

General duties of a director of a Jersey company

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The directors of a Jersey company have a range of duties. These arise principally under:

- Jersey customary law
- the Companies (Jersey) Law 1991 (the **Companies Law**); and
- the company's articles of association.

This guide examines the general duties of a director of a Jersey company.

Whilst the Companies Law is the principal statute in relation to the duties of directors, other statutes may also be of relevance, including:

- the Financial Services (Jersey) Law 1998;
- the Proceeds of Crime (Jersey) Law 1999;
- the Money Laundering (Jersey) Order 2008; and
- the Companies (Takeovers and Mergers Panel) (Jersey) Law 2009.

This guide does not consider those statutes.

Who is a director?

Under the Companies Law, a director is a person occupying the position of director by whatever name called. A person who has been appointed as a director and whose name is entered in the register of directors is clearly a director. But in addition, a person will be treated as a director under the Companies Law (and, therefore, be subject to the duties, responsibilities and liabilities of a director) where that person performs the functions of a director (sometimes referred to as a 'de facto' director), or where the directors are accustomed to acting in accordance with that person's wishes or directions (sometimes referred to as a shadow director).

To whom are duties owed?

Company

The directors owe their duties solely to the company as a whole (rather than to the members individually). This means that the directors must consider the interests of the present and future members of the company as a whole.

Since the directors' duties are owed to the company, generally only the company may enforce them. It is, however, possible under Jersey customary law for a member to bring an action on behalf of the company in certain circumstances.

Creditors

Where a company is insolvent, or bordering on insolvency but is not faced with an inevitable insolvent liquidation or administration, the directors should consider the interests of creditors, balancing them

against the interests of shareholders where they may conflict. The greater the company's financial difficulties, the more the directors should prioritise the interests of creditors.

For further information regarding the duty of the directors of a company that is in financial difficulty to consider the position of the company's creditors, please refer to our guide entitled *Directors' concerns: Facing insolvency and wrongful trading*.

All directors owe the same duties

Each director owes the same duties and responsibilities to the company irrespective of whether the director is an executive director, a non-executive director, an alternate director or the chairperson.

Where a director is an appointee of a particular member or creditor, the director must nonetheless act in good faith in the interests of the company rather than in the interests of that member or creditor.

Similarly, where a director is a director of a number of companies within a group, in discharging the director's duties to a particular company, the director must act in the interests of that company individually and not in the interests of any other group company or the group as a whole.

Jersey customary law

A director owes the following general duties to the company under Jersey customary law.

Act in good faith

A director must act in good faith in what the director considers to be the best interests of the company as a whole. This duty is a subjective one and a court will not substitute its own judgment for that of the relevant director. It requires a director to treat different classes or groups of members fairly and to balance the interests of the present and future members of the company. As noted above, where a company is insolvent or of doubtful solvency, a director is under a duty to act in the interests of the company's creditors.

Exercise powers for proper purposes

A director must exercise the director's powers in the company's interests and only for the purposes for which the powers are given and not for a collateral purpose. This duty applies even where the director does not stand to make a personal gain or the director believes that to use the director's powers otherwise than for the purposes for which they are given would be in the best interests of the company.

Avoid conflicts of interest

A director must avoid actual or potential conflicts of interest between the director's duties to the company and the director's personal interests and/or duties as a director of another company. This duty may be relaxed in relation to a particular conflict of interests if the conflict is disclosed to, and approved by, the members.

The company's articles of association will normally allow the director to have certain interests and to retain any benefit derived from them if the director discloses the nature and extent of those interests to the company.

Not misuse company property

A director may be regarded as a quasi-trustee of the company's property. Accordingly, a director must only use the company's property (including any confidential information and intellectual property) for the benefit of the company. A director must not use the company's property for the director's own personal gain. A director may retain a benefit if the director is permitted to do so by the company's articles of association or if it has been disclosed to, and approved by, the members.

Exercise skill and care

A director is required to exercise the degree of skill and care that may reasonably be expected from a person in the director's position having regard to the skill and experience possessed by the director. If a director claims to have specialist knowledge in a particular area (eg financial or legal matters) the director must display a higher level of expertise.

A director is under a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable the director to properly discharge the director's duties as a director.

Companies Law

A director owes the following general duties to the company under the Companies Law.

Act honestly, in good faith and with skill

A director, in exercising the director's powers and discharging the director's duties, is required to:

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

Although a director is entitled to rely on advice on a particular issue from a fellow director with relevant expertise (eg in financial or legal matters), the director cannot abandon all responsibility for particular areas or the company's business generally to the other directors.

Disclose interests

A director is required to disclose to the company the nature and extent of any interest of the director (whether direct or indirect) of which the director is aware in any transaction entered into, or proposed to be entered into, by the company or any of its subsidiaries which conflicts, or may conflict, to a material extent with the interests of the company.

The disclosure must be made at the first meeting of the directors at which the transaction is considered after the director becomes aware of the circumstances giving rise to the director's duty to make it, or if the director fails to do so, as soon as practicable after that meeting.

Articles of association

The directors must act within any limits imposed upon them by the company's articles of association.

A company's articles of association will normally place a number of duties on directors. These may, for example, include duties to disclose interests, to observe procedural requirements relating to meetings, to maintain records and registers, to ensure that the company's borrowings do not exceed a prescribed amount or to obtain consent from members before taking certain actions.

If the directors exceed their powers under the company's articles of association, they will be in breach of their duties of skill and care, and consequently, potentially liable to compensate the company for any loss suffered by the company as a result.

Delegation

The general rule is that directors must exercise the powers conferred on them collectively as a board.

However, the directors are normally permitted by the company's articles of association to delegate their powers to another person or a committee. The directors may only exercise the power to delegate in good faith in circumstances where it is reasonable for them to do so. The directors must exercise adequate supervision over any person or committee to whom power has been delegated and cannot use delegation as a means of avoiding liability for carrying out their duties.

Effect of breach

In general terms, the effect of a breach of a director's duties under Jersey customary law or the Companies Law is, depending on the duty which has been breached, that the relevant transaction may be set aside, the director will be liable to compensate the company for any loss suffered by it as a result of the breach and/or the director will be liable to account to the company for any profit or gain made by the director.

Relief

From members

The Companies Law provides a mechanism for the members to relieve a director from the liability that would otherwise arise from an act or omission that would constitute a breach by the director of the director's statutory duties to act honestly and in good faith with a view to the best interests of the company and to exercise care, diligence and skill. It provides that no act or omission of a director will be a breach of those statutory duties if:

- all of the members (including any member whose shares have limited or no voting rights) authorise or ratify the act or omission; and
- the company will be able to discharge its liabilities as they fall due after the act or omission has been committed.

This mechanism is most frequently used by directors in a group financing context where there is a concern that a guarantee of group borrowings to be given by the company may not be in the company's best interests. The Companies Law also provides a mechanism for a majority of members to approve or ratify an act or omission which can be used in certain circumstances.

In addition, the members may, by ordinary resolution, authorise or ratify a breach of a director's Jersey customary law duties.

From court

If proceedings were instituted against a director alleging that the director breached the director's duties to the company, the director would be entitled to apply to the court to be relieved from liability. The court is empowered by the Companies Law to relieve the director, in whole or part, from liability for negligence, default or breach of duty or trust on such terms as the court thinks fit if it appears to the court that:

- the director acted honestly; and
- having regard to all the circumstances of the case, the director ought fairly to be excused from liability.

In practice, however, the court is only likely to exercise these powers in favour of a director in rare cases.

Other potential liabilities

For information regarding the potential liability of a director in connection with:

- Jersey insolvency laws, refer to our guide entitled *Challenging transactions in an insolvency*; and
- distributions and share purchases and redemptions, refer to our guide entitled *Distributions and share purchases and redemptions under the Companies (Jersey) Law 1991*.

Indemnities

Although the Companies Law permits a company to indemnify a person in respect of any liability arising by virtue of the person acting as a director, it restricts the scope of any such indemnity and does not allow the company to indemnify the director against any liability incurred to the company. Please refer to our guide entitled *Directors' indemnities*.

Practical steps to avoid a breach

It is not possible to provide comprehensive guidance on the actions that a director should take to ensure that the director fulfils the director's statutory and Jersey customary law duties, however, as a general guide, a director should seek to:

- be familiar with the company's articles of association;
- take such action as is necessary to ensure that the director is aware of, and understands, the company's business;
- actively participate in the conduct of the company's business;
- attend all board meetings, and where this is not possible, read any board papers and discuss the agenda items with the chairperson before and after the relevant meeting or appoint an alternate to attend the meeting;
- read all financial statements, reports and papers sent to the directors;

- ensure that accurate minutes are kept of all meetings of directors and members;
- ensure that the company has competent management in place and actively engage with and (where necessary) scrutinise management;
- monitor the activities of any person or committee to whom any powers have been delegated by the directors (eg by requiring regular reports);
- ensure that adequate internal controls and risk management procedures are put in place and followed;
- regularly monitor the financial position of the company; and
- avoid any conflict of interests, and where a potential conflict of interest does arise, promptly notify the company secretary.

Contacts

A full list of contacts specialising in corporate law can be found [here](#).