



CPSA DIRECTORS' DUTIES AND RESPONSIBILITIES

A SIMPLE GUIDE TO DIRECTORS' DUTIES AND RESPONSIBILITIES UNDER THE COMPANIES ACT 2006 AND CERTAIN CPSA POLICIES

This is a basic guide borrowed, in part, from the Technical Advisory Service of the ACCA. It is an introduction to a complex subject and is intended to alert members to the actions needed in relation to directors' duties under the Companies Act 2006 ("the Act"). Specific advice should be obtained, where necessary.

The Act, sections 170 – 178, sets out the main legal responsibilities and general duties of directors and are known as the Statement of General Duties of Directors. The Act is based on established common law principles and case law, but also includes important reforms which affect all directors – executive or non-executive – in companies of every size.

Directors also have other duties, both under the Act and under a wide variety of other laws and regulations, such as insolvency and health and safety legislation. However, these duties are outside the scope of this guide.

The Statement of General Duties of Directors took effect on 1 October 2007, with the exception of the duty to avoid conflicts of interest, which came into force in October 2008.

The main principles are summarised below:

1. The general duties

A director must act in the interests of the company and not in the interests of any other parties – including members or other stakeholders. Directors do not, by virtue of the office of director, owe duties to the CPSA members or creditors.

The duties are owed to the CPSA and therefore the CPSA comes first. Understanding this principle should make it easier for you to decide how to act when there are a number of interested parties with apparently conflicting interests.

In general, a director's duties to the company will start when they became a director, but after resignation, they will not continue to owe the general duties to the company. However, the Act provides that certain aspects of the duty to avoid conflicts of interest (see duty 6 below) and the duty not to accept benefits from third parties (see duty 7 below) continue to apply after a person ceases to be a director. A director also continues to owe duties of confidence to the company following their resignation and this will be enforced by CPSA as required.

Where more than one duty applies in a given case, the directors must comply with each applicable duty. For example, the duty to promote the success of the CPSA (see duty 3 below) will not authorise directors to breach their duty to act within their powers (see duty 2 below), even if they consider that action would be most likely to promote its success.

The general duties also do not require or authorise a director to breach any other law.

2. Duty to act within the company's powers

In addition to the duties and responsibilities imposed on directors by the Act, every company will have its own set of rules known as its 'constitution'. Directors must follow the rules and restrictions contained in the constitution.

CPSA's constitution includes:

- The company's articles of association ("the articles");
- Decisions taken in accordance with the articles and other decisions taken by the members if they can be regarded as decisions of the company; and
- Any resolutions and agreements affecting the company's constitution.

Companies may, through their articles, go further than the general duties by placing more onerous requirements on their directors. However, the articles may not dilute the duties except to the extent permitted by specific sections within the Act.

The directors must use the powers delegated to them by the members for the benefit of the CPSA.

3. Duty to promote the success of the company

The term 'success' is not defined in the Act because this may vary from company to company. In most cases, however, it is likely to mean sustainable profitability. The underlying principle here is that every director has a legal duty to try to act in such a way which, in their judgement, is most likely to bring 'success' to the CPSA for the benefit of its members as a whole. However, directors are not held to be guarantors of a company's success.

The directors must have regard (among other matters) to:

- The likely consequences of any decision in the long term.
- The interests of the company's employees.
- The need to foster the company's business relationships with suppliers, customers and others.
- The impact of the company's operations on the community and the environment.
- The desirability of the company maintaining a reputation for high standards of business conduct.
- The need to act fairly as between the members of the company.

It should be noted that:

- The duty applies to all decisions made by a director, not merely formal decisions made by the whole board.
- The obligation to have regard to the listed factors is subordinate to the overarching duty to promote the success of the CPSA for the benefit of its members as a whole. However, the obligation to have regard to at least the listed factors, in carrying out the overarching duty, is mandatory.
- The list of factors is not exhaustive: directors should have regard to other matters relevant to the duty to promote the success of the CPSA.

This duty is subject to any enactment or rule of law requiring directors in certain circumstances to consider or act in the interests of the creditors of the company. Accordingly, the duty is displaced

when the company is insolvent, and may be modified by an obligation to have regard to the interests of creditors as the company nears insolvency.

The holding of regular board meetings and reviews, accompanied by clear minutes, have proved in practice to be the best evidence of the steps the directors took, and why.

4. Duty to exercise independent judgement

Directors must exercise their powers independently, without subordinating their powers to the will of others, whether by delegation or otherwise. The Act will not be breached if you exercise your duties in line with any prior agreement with the CPSA or with the CPSA constitution.

This duty will not prevent directors relying on advice, as long as the directors exercise their own judgment in deciding whether or not to follow the advice. See duty 5 below for further details on permitted delegation / division of tasks.

5. Duty of skill, care and diligence

Every director must exercise reasonable care, skill and diligence in everything they do for the CPSA. The duty is broken into two parts:

- As a director you must demonstrate the general knowledge and skill reasonably expected of a person carrying out the functions you carry out in relation to the CPSA. Therefore, a managing director will be expected to have a knowledge of all areas of the business or to have engaged people who can help them; and
- As a director you must also act in accordance with any specific general knowledge and skills you actually have. Therefore, a director who is a qualified accountant would be expected to show greater general knowledge, skills and interest in relation to financial aspects of the CPSA than another director who was not so qualified.

A director will also be required to exercise their duties diligently, keep themselves informed about the CPSA's affairs and join with their co-directors in supervising and controlling them. This will not prevent a director from relying on the experience and expertise of their colleagues or, generally, prevent sensible delegation or division of tasks, provided that the director does not attempt to abrogate all responsibility.

6. Duty to avoid conflicts of interest

You must avoid any situations where you have any personal or outside interests which will potentially come into conflict with the interests of the CPSA. This applies, in particular, to the exploitation of property, information or opportunity, regardless as to whether or not the company could take advantage of the property, information or opportunity. The test of whether there is a breach of this duty is objective, and does not depend on whether the director is aware that what they are doing is a breach of their duty.

However, this duty is not infringed if:

- the situation cannot reasonably be regarded as likely to give rise to a conflict; or
- the matter has been and is permitted to be authorised by the directors.

The duty to avoid conflicts of interest will continue to apply after a person ceases to be a director as regards the exploitation of any property, information or opportunity of which they became aware at a time when they were a director.

7. Duty not to accept benefits from third parties

A director of a company must not accept any benefit from a third party arising from them being a director; or from their actions or omissions as a director.

Any benefits that cannot reasonably be regarded as likely to give rise to a conflict of interest can be ignored.

The duty not to accept benefits from third parties will continue to apply regards things done or omitted by them before they ceased to be a director.

8. Duty to declare an interest in a proposed transaction or arrangement

The Act states: "If a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company he [she] must declare the nature and extent of that interest to the other directors." The director need not be a party to the transaction for the duty to apply.

The declaration of an interest can be either verbal or written but must comply with the requirements set out in the Act. It must be made before the CPSA enters into the transaction or arrangement.

9. CPSA social media policy

A director must avoid making any social media communications that could damage CPSA's interests or reputation, even indirectly. In particular, a director must not use social media to:

- defame or disparage CPSA, its staff, its members or any third party;
- make false or misleading statements;
- express opinions on CPSA's behalf, unless expressly authorised to do so by the Board; or
- post comments about anything discussed at Board meetings.

Any breach of this social media policy may result in disciplinary action up to and including termination of a director's appointment (where a unanimous resolution of the other members of the Board (excluding the person so removed) is passed).

A director may be required to remove any social media content that the Board considers to constitute a breach of this policy. Failure to comply with such a request may in itself result in disciplinary action.

CONSEQUENCES OF BREACH

The duties are owed to the CPSA and, except for limited circumstances, only the CPSA will be able to enforce them.

The remedies for a breach of the duties include:

- An injunction;
- Setting aside of the transaction, restitution and account of profits;
- Restoration of company property held by the director; and
- Damages.

A breach of duty may also be grounds for the termination of an executive director's service contract, or for disqualification as a director under the Company Directors Disqualification Act 1986. The company can ratify (in the sense of condone, forgive) conduct by a director amounting to negligence, default, breach of duty or breach of trust in relation to the company.

Where proceedings for negligence, default, breach of duty or breach of trust are brought against a director, the court may relieve them from liability if it considers both that:

- They have acted honestly and reasonably.
- Considering all the circumstances of the case, they ought fairly to be excused.

REFORMS INTRODUCED BY THE 2006 ACT

A number of important reforms took effect from October 2008:

- **Minimum age**
The minimum age at which someone can be appointed as a director is now 16 years. At the same time, the maximum age of 70 for directors of public bodies was abolished.
- **Registration and publication of directors' residential addresses**
It is no longer necessary to include directors' home addresses on public records. They are able to use a 'service' address such as the company's registered office. However, it will still be necessary to keep a separate register of directors' home addresses.

ADDITIONAL DUTIES

In addition to the duties outlined above, as a director you will continue to have responsibilities and duties to ensure that:

- the company is not wrongfully trading;
- the company does not pay an illegal dividend;
- you are not illegally involved with 'phoenix' companies – where the assets of a failed company are moved to another legal entity;
- you are not acting in breach of disqualification orders; and
- accounts are prepared properly, with proper keeping of books and records.

You need to be aware that there are civil (as mentioned above) and criminal sanctions and penalties for breaches of your responsibilities and duties as a director.