

Duties and role of the director



Contents

Definition of the so called “ director”

Duties and Role of Director

DIRECTORS’ DUTIES UNTIL 2006

Directors’ duties after 2006

CONSIDERATION

CONSIDERING OF SCENARIO in light of s 174 CA 2006:

Reference list

Definition of the so called “ director”

As the s 154 CA 2006 says, all the private ltd in the United Kingdom need to designate at least one director to manage their business activity. All the Companies are legal persons which may act through by proxies, the directors, even in the case of a small ltd composed by one or two shareholders, is required having at least a director, even if the director and the shareholder are the same and the only person.[Davies, 2007, p. 10]

The gap of the formulation of an exactly term of “ director” does not support legal sureness but, as Davies notes, “ *On the other hand, the absence of an exhaustive definition serves the interests of flexibility*”.

The designedly broad definition could permit the law on directors' duties to be applied to persons who, for some reasons, do not formally register themselves as directors of their companies.[Davies, 2007, p. 10]

As the S 250 of the CA 2006 says that a director “ *includes any person attend to the position of director, by whatever name called*”.

Duties and role of Director

Over the years, various definitions have been given for the role of director.

Re City Equitable Fire Insurance Co. [1925] Ch. 407 at 426 per Romer J.

All the directors (acting collectively) could be defined as agents of the company rather than trustees of it or its property.

But as agents they act like fiduciary relationship to their principal, the company.

When directors take an action collectively, act on behalf and in name of “ the company”.

In the case of Adam, we are faced with a person to whom the trust's response has been .

However, there are some circumstances in which a person could be not have the criteria to act as a director:

Any person will become director must not have been interdicted from acting as a company director by a court (unless particular cases established by the court);

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Any person will become director must not had declared bankruptcy (except the case with leave of the court);

Any person will become director must not be under 16 years old; *There are not references about the age of Adam in our scenario, we are pretty sure he is over 16 years old .*

A company newly established must have at least one director who is a natural person;

A company's articles is required. In many cases, we can find a director may hold some company's shares.

The AMA is a Private ltd and we do not know if Adam hold any shares of the company.

Directors' duties until 2006

There was many comments before 2006 directors' duties that there was no one place for directors to look for a fully list of their responsibilities. Principal changes have lately been made to United Kingdom company law, however, incorporate the directors' duties.

These can be categorised as follows:

THE FIDUCIARY DUTY

Directors was always considered by the court as being ' fiduciaries', a fiduciary being ' someone who has undertaken to act for another in a particular matter in circumstances which connect to a relationship of trust and confidence'(Bristol and West Building Society v Mothew [1998] Ch1).

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Thus, the director is subject to similar obligations consequent from the relationship of trust and confidence as those that are levied on trustees and professionals. Very relevant, they needed to act in good faith in a way to favouring interests of the person that they represent (the company), and cannot betray the trust and the confidence put back on them. Although the figure of director is most of the time compared to a proper trustee, but there are some differences – the role of the trustee is to follow with prudence and protecting the interests of the beneficiary than would be reasonable to impose on a person in charge of a company. Subject to this allowance for a higher risk on the part of directors, however, the positions of both are comparable.

THE DUTY OF SKILL AND CARE

“ General duty of skill and care Directors generally have responsibility for the daily running of the company and for everything concern the management of the business. That is mean that a director must exercise reasonable skill and care to perform these responsibilities. To make matters more complicated, however, the requirement of skill and care is judged from both objective and subjective criteria”.

See Re D'Jan of London [1993] BCC 646, per Hoffman LJ; Companies Act 2006, section 174 .

“ There is no single professional standard for company directors. The standard required therefore varies according to the directors' personal knowledge and experience, functions carried out and the amount of time

that they are required to devote to their duties. Historically, a director could get away with being as inept and as absent as he liked”.

See Re Brazilian Rubber Plantations and Estates Ltd [1911] 1 CH 425 and Re Cardiff Savings Bank [1892] 2 CH 100 .

As a matter of fact, it was still an option to use Articles specifically absolving of future liability a director, careless of how incompetent prove to be. ³ See *Re City Equitable Fire Insurance Company Ltd [1925] CH 407*

“ Nowadays, it is clear that certain displays of incapacity will not anymore tolerated. However, the law is still careful not to completely discourage enterprising directors and new generation entrepreneurs and the decided cases point out that more than an error of judgement is needed before directors could be in breach of the duty of care they owe to the company”.

STATUATORY DUTIES

“ Legislation of companies (as the other legislation in the world) has during the years imposed a series of precise responsibilities on directors. As well as those duties that are positioned on directors by merit of their status, many others will be forced on the company itself – in such cases, it will be, practically, the liability of the directors either to perform those obligations themselves or to insure that they are satisfied with another person”.

Directors’ duties after 2006

The sections from 171 to 177 expose seven ordinary duties which all the directors must have into their companies. Commonly, it would be the

company which would sue the director if one of these duties was violated. These statutory duties settled the common law. When the courts explain and perform them, they will consider the principles of law valid before the year 2006 Act came to exist. It should be underlined that, together with the general duties, the 2006 Act imposes many administrative duties on directors, such as the duty to file accounts.

The seven general statutory duties are the following:

Act within powers

Section 171 established that in a company a director must:

- (a) act in accordance with the company's constitution and
- (b) only practiced powers for the purposes for which they are awarded.

“ Before the 2006 Act came into force, this duty would have been regarded as two separate duties. In this context the company's constitution also includes unanimous informal decisions taken by the company members, even if these concern a matter which would not have needed to be passed as a special resolution”.

Promote the success of the company

S. 172(1) establishes that:

“ In a company a director must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit

of its members as a whole, and in doing so have regard (between other matters) to:

- (a) thinking the probable consequences of any decision in a long-term way,
- (b) Try to protect the interests of the employees of the company,
- (c) Promote the relationships with suppliers, customers and others favouring the company's business,
- (d) Be aware of the impact on the community and on the environment of the company's operations,
- (e) Maintain an high reputation for high standards of business conduct and
- (f) Listen to the needs to act fairly as between the company members.

The S. 172 want to underline the value of the shareholder. The director's expectations are to act in good faith to promote the success of their company. Every time they do this, they will not become liable merely because of a wrong decision. However, this section is sickly connected with s. 174, which expose a duty to exercise reasonable care, skill and diligence".

Exercise independent judgment

S. 173 provides that:

" In a company, a director must practise independent judgment.

This kind of duty is not altered by his acting

- (a) In accordance with the company he must to use discretion, or must be

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(b) Authorised by the constitution of the company.

Some of the duties can be delegate if expected from the constitution of the company. Alternatively, an agreement between company and director could be found for acting in a determined way. Simplifying s. 173 says that a director have to exercise independent judgement and not only to follow instructions from other people.

Exercise reasonable care, skill and diligence

S. 174 states that:

“(1) What a director of a company has to do is: exercise reasonable care, skill and diligence.

(2) These tasks would be exercised by a person with diligence

This person also needs to has the general knowledge, skill and experience expected from a person that begins the role carried out by the director in relation to the company.

A director must exercise this standard which could objectively be expected of a director, better if he has any extra skills will raise the expectations of him”.

Avoid conflicts of interest

S. 175 establishes that the duty to avoid a conflict between personal interests of the director and the interests of the company. It exposes:

“ Inside a company, a director must do not be involved in all the situation that he can have, an interest that conflicts with the interests of the company. This concern the utilization of any matters that advantage the director and weaken the company.

S. 175 says that this duty does not move on a conflict of interest which is in relationship with matters involved with the company.

S. 175(4) establishes that there is not breached if the conflictual situation has been approved by the directors. In a private company such authorisation is allowed if nothing is expected in the constitution act.

As regards both public and private companies, s. 175(6) established that the director in question does not count towards the quorum of the meeting which gives authorisation. His vote could be impartial.

A person who quit to be a director must continue to avoid the conflict of interest as regards the exploitation of any property, information or whatever opportunity he knew from the period that he was a director”.

Do not accept benefits from third parties

S. 176 provides that:

“ In a company a director cannot accept benefits from third parties awarded by reason of

(a) Be a director,

(b) Do (or not) anything as director.

A person who quit to be a director has to continue to not accept benefits from third parties as regards things done or not by him before he quit his functions”.

Declare an interest in a proposed transaction or arrangement

S. 177 provides that:

“ If in a company a director is in any way, directly or none, interested in a proposed transaction or arrangement with the company, he must reveal the nature of this interest and let it know to the others directors”.

CONSIDERATION

The regulation of directors’ duties by the Act wrote in 2006 has improved matters to the extent that as there is now at least one single place for a director to look for a precise list of his responsibilities. The general duties expose in the Act need to be interpreted and applied in the same way as corresponding common law rules and equitable principles. The result of interpretation of the general duties set down in the Act probably will be influenced by future adjustments in common law and equity, meaning that is still a complicated matter where directors most of the time will need to looking for precise advice.

Still, it’s not everything dark and twisted and directors should take a great deal of comfort according to *the case of Lagunas Nitrate Co v Lagunas Syndicate* . This case was decided in the 19th Century but the words of Lindley MR are still topical:

“ As directors, I am not aware that there is any difference between their legal and their equitable duties. If directors act within their powers, if they act with such care as is reasonably to be expected from them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, they discharge both their equitable as well as their legal duty to the company. The amount of care to be taken is difficult to define; but it is plain that directors are not liable for all the mistakes they may make, although if they had taken more care, they might have avoided them.”

CONSIDERING OF SCENARIO in light of s 174 CA 2006:

First of all, we have to consider the exactly role of Adam in Ama Ltd. The protagonist of our case works as a *training accountant* in that company. Although he has no marketing experience, but at the same time he has full responsibility for the marketing strategy of the company.

The fact that he works as a training accountant and has no experience in marketing suppose that it will be an initial period, during which he will be followed and supervised from a responsible that will check his work day by day.

Section 174(1) CA 2006 now expose that a director must exercise reasonable care, skill and diligence. Section 174(2) tags that the requirement in section 174(1) means the care, skill and diligence that would be exercised by a reasonably diligent person with:

- the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company and
- the general knowledge, skill and experience that the director has.

Consequently, there is an obligation for a director to carry out the duties in accordance with the broadly-framed benchmark set out in the section 174(1) – the director must exercise a ‘reasonable’ level of care, skill and diligence.

Does Adam had a reasonable level of care, skill and diligence in this case?

We know that in the last six months, Adam took many decisions without consulting his fellow directors. So is it true that Adam is maybe liable, but is considerable that there is a lack of super visioning and a neglect of the job of Adam from the the board of directors.

As result, was also revealed that the decisions of Adam were wrong and resulted in a loss of profits.

Before every decision was taken it was supposed that someone of the board of directors been aware of these decisions, so again we recognize a lack of supervision of the Adam job by the board of directors, that is required to act honestly for the benefit of the company they represent and pay their salaries.

The term ‘reasonable’ assure that the benchmark of conduct is not set at such an illogical high level that it would discourage people from forming new companies and becoming directors. What the term will amount to in any particular case will depend, via the provisions of sub-section (2), on both

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objective and subjective criteria, and on how the courts apply them in specific cases.

By contribution of section 174(2)(a), a director will be expected to act in a way which is appropriate for the position occupied.

“ If the director has a role specific, as the example of a Director of Marketing, then the law will expect from this director to demonstrate the knowledge, skill and experience that is considered to be reasonable to expect from a person in that role”.

In the case of Adam, we are in the situation that he has no marketing experience and in the same time he has full responsibility for the marketing strategies of the company. So, Adam maybe liable because he accepts his role though he does not have any experience but, the board of directors made a questionable choice for the interest of the shareholders and the profits.

The standards expected of a director under both the objective and subjective criteria will be subject to the ‘ reasonably diligent person’ test. Directors who have no specialist knowledge, skills or experience will not be entitled to use that fact as a justification for not showing a measure of diligence in the way that they approach the conduct of their functions.

Once a person becomes a director, however, the law will expect him or her to act in agreement with the legal standard.

‘ Anyone accepting the office of director was required to understand the nature of the duty which he/she was called upon to perform. The nature of

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that duty would depend on the size and business of that company and the experience the director held himself out as having.’ (Re Barings (No 5) [2000] BCLC 523).

In the end, we advise the Ama Ltd that, if decide to take an action against Adam for breach of duties, this choice could be rebound against the company, because Adam certainly can take an action against the company because he was never appointed, and because the board of directors overlooked him.

Reference list

Cases

- *Baker v Secretary of State for Trade and Industry* [2001] BCC 273
- *Dorchester Finance Co Ltd v Stebbings* [1989] BCLC 49
- Re Barings (No 5) [2000] BCLC 523
- *Brazilian Rubber Plantations and Estates Ltd* [1911] 1 CH 425 and *Re Cardiff Savings Bank* [1892] 2 CH 100
- *D’Jan of London* [1993] BCC 646, per Hoffman LJ; *Companies Act 2006, section 174*
- *City Equitable Fire Insurance Company Ltd* [1925] CH 407
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