

## **Who Wants To be A Director?**

Whether you are at the apex of a multi-national corporation, or in a small start up company, you are equally subject to the law relating to directors.

The benefits and attractions of holding a directorship are obvious. You are at the top of an organization and part of the decision making process. You are able to see the big picture and exercise real control and can instigate changes. This can be rewarding both personally and potentially financially, but directors also have responsibilities as well as privileges.

The first is to the company itself. Very briefly, under the Companies Act 2006, a director has a duty to promote the success of the company and to exercise reasonable care, skill and diligence, while avoiding conflicts of interest and external influence.

These duties are owed to the company and are only enforceable by the company. Instances of a board of directors voting to bring an action against itself are not common, though actions by a new board of directors on behalf of the company against ex-directors are much more frequent. The removal from office of a director requires an ordinary resolution; usually 50% of shareholders. If you find yourself in a company where, for example, three directors are each also equal shareholders, being voted from the board could leave you worryingly exposed.

Even if your co-directors and a majority of the shareholders are satisfied, you could still face an action from any other shareholder on behalf of the company. Any shareholder can bring an action against a director for negligence, default, breach of duty or breach of trust. Such an action can predate that shareholder's membership and can be brought even after a director has retired from his position.

However the permission of the Court is needed for such an action. The court will consider a number of factors before reaching a decision to either allow, dismiss or put conditions on any such action.

What if the company goes into liquidation and ceases to trade?. The Insolvency Act 1986 gives powers to the Liquidator/Administrator to bring any action against the directors on behalf of the company as if it were still trading.

Additionally, the Liquidator/Administrator has wide powers to investigate all of the company's transactions, going back in some cases to two years before the insolvency, as their primary responsibility is to maximize returns for a company's creditors. Directors will be asked to personally contribute to assets to be distributed to the creditors, if they have carried on trading when they knew or should have known that the company was insolvent.

There are further hazards which a director needs to avoid and obligations with which they need to comply. For example, while a company is a separate legal entity, criminal liability can attach to Directors in various circumstances if they are found (in the language of the relevant statutes) to have acted "neglectfully" or have "connived" at the offending behavior.

Directors may also find themselves investigated and either prosecuted or fined by criminal or regulatory authorities over acts or omissions. Authorities such as the Companies Investigation Branch (CIB) of the Department for Business, have wide powers of investigation that they are not afraid to use.

Other statutory duties are also imposed on directors under legislation as diverse as the Financial Services and Markets Act 2000, the Health and Safety at Work Act 1974, the Environmental Protection Act 1999 and the Insolvency Act 1986 and needless to say directors can be prosecuted in their own right for criminal offences such as bribery, fraud, insider dealing and price fixing.

While the recent Corporate Manslaughter and Corporate Homicide Act of 2007 applies to companies and not to directors personally, directors can be found personally liable if their gross negligence causes death under a common law offence. If guilty the average sentence is 18 months to 2 years.

Most directors will be all too aware of the personal guarantees required by banks and similar institutions, which circumvent the principle that liability rests with the company not an individual (referred to as the corporate veil). A director will also become personally liable to a third party in certain specific circumstances and more generally if there is clear evidence of a course of dealings between the third party and the Director personally.

Clearly a directorship has many responsibilities, but with care, diligence, common sense and a certain amount of business acumen there is no reason why any director should fall foul of the law.

Being a director also has a number of advantages over being a sole trader or partner, where personal liability is the founding principle of the position.

Rapid, sound, commercially based legal advice is often the key to resolving any problems when they arise. Our firm, within its Regulatory and Commercial Law departments, has the experience and expertise to help.

Contact Christopher Burgon at [christopher.burgon@saunders.co.uk](mailto:christopher.burgon@saunders.co.uk) with any queries and assistance.

