

## Promoting the success of a company

### Dispute Resolution

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The changes to the duties of Directors introduced by the Companies Act 2006 ("the Act") have now been in place for some time. If you are a director of a company then you should be aware that you now have a duty to run your company in a way that you genuinely consider would be most likely to promote the "success" of the company for the benefit of its members (i.e. shareholders) as a whole.

This is a "new" duty which imposes a higher burden on directors than previously existed, and there is still some doubt as to how it will be policed by the Courts in practice.

The following will give you some guidance as to how to approach this duty:

#### To whom is the duty owed?

All duties are owed to the company not the shareholders. This means that only the company can take a claim against any director who is considered to be in breach of duty.

#### Is there anything that a shareholder can do if they feel that a director has been acting in breach of the duty?

The Act entitles shareholders to apply to the Court to be given permission to progress a claim in the name of the company against an offending director where the directors themselves refuse to take the claim. This is known as a "derivative claim" and its use is becoming more common.

#### What must directors do to satisfy the duty?

Directors must be able to show that they have considered the statutory factors that apply to the duty as well as any other factors which obviously arise from any action that is being proposed. The prevailing view is that this has to be proper consideration rather than just lip-service, and it is no excuse to argue that the company does not have the necessary financial resources to undertake a proper consideration of the relevant factors.

#### What should directors do to show compliance with the duty?

Directors should have a methodology in place to show evidence of compliance with the duty. There are a number of options available, ranging from doing nothing to fully recording how the statutory factors were considered for every single board decision in the minutes. Neither of these extremes is attractive for differing reasons. The best way to deal with the question of evidencing compliance will vary from company to company, but should include some record of consideration of the factors, either in the briefing notes to the board on important issues or by noting the minutes to reflect how the factors were considered by way of "headline" notes.

#### What are the consequences of not keeping evidence?

The duty is not directed specifically at keeping evidence. On that basis a lack of evidence will not, by itself, be evidence of breach. However, the onus will be on a director to establish compliance with the duty and the absence of any evidence of consideration of the statutory factors will undoubtedly make this exercise more difficult.

#### In what circumstances is an allegation of breach most likely to be made?

The most likely situation in which an allegation of breach might be made against an individual director, or the board as a collective, is in the case of a disenchanted shareholder through a derivative action. Where the directors have been diligent in collecting evidence of compliance with the duty, ironically there is a risk that such a shareholder might rely on this evidence to substantiate such a claim. However, in our view this risk does not outweigh the risks associated with not keeping appropriate evidence of compliance and should not dissuade directors from doing so.

### Are there any other circumstances in which an allegation of breach might be made?

The other circumstances in which an assertion of breach may be made are most likely to be in connection with the insolvency of the company, when the actions of the directors in the lead up to the insolvency will be scrutinised by an Insolvency Practitioner, and also in relation to Director Disqualification proceedings. Directors would be well advised, in both of these situations, to have clear evidence of compliance with the duty so as to avoid action being taken against them on a personal level.

### What should I do if I am unsure as to how the duty will operate in relation to my particular company?

We would certainly advise that advice be sought so that any advice obtained can be used to evidence the fact that proper consideration was given as to the requirements of the duty should any action be taken involving an assertion of breach. Each company's circumstances will be different and will require a specific level of response to the requirements of the duty. If you are in any doubt then the best position is to take advice without delay.

If we can assist in relation to any issue relating to directors duties then please contact any member of the Dispute Resolution team for a no obligation discussion.