

Governance of the Cheshire and Warrington DF (GP) Ltd

Appendix

Directors' Duties – Summary

Directors' duties were codified by the Companies Act 2006. Duties are owed to the company and it is only the company that can bring an action against a director for breach of duty, breach of trust or negligence.

The remedies for breach of a director's duties include damages, an injunction, setting transactions aside, accounting for profits and the return of the company's property.

The General Duties

The Companies Act 2006 sets out seven general duties:

Duty to Act Within Powers (Section 171)

A director must act in accordance with the company's constitution and must only exercise powers for their proper purpose.

Duty to Promote the Success of the Company (Section 172)

A director must act in good faith and in a way that would be most likely to promote the success of the company for the benefit of its members as a whole. The Companies Act 2006 contains six factors that must be considered:

- *the likely consequences of the 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 to maintain a reputation for high standards of business conduct; and*
- *the need to act fairly as between the members of the company.*

This is not an exhaustive list; other factors such as profitability can also be considered, and the factors are in no particular order. Indeed there is no guidance on which should take priority in the event of a conflict. In order to demonstrate compliance with this duty, directors should document the factors that have been considered for each decision in the minutes of meetings.

Duty to Exercise Independent Judgment (Section 173)

A director must exercise their own judgement, independent of the views of others on the board. This duty does not prevent a director from taking advice but their own judgement must be used in deciding whether to follow the advice.

Duty to Exercise Reasonable Care, Skill and Diligence (Section 174)

A director must act as a reasonably diligent person. This takes into account:

- *the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as that director; and*
- *the specific general knowledge, skill and experience of that particular director.*

The first element is an objective test and the second analyses a director's particular expertise. For example, a director with accountancy qualifications or experience would be expected to exercise greater scrutiny of the company's accounts.

Duty to Avoid Conflicts of Interest (Section 175)

A director must avoid situations where there could be an interest that conflicts with the interests of the company, although the directors who are not conflicted may be able to authorise a director to continue to act despite there being a conflict. This duty is interpreted widely and applies to the use of any property, information or opportunity available to the company. The duty will be breached even if a director exploits an opportunity that the company considered but decided not to pursue and continues to apply after a person ceases to be a director.

Duty Not to Accept Benefits From Third Parties (Section 176)

A director must not accept any benefit from a third party that is given due to their position as a director or their actions, or omissions, as a director unless the benefit cannot reasonably be regarded as likely to cause a conflict of interest. The benefits covered by this duty include financial and non-financial benefits. It is important to consider what would be regarded as 'normal' in the circumstances and whether the benefit is excessive.

Duty to Declare an Interest in a Proposed Transaction or Arrangement with the Company (Section 177)

There is no duty to avoid interest in transactions or arrangements with the company. However, a director must disclose to the other directors the nature and extent of any interest in a proposed transaction or arrangement with the company, whether direct or indirect. Such a declaration must be made before the company enters into the transaction or arrangement at a board meeting, by written notice or by general notice and must be updated should the interest change. There is also a duty under section 182 of the Companies Act 2006 to declare any interest in an existing transaction or arrangement.

There are certain exemptions where declaration of an interest is not required, including the following:

- *the director is unaware of the interest or of the transaction. However, ignorance is not a complete defence and the director will be deemed to be aware of matters that they ought reasonably to be aware of;*
- *there is no reasonable possibility of a conflict of interest;*
- *the other directors know of the interest, therefore no disclosure is required if the company has only one director. It will be for a director seeking to rely on this exemption to prove that the other directors knew, or ought reasonably to have known, of the interest. It is therefore best to declare an interest in order to avoid any doubt; and*
- *the transaction is a service contract between the company and the director.*

The Companies Act 2006 sets out certain types of transaction where a conflict of interest is likely to arise that includes substantial property transactions, directors' loans, payment for

loss of office and directors' service contracts for more than two years. In general, should these circumstances be met, the transaction will need to be approved by an ordinary resolution of the shareholders.