

Directors' duties and liabilities: Other duties, liabilities for breach and general guidance

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The general statutory duties discussed in [part 2](#) of this series of articles and the conflict related duties discussed in [part 3](#) are only a small part of the overall picture of responsibility.

Some examples of the other duties directors are subject to include:

- Other Companies Act duties – e.g. delivering accounts on time, Companies House filing obligations and maintenance of the company statutory registers
- Duties of listed company directors under the Listing Rules and Disclosure Guidance
- Uncodified duties (those not found in statute), for example, a duty to consider creditors in times of threatened insolvency.

It is imperative that directors are well apprised of their obligations under not just the [Companies Act 2006](#) (the CA 2006), but more broadly arising from legislation such as the Insolvency Act 1986, the company's Articles of Association (and any Shareholders' Agreement which may seek to indirectly regulate the conduct of directors), any relevant rules applying to listed companies, uncodified duties not found in statute, health and safety, as well as sector or industry specific considerations.

Other risks and obligations

Some other risks and obligations that directors would be well advised to be mindful of are as follows:

- **Financial reporting** - directors should be aware of their obligation to deliver annual accounts and what those accounts should contain
- **Financial services liabilities** - directors must also be aware of any obligations and possible liabilities under the Financial Services and Markets Act 2000 (and related financial crime regulations, see further below)
- **Health & safety offences** – for example corporate manslaughter. An organisation will be guilty of the offence if the way in which its activities are managed or organised causes a person's death, the person's death is the result of a gross breach of a relevant duty of care owed to that person, and the way in which senior management managed or organised the organisation's activities is a substantial element of the breach. Senior management will be subject to the common law offence of manslaughter by gross negligence and for breaches of Health and Safety laws. Directors should therefore take advice in respect of their company's health & safety operations to ensure they are appropriately assessing risk, putting in place mitigating measures and, importantly, keeping records of such actions taken
- **Corporate social responsibility** - directors are subject to ever increasing pressure to take a holistic view of this, and run the company in a way that not only enhances shareholder profits, but that the company does so in a way that is respectful of the communities and environment in which it operates
- **Money laundering, anti-bribery and corruption measures** - many of the laws applicable to this area put personal responsibility of the senior managers in a business to ensure robust policies and procedures are in place, and there have been several reports of senior figures being criminally prosecuted for failing to take appropriate steps to prevent money laundering, bribery and corruption.

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Consequences of breach of directors' duties

The CA 2006 does not contain any detailed provisions on the consequences of a breach of directors' general duties and so in the event of a breach of duty, it is necessary to turn to the common law rules and equitable principles. The general duties (except the duty to exercise reasonable care, skill and diligence, which is not considered to be a fiduciary duty) are enforceable in the same way as any other fiduciary duty owed to a company by its directors. The consequences of a breach of fiduciary duties may, amongst other things, include:

- Claims for damages or compensation where the company has suffered loss
- Restoration of the company's property
- An account of profits made by the director
- Rescission of a contract
- Termination of a service contract (meaning possible dismissal and/or removal as a director), if the relevant clause for breach of duty is in the contract
- A claim against the company from a minority shareholder.

Protection from liability in the event of a breach

It may be possible for a director to be protected from liability in the event of a breach of their general duties. Protections include:

- Directors and officers liability insurance
- Obtaining an indemnity from the company
- Ratification by the shareholders of the company
- Relief from the Court for the breach of duty.

Minimising risks from breach of duties - practical guidance

Below are some tips and best practices to ensure that directors' duties are exercised in a lawful manner, in order to mitigate the risk of a shareholder claim:

- **Communication** – ensuring both the board of directors and any functions or individuals exercising delegated powers are communicating decisions clearly both within the organisation, but also with shareholders
- **Duties** – it is important to ensure that meetings are minuted, and that when directors' duties are considered, or declarations made (as required by the CA 2006), these are properly recorded
- **Shareholders' Agreement and/or bespoke Articles of Association** – these can properly and clearly record shareholders' rights in relation to the company as well as their obligations, and be pivotal in preventing shareholder disputes
- **Dispute Resolution Strategy** – to handle claims that may be brought by minority shareholders including, where possible, dealing with such claims by way of Alternative Dispute Resolution (ADR). Minority shareholder claims are often particularly suited to ADR either by

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way of informal without prejudice negotiation or a formal mediation. The right course may also often be for the majority shareholder to purchase the minority shareholder's shares

- **Insurance** - directors and officers liability insurance can provide protection against liability for a breach of duty, and you should speak to a specialist to make sure your cover provides protection against liability for a breach of duty and all forms of derivative actions.

If you have any questions about the topics raised in this article, please get in touch info@ts-p.co.uk.