



INSIGHTS

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Directors – The Concept – Duties & Liabilities

Appointment & Qualification of Directors

Types of Directors

Whilst shareholders “own” the company, the management of a company falls largely on the company’s board of directors.

Although the law only recognizes one form of directorship. In practice, however, there are several kinds of directors, including; executive directors, nonexecutive directors and “shadow” directors, etc. Executive directors are the most common type of directors who work for the company on a full-time basis.

The law requires that every company must have at least one director who is ordinarily resident in Singapore.

Qualifications of Directors

Under Section 145(2) of the Companies Act (Cap. 50) (“the Act”), no person other than a

natural person who has attained the age of 18 years and who is otherwise of full legal capacity shall be a director of a company.

Whilst there are no legal requirements that a director should be of a certain educational standard, or should have some professional qualification, the Act does set out certain scenarios where a person may be disqualified from acting as a director.

- a) A person is an undischarged bankrupt;
- b) Persons unfit to be directors under Section 149 of the Act. No automatic disqualification, the Court must make a disqualification order;
- c) A person convicted of certain offences (e.g. involving fraud, dishonesty, etc).

Directors' Duties & Liabilities

Due to the concept of the separation of "ownership" and "management", there is the possibility that the managers (i.e. the directors), who have control of the business, will not manage the company properly.

One of the ways which the law has developed to counter this risk is to impose on the directors legally enforceable duties to act in the company's interests.

a) Duties at Common Law; directors owe fiduciary duties to the company. Simply, a company is entitled to the fidelity of its officers who may only consider the interests of the company when making a decision, these include: -

- Duty to Act in Good Faith in the Interests of the Company ("Duty of Good Faith"); in determining whether

- the directors had made a decision in the "interests of the company", the Court will not substitute its opinion for that of the management if that decision was bona fide arrived at. The test is whether an honest and intelligent man in the position of the directors, taking an objective view, could reasonably have concluded that the transactions were in the "interests of the company".

- Avoidance of Conflict of Duty and Interest (No -Conflict rule) ; a director is under an obligation not to place himself in a position where the interests of the company comes into conflict with either his personal interests or that of a third party for whom he acts. Such conundrums typically arise where a director transacts with the company, competes with the company or takes on conflicting duties.

- No -Profit Rule; Use of Corporate Opportunity and Information ; unless a director has provided full disclosure and obtained the informed consent of the company, a director who acquires a benefit in connection with his office is accountable to the company for that benefit.

- Duties of skill, care and diligence ; a director has an obligation to carry out his duties with due care and diligence. If he has fallen below such standards and caused loss to the company, he is accountable to the company for such loss. Though, the local Courts have noted that it will not be overly interventionist as "it is the role of the marketplace and not the function of the court to punish and censure directors who have in good faith, made incorrect commercial decisions."

Directors' Duties & Liabilities (Cont'd)

a) Statutory Duties; as prescribed under the Act, including:-

i. Section 156 of the Act; A director has an obligation to disclose to the company any conflicting interests and duties that that director may have.

ii. Section 157 of the Act; A director shall at all times "act honestly and use reasonable diligence" in the discharge of the duties of his office and shall not make "improper use" of his position in the company or of any information acquired by virtue of his position to gain an advantage for himself, any other person or cause harm to the company.

iii. Section 201 of the Act; A director shall, at a date not later than 18 months after the incorporation of the company and subsequently at least once in every calendar year at intervals of not more than 15 months, lay before the company at its annual general meeting the financial statements for the period since the preceding financial statements.

iv. Criminal Liability for Breach of Duties; see Sections 157(3), 156(10) , etc, of the Act.

Civil Remedies for Breach of Duties

a) Rescission; It may be possible to avoid transactions entered into by a director in breach of his duties. Where such transaction is with the company, it is voidable at the instance of the company. The situation is less clear where the transactions are with third parties.

b) Return of property; a director can be made to return such property acquired by director in breach of fiduciary duty as such property is deemed to be held on trust for company. If contract with third party is avoided (see above), any property received by a third party must be restored to company (on contract/restitution principles).

c) Account of profits; a director may be required to account for (i.e. pay value of) benefit gained by him in breach of duty. Whereas, a third party may be liable to account under the "knowing assistance" rule.

d) Damages; to claim for compensation for a loss suffered by the company.

e) Injunction or declaration; to prevent a threatened breach of duty.

Is it permissible for a director to delegate some of his management functions and would such delegation amount to a breach of his duties? (see *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR 162)

a) Delegation is permissible; "It would be wholly impractical to expect directors to be omniscient or to personally discharge all corporate powers and functions. The larger the business, the greater the commercial need for delegation. The more specialised functions are, the greater the need for independent operations and powers."

b) Test as to the propriety of delegation; a director "must reasonably believe that his subordinates will competently discharge their duties in the company's interests. ... It can however be safely assumed that the court will be reluctant to take to task a director who has bona fide delegated his functions and/or powers to competent subordinates."

c) Cannot relinquish supervisory role; a director cannot be viewed as a mere sentinel who may occasionally doze off at his post. Directors are officers who must remain alert and watchful at the helm.

d) "Business Judgment Rule"; "It is the role of the marketplace and not the function of the court to punish and censure directors who have in good faith, made incorrect commercial decisions. Bona fide entrepreneurs and honest commercial men should not fear that business failure entails legal liability. ... Undue legal interference will dampen, if not stifle, the appetite for commercial risk and entrepreneurship."

For more information on the article, or if you wish to learn more about the topics discussed, please contact:-



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