DUTIES OF A COMPANY DIRECTOR – Part 2

Jeremy Thorn, an experienced company Chairman and Director, looks at many of the requirements of being a Company Director.

In Part 1 of this article, *'Becoming a Company Director'*, we looked at some very important basics. We examined some common misconceptions about being a director: for example, the different roles of a director and a shareholder, the need to consider a company's best interests as a legal entity in its own right and the relevance (or not) of limited liability. We also reviewed the possible components of a Board, different types of directors and some important practicalities, such as what should happen when a board might disagree.

But what about the more practical detail of any Director's duties? Being a company director is a very exciting and fulfilling role. With your board colleagues, you get to steer your company's fortunes and future, see the whole picture, work outside your specific area of functional expertise at the most senior level, help to influence and make really important decisions, and shape just what sort of company you want to be part of.

But with such power comes responsibility.

DUTIES OF A DIRECTOR

Although Company Law is often changing, the essence of a Company Director's 'fiduciary responsibility' towards their company still prevails.

It may seem obvious, but directors run the company on behalf of shareholders, 'in trust'. These are their 'fiduciary duties'. Shareholders get their say at General Meetings, whether Annual or Extraordinary, but between such Meetings, Directors are generally empowered to run the business. The few exceptions may include long-term service contracts, substantial property transactions or similar, significant loans and payments for loss of office (if any).

Meanwhile, Directors (whether Executive or Non-Executive) are responsible for determining and executing detailed strategic objectives and policies, appointing senior management, monitoring and accounting for progress, ensuring the company complies with it legal obligations and communicating to shareholders. As such, <u>every</u> director is required to know what is going on in the business – and to find out if they do not. There can be no role for 'junior directors' (or 'less-senior' ones) who can be fobbed-off by suggestions that key operational details of the company are 'none of their business'!

In practice, some tact and judgement may be required here, especially for new directors:

- first, to get up to speed outside board meetings with their MD or Chairman privately with a full briefing, so as not to slow board matters down;

- second, probably to ask initial questions privately and tactfully with any relevant board colleagues, especially any potentially departmentally-sensitive ones, if only to get the whole picture first before making them a full-blown board-issue;
- third, not to be defensive in having other colleagues ask you such questions!

However, never be frightened of asking good questions – that is your role! Don't forget, all directors have a 'fiduciary responsibility' to:

- Show the highest loyalty to the company and its wider interests;
- Act in good faith, honestly and diligently;
- Balance both the long and short term interests of the company;
- 'Have the attributes of Trustees as regards company property', such as cash, tangible assets, intellectual property, trade-secrets, know-how, etc;
- Not to defame the company (for example, when in dispute);
- Declare any possible conflicts of interest.

These duties fall into a number of more detailed, key categories.

a) Diligence and Accountability:
As a director, you are expected to have and to exercise:
- the general knowledge, skill and experience that may be reasonably expected of any person carrying out that function;
- and the general knowledge, skill and experience which that you may have personally.

Along with the rest of your board, you are also required to ensure:
- the fullest communication with shareholders as appropriate to the company's identification with their interests: including business vulnerabilities, risks and opportunities; appropriate monitoring procedures, the timely reporting of management performance against agreed objectives and corrective actions as necessary;
- compliance with all legal obligations and the disclosure of information with the appropriate level of transparency concerning the company's business.

If you ever think something is wrong, incomplete or unsubstantiated within your business, you have a duty to enquire further and act accordingly.

b) Whose interests?
You may be surprised how many categories a board of directors has a legal duty of care for!

This clearly includes responsibilities for the company in its own right, and thus to its shareholders, but also its employees, customers, creditors, Government and the wider community. Most of these responsibilities are bound by law, with strict penalties – and ignorance of either the law or material matters affecting your business which you could reasonably be expected to have known about is no excuse!

These many responsibilities are generally blindingly obvious 'commonsense'. The only real difficulty usually arises when they may seem to be in opposition when taken together! That is when a Board most especially needs collegiate responsibility and the deepest ethical principles, and when individual directors must stand up for themselves and be counted if necessary. Fortunately such conflicts are very rare. But you need to know where you stand on such issues before they arise - afterwards is often too late! (Can I quote Rudi Giuliani here, ex Mayor of New York? *"Before you can be a leader, you need to know who you are and what you stand for."* Sound words!) If you are ever caught in such a dilemma, seek independent legal advice, early.

Finally, please note, as a director, your personal interests must always come *after* the company's? Your role as a director is not to fight *your* special interests in the company, but the company's!

c) Insolvency
This is probably every director's worst nightmare – put crudely, trading when you knew you couldn't pay your bills. All directors have a fiduciary duty "to mitigate the potential loss to their company's creditors when any ought reasonably to have known there was no reasonable prospect of the company avoiding insolvent liquidation".

So you have a duty to be kept informed of your current financial situation by someone you may be reasonably entitled to rely on; to be aware of key factors which might trigger insolvent liquidation and any changes that may affect these; and to take appropriate action. If ever in doubt, seek proper accountancy advice, early.

d) Strategy
Many new directors delight at the opportunity to get involved in determining business strategy – and *all* of your board have a duty to do so! This involves agreeing core business activities and goals; ensuring adequate resources; approving appropriate budgets for capital investment, sales, costs and cash flow; determining the likely risks and keeping these under review; and communicating your policies as appropriate.

You and your board also have a duty to develop appropriate succession and development plans, monitor staff remuneration and morale, consider disaster recovery plans and its environmental impact, to ensure an adequate management structure, and even recommend dividend policies.

e) Other matters?
Finally in this section (which cannot be a complete review of a Director's duties and is only a 'taster', but I hope helpful), do note the following in passing?

- Some duties of a Director will not cease after that director resigns. Examples might include exploiting an opportunity that came through their directorship, revealing 'trade secrets', or any other agreed restrictions such as in recruiting ex colleagues or soliciting existing clients, where this is not seen to be an unfair restraint of trade.)

- Companies may go further than their statutory duties in placing more onerous duties upon their directors. So be prepared!

- Boards are required to retain minutes of their transactions – which may then be open for inspection by any qualified third party with due cause. So don't ignore what your board may report in its minutes and be very willing to challenge them if you don't agree before signing them off!

DELEGATED COMMITTEES

The very word 'committee' may strike terror in the heart of any 'hands-on' director! Perhaps the very idea may suggest bureaucracy, wasted time and the absence of action? But in fact, delegated Board sub-committees have a very valuable role to play, in well-established companies most especially, even quite small ones. They may be to ensure proper, independent Corporate Governance, or they might be to spare Board meetings from becoming mired in operational detail when they might much more productively focus on longer-term strategy.

These delegated committees, sometimes specifically required in a company's Articles of Association, all necessarily report to the Board. As a board-member, you should be aware of them. They can typically be as follows:

i) Executive Committee(s)
If your board meetings are regularly clogged up with important but strictly tactical, detailed management issues, which stop your board from focussing on the vital strategic concerns facing your company, here is the solution!

An Executive Committee usually comprises a group of senior colleagues who will not all be directors (even though usually chaired by a director), to look at specific management issues 'off-line'. It offers a very helpful way to avoid wasting valuable board time while the necessary facts are gathered and detailed proposals formulated. It is also a great way of developing your next line of senior managers.

This committee's remit will most often cover the more routine, tactical operational reviews that do not belong properly belong in a more strategic board meeting as such, but they could also equally as well be a committee to discuss more specific activities before further board discussion, such as planning for new premises, HR policy updates, IT development, Health & safety concerns, Training needs analysis, Market research, PR plans or Environmental impact monitoring.

ii) Audit Committee
This is often a key committee, most especially where there are substantial external investors. Its role is to ensure the independence of any official audit and that appropriate diligence has been applied in preparing the accounts and all other financial matters.

It will almost always be chaired by the Chairman and otherwise comprise Non-Executive Directors, with the Finance Director in attendance. But even if you are not involved personally, this is a very powerful committee and you will need to know of its importance.

iii) Remuneration and/or Appointments Committee
This is another important committee, again usually attended by Non Executive Directors, most often chaired by the Chairman with the Managing Director in attendance. Its interest is in Board remuneration and appointments. Given the sensitivity of such matters, it can offer huge advantages in removing such matters from detailed 'board squabbles'!

NEXT?

Curiously, many directors do not seem to be fully aware of all these requirements, other than by 'osmosis' and creeping awareness with experience! Yet the above list of duties is not a 'pick-and-mix' menu of 'nice-to-haves' - and wouldn't you rather know in advance than find out later?

This article has so far been about 'what has to be done'. It says little about how to do it! So in Part 3 of this article, we shall explore some of the essential skills and qualities of a Director.

In writing this article, I gratefully acknowledge helpful information from the Institute of Directors, UK Training (who run nationwide seminars on 'The Impact of the Companies Act 2006' www.uktraining.info) and many other sources. However, I take no personal responsibility for any specific advice contained here and I warmly recommend you discuss any key points arising with your lawyers or accountants before taking further action.

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Author of several prize-winning business books and a frequent speaker to the Academy for Chief Executives, Vistage and a wide range of other professional organisations on business matters, Jeremy is a past founding Chairman of a management consultancy business, past Managing Director of a large international engineering company which was one of the first ever accredited to the Investor In People standard, and a Fellow of the Royal Society of Arts.

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