



**Every Bermuda exempted company is required to have at least one director which may be an individual or other legal person. A director of a Bermuda exempted company need not necessarily be resident in Bermuda, so long as the company otherwise meets the residency requirement under the Companies Act 1981 (the “Companies Act”).**

Bermuda law does not impose an all-embracing code of conduct on directors. A company's memorandum of association and bye-laws comprise its constitution and together with the Companies Act prescribe the ambit of the directors' powers. Accordingly, if the directors act ultra vires the company's constitution, they are answerable to the company. The function of the substantive law is to supplement the internal constitutional checks on a director's powers and to deal with areas where the company's constitution may be silent. Directors are personally appointed and their appointment may not be generally delegated or assigned.

Many of the duties and obligations of a director are statutory; others are found only in common law. The Companies Act contains numerous provisions relating to the duties of directors and prescribes penalties for breach of such duties.

### **Those to Whom Director's Duties are Owed**

Directors are responsible to the company and not, in the absence of special circumstances, to the members as individuals. For the purposes of describing directors' duties, the company is generally defined with reference to the interest of both present and future members of the company as a whole.

### **Common Law Duties of Directors**

At common law a director owes two types of duty to the company: fiduciary duties and duties of skill and care.

#### **Fiduciary Duty**

While the directors act collectively as a board, each individual director must act in good faith in his or her dealings with or on behalf of the company and must exercise the powers and fulfil the duties of the office honestly.

#### **Duty of Skill and Care**

A director's fiduciary duty imposes a largely negative obligation to do nothing which conflicts with the company's interests. However, when a director is acting in the company's interests she or he is expected to exercise whatever skill she or he possesses with reasonable care.

#### **Consequences of Breach**

A director may be personally liable to the company in damages for breaching fiduciary duties or duties of skill and care. All directors who participate in the breach will be held jointly and severally liable but as between them, they will have rights of contribution.

### **Statutory Duties and Obligations**

The general principles governing a director's conduct set out above are augmented by a range of specific duties imposed by statute. Some of these duties are imposed not on the directors in their own right but on the company. However, since the directors are responsible for the performance of the statutory duties imposed on the company, it is they who must ensure that the company does everything that is required of it.

In addition to the above, the Companies Act imposes various duties on officers of a company with respect to certain matters of management and administration of the company. The Companies Act contains provisions which impose default fines on persons who fail to satisfy those requirements. However, in many circumstances, a person shall only be liable if he knowingly is guilty of the default or knowingly and wilfully authorises or permits the default.

## **Tortious Liabilities**

Directors are agents of the company and, therefore, may be at risk of being jointly and severally liable with the company to third parties for torts committed by the company in certain limited circumstances. While Bermuda case law on this topic is limited, a Bermuda court is likely to follow the decisions of the English courts in this regard and it would appear to be the case that if a director gives instructions for the commission of a tort by the company, then he may be liable for it even though the tort was the act of the company. Directors may also incur contractual or tortious liability directly to third parties for negligent misrepresentations and may incur criminal liability if they knowingly participate in the issue of materially misleading or false accounts or statements.

## **Conclusion**

The Companies Act and the common law impose various duties and responsibilities on directors. Directors should always consider these duties and responsibilities when charting a course of conduct with respect to the company and its interests. Although the fact that a decision turns out to be wrong, not beneficial, or causes loss will not necessarily give rise to liability, if there is the least doubt or concern about a particular approach or action, and how it might impinge upon or otherwise interact with the director's duties and obligations, legal advice should be obtained without delay.

For more information please contact your usual Conyers lawyer or corporate services manager or reach out to one of the listed contacts.

## **Speak to our experts**

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