

Disclaimer: This online publication describes the law in general terms. It is not intended to provide legal advice on specific situations and should not be relied upon as a source of legal advice.

Date produced: 11th December 2020.

qLegal Online Publication

Directors' Duties

This online publication outlines the different types of directors, their roles and duties, as well as their various liabilities.

By: Manuliza Faktaufon, Romina Araghian and Taiwo Fakorede.

A company director.

The Companies Act 2006 requires every company to have directors, and at least one director must be a real or natural person. The director represents the directing mind and management of a company because they regulate and assign the duties carried out in the day-to-day operations of the company. According to the constitution of the company, otherwise known as the Article of Association (articles or company's article), the directors shall be responsible for the controlling of the business of the company. They may exercise all the powers of the company.

Types of directors.

The three main types of directors are:

- **A de jure director** is a director that has been formally appointed by law. They include executive directors (full-time employees operating on a day-to-day basis) and non-executive directors (These directors do not usually enter into a contract of employment with the company, and they act in an advisory capacity).
- **A de facto director** is a director that is not appointed in accordance with the company's articles of association but becomes a director by performing such tasks and assumes the duties generally associated with the office. They have to perform tasks that exceed that of a mere employee.
- **A shadow director** is a person whose words or instructions the directors of a company listen and follow.

What are your duties as a director?

The Companies Act 2006 includes a list of director's responsibilities, some of which are outlined below:

You must act within your powers: You should never act beyond the powers entrusted in you by the company. For example, you should not enter into a contract involving an amount not stipulated in the company's articles. You must also ensure that you do not abuse your powers as a director.

You must promote the success of the company: You must perform your duties in a way that supports the company's success. This involves considering, amongst other things, the company's interests, its reputation, the long-term consequences of its decisions, its

relationship with its customers and other stakeholders. While this duty is owed to the company, ultimately the effect is that it benefits the company's employees.

You must exercise independent judgement: You must be free from influence but always act in accordance with the company's constitution and the company's best interests. For example, when making a judgment, you can accept advice from accountants and lawyers, but the final decision is yours.

You must exercise reasonable care, skill and diligence: You must have the necessary knowledge, skill and experience to enable you to perform your duties as a director; and most importantly to the standard expected by the company.

You must avoid conflicts of interest: If you have been assigned the role to sign contracts on behalf of the company, you cannot take any contract for yourself, if the contract was offered to the company. The golden rule is that if a corporate opportunity arises, you have a duty to demonstrate the utmost loyalty towards the company and take that opportunity in the name of the company and never yourself.

You must not accept third party benefits: During your time working in your capacity as a director you may be offered benefits in relation to the work that you are doing, or on the contrary, not doing. You are required to refuse any gifts or incentives.

You must declare any interests in proposed transactions: As a director, you have a duty to declare to the board of directors that you have an interest in the company's proposed transactions. This is because it could interfere with your private interest in making profits for the company and yourself, and you should not put yourself in a compromising position.

Why are these duties important?

- To ensure shareholders' investments are not mismanaged or misspent, there has to be some protection for their investments in the company. Shareholders must be in a position to review and analyse the actions of the directors. This is because the directors' duties are owed to the company. However, the interest of the shareholders as a whole should be considered when making decisions.
- The company is considered a legal person, separate from the individuals who run the company; so, for the sake of its success, directors ought to behave in ways that facilitate the legal person's success.
- To prevent directors' abusing their powers; this might seem obvious and straightforward, but many directors do not know they are acting beyond their capacities. So, in the event of misconduct, the directors need to be held accountable.

A Directors' liability.

According to s.232(1) of the Companies Act, any directors involved in a breach are jointly and severally liable for the breach, and the company cannot exempt directors from liabilities. The exception to this liability is if the director took no part in his/her co-directors breaches, and he has no knowledge of the breaches, and he ought not in the circumstances have been suspicious.

Appointment, termination and resignation of directors



If your company is a private company, it must have at least one director. If it is a public company, there must be at least two directors. The initial directors of a company are appointed during the process of registering and incorporating the company. Afterwards, the appointment of subsequent directors is usually covered by the company's articles of association.

Under the Companies Act 2006, shareholders can propose a resolution for the removal of a director. A notice will be served, and the board of directors will meet. If you are the director that is being removed, then you may defend yourself in this meeting. In the end, the board will have a vote, and if 50% have voted in favour, then the resolution for removal will be passed. It is important to note that if you are also an employee of the company then sometimes, based on financial circumstances, you may make a claim for unfair dismissal.

It is also important to note that as a director, you may also step down for non-disciplinary reasons, including those concerning having other priorities that require your time and duties. Termination is not the only reason for stepping down from this role.

Disqualification of Directors

According to the Disqualification Act 1896, there are also four grounds for disqualification of a director: bankruptcy, indictable offences in management of companies, persistent non-compliance with Companies Act filing provisions and unfitness of the directors relating to the winding up of a company due to insolvency.

How do a director's duties change upon insolvency?

Once a company becomes insolvent, the director's responsibility shifts from belonging to the company shareholders to belonging its creditors. According to the Insolvency Act, as soon as an insolvency practitioner is appointed your powers as a director cease. However, you do still have a duty to cooperate with the liquidator and provide any accounts, books, records and information. In simple terms, the overriding duty of directors during insolvency is to protect the value of the assets of the company and more importantly minimise the losses to the company's creditors as much as possible.

Having understood directors and their duties, what makes a responsible business?

As a director, you may view a responsible business as one that promotes the success and interests of the company and improving its financial position. Beyond this, a responsible business includes identifying and making decisions on aspects of the business that may benefit the employees, consumers and the community.