudulent trading. This means that a director must not carry on trading where there is no reasonable prospect that the company would avoid going into insolvent liquidation or where the company, having gone into insolvent liquidation, knowingly carried on business with intent to defraud creditors.

- ◆ Financial Services Act 1986. Where an application is made for listing on the Stock Exchange and misleading or untrue statements are made by the directors, any person who has suffered a loss as a result of making an investment can claim compensation from the directors.

4. Remedies

If a director fails to perform his duties properly and take appropriate advice, this could result in disqualification from office and personal liability to contribute to the company's debts if it becomes insolvent. The maximum period of disqualification is 15 years. In the case of disqualification for unfitness to act as a director, there is a minimum period of disqualification of 2 years.

A director may be disqualified on the following grounds:

- ◆ for persistently failing to file a company's annual returns, accounts and other documents (e.g. copies of special resolutions) with the Registrar of Companies.

- ◆ for being unfit to act as a director. A director who has mismanaged a company that has become insolvent can be disqualified for up to 15 years. The court **must** disqualify a person who was a director of a company before it became insolvent if his conduct showed him to be unfit to manage a company.

- ◆ if a director has been found guilty of fraudulent or wrongful trading he can also be disqualified for up to 15 years.

If a person manages a company while disqualified for an undischarged bankrupt, he may be made personally responsible for the debts and liabilities of the company which were incurred during that period.

Anyone who acts, or who is willing to act, on instructions from a person whom he knows to be disqualified or an undischarged bankrupt may also be made personally responsible for the company's debts and liabilities incurred while he was acting in this way.

The above goes some way to highlight the obligations and liabilities that face directors today.

With ever-increasing statutory obligations being placed on companies and their officers, the "lot" of the director is not easy. To avoid personal liability and to keep abreast of changes in

the laws, you must ensure adequate controls are in place as to how the company is managed and demonstrate this by meeting regularly, minuting discussions and decisions and above all taking appropriate accountancy and legal advice. Resignation from the Board will not absolve you from liability if things start to go wrong.

Should you wish to discuss further your role and duties as a company director, please contact Sonya Gillespie or a member of the Corporate Team.