

Directors - are you interested?

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In the case of Stock v Pantrust International and Others (2016), the Royal Court of Jersey considered exercising its powers under Article 76 of the Companies (Jersey) Law 1991, as amended (the Law) to set aside a transaction on the ground of non-disclosure of a director's conflicting interest contrary to the Law.

The case is a reminder for companies and directors of the duty of a director to disclose interests, the disclosure requirements under the Law, and to consider voting and quorum requirements in relation to a transaction.

Duty to disclose interests

The Law imposes upon a director a statutory duty to disclose to the company the **nature and extent** of his direct or indirect interest in any transaction entered into, or proposed to be entered into, by the company which materially conflicts with the company's interests. This disclosure must be made as soon as practicable after a director becomes aware of the circumstances giving rise to his duty to make such disclosure, and before voting on a matter.

The Law does not preclude a director from having an interest in a transaction with the company, so long as the director complies with the duty to disclose.

Consequences of breach

If a director fails to disclose an interest under the Law, the company or a shareholder may apply to the Jersey courts for an order setting aside the transaction concerned and directing that the director account to the company for any resulting profit or gain.

The Law provides a defence to a director where the transaction is approved by special resolution of the shareholders and the nature and extent of the director's interest in the transaction is disclosed in reasonable detail in a notice to the shareholders at which the resolution is passed. In such circumstances, a transaction is not voidable and a director is not accountable for any profit

or gain realised.

In addition, a transaction will not be set aside by the Jersey courts under Article 76 of the Law unless the Jersey courts are satisfied that:

- i. the interests of third parties who have acted in good faith under the transaction would not as a result be unfairly prejudiced; and
- ii. the transaction was not reasonable and fair in the interests of the company at the time it was entered into.

Does the duty to disclose interests apply to me?

Under the Law a director is defined as “a person occupying the position of director, by whatever name called”. Therefore, in addition to formally appointed directors, alternate directors, shadow directors and other persons occupying the position of directors (although not formally appointed as such) are subject to directors’ duties and may be treated by the Jersey courts as a director.

Implications

In practice, the articles of association of a company usually set out provisions relating to a company’s internal management. The articles of association may also impose further obligations upon directors to disclose relevant interests, and may or may not allow a director who has disclosed his interest to vote and be counted in the quorum on the relevant board resolutions considering the transaction.

The recent case before the Jersey courts highlights the importance of always reviewing a company’s articles of association as a starting point to analyse the voting and quorum requirements in relation to a transaction and compliance by a director with his/her duties to disclose interests required under the Law.

As a matter of good corporate governance, minutes of board meetings or board resolutions should adequately record the disclosure of interests of a director in relation to a transaction, along with any consequences on voting and quorum requirements of a director. Rather than relying on generic statements, a director must consider his/her interests on every transaction and board minutes or resolutions should include sufficient detail of such interests so that disclosure is clear.

The Law requires disclosure only where a director is aware of having interests which “to a material extent” conflict or may conflict with the interests of the company. Materiality is not defined in the Law and so the prudent course of action for any director is to ensure that appropriate disclosure is made even where he/she considers the nature of the interest to be insignificant.

Whilst board minutes or resolutions serve as a record, they do not, of themselves, discharge the

duty of a director to disclose the nature and extent of any conflicting interests under the Law.

For more information on duties of directors please contact us directly.

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