

Directors' duties and corporate governance in Guernsey

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Directors' duties are the duties owed by executive and non-executive directors to the companies to which they are appointed and are personal to each director. By comparison, corporate governance is the collection of principles and practices surrounding how a company is operated, and is the collective responsibility of the board of directors as a whole rather than each individual personally.

Directors duties

Directors duties in Guernsey arise from customary law, statute and contractual obligations but are not codified under the Companies (Guernsey) Law 2008, as amended (the **Law**) and instead are drawn from the English common law duties in place prior to the introduction of the United Kingdom Companies Act 2006.

This has been confirmed in multiple cases in the Royal Court of Guernsey, including the well-publicised *Carlyle Capital Corporation Limited (in Liquidation) and others v Conway and others (Guernsey Judgment 38/2017)* where Ogier's dispute resolution team successfully defended an action against executive and non-executive directors of Carlyle Capital Corporation following its collapse. A copy of the Ogier briefing on Carlyle is available [here](#).

The duties of company directors in Guernsey are owed primarily to the relevant company and arise from:

1) customary laws, statutory laws and contractual obligations. The customary law of Guernsey with respect to directors' duties is essentially imported from the English common law (as it stood prior to the incorporation of the English common law duties into English statute);

2) the Law and the ordinances, statutory instruments and regulations made pursuant to it. These impose some additional duties on directors (although as explained above, this is not exhaustive); and

3) the memorandum and articles of incorporation of a company. In most cases these will set out the particular rights and obligations of its directors regarding the management of the business and affairs of that company.

Generally, it is accepted that there are four fiduciary duties owed by directors to the companies for which they are appointed and one "competence-based" duty. These are:

1. to act *bona fide* in the best interests of the company;
2. to act for proper purposes/ not to act for collateral or improper purposes;
3. to exercise independent judgment;
4. to avoid conflicts of interest; and
5. to exercise reasonable skill and care.

These duties are owed by each of the directors and are personal to each of them. They are owed to the company for its members as a whole and in particular not to any wider group entities or specific members (for example, where a specific member may have a right to appoint a director).

The only time that directors may owe duties to someone, other than the company, are when the company begins to enter financial difficulties. As set out in the *Carlyle* judgment at paragraphs 432 to 435, when a company gets into serious financial difficulty the duty to act in the best interests of the company is extended to include a duty to consider and act with proper regard for the interests of its creditors.

This "shift" in directors' duties is likely to be subtle initially, as it is generally in the best interests of a company to have sufficient liquid assets to be able to pay its creditors in a timely manner. However, where financial difficulties continue and the interests of a company's members and creditors begin to diverge, this change in priorities should be kept in the forefront of directors' minds. In particular, the solvency position of the company should be kept under regular review to prevent a breach of the provisions of the Law relating to wrongful or fraudulent trading (although this is beyond the scope of this article).

Corporate governance

Corporate governance for Guernsey companies can be found in a number of sources, including both internal sources (such as internal policies and procedures, mission statements, or performance measurement systems) and external sources (such as codes of practice, guidance notes, or the Law itself). The directors of a company are the driving force in influencing its corporate governance and a failure by the directors to enforce strong corporate governance could expose the directors to allegations of failing to comply with the duties which they owe to the company.

One of the most significant sources of corporate governance for many Guernsey companies is the GFSC's code of corporate governance for the finance sector, which is supplemented by a series of codes of practice applicable to specific industries (for example, company directors, corporate service providers and trust service providers).

The code of corporate governance for the finance sector is structured around eight key principles and then provides additional guidance on how to meet these principles. They are:

1. **the board** – companies should be headed by an effective board of directors which is responsible for governance;
2. **directors** – directors should take collective responsibility for directing and supervising the affairs of the business;
3. **business conduct and ethics** – all directors should maintain good standards of business conduct, integrity and ethical behaviour and should operate with due care and diligence and at all times act honestly and openly;
4. **accountability** – the board should have formal and transparent arrangements in place for presenting a balanced and understandable assessment of the company's position and prospects and for considering how they apply financial reporting and internal control principles;
5. **risk management** – the board should provide suitable oversight of risk management and maintain a sound system of risk measurement and control;
6. **disclosure and reporting** – the board should ensure the timely and balanced disclosure to shareholders and/or to regulators of all material matters concerning the company;
7. **remuneration** – the board should ensure remuneration arrangements are structured fairly and responsibly and that remuneration policies are consistent with effective risk management; and
8. **shareholder relations** – the board should ensure that satisfactory communication takes place with shareholders and is based on a mutual understanding of needs, objectives and concerns.

In addition, while the GFSC's Code of Practice – Company Directors only applies to certain

persons licensed under The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000, it is generally considered that the principles should be adopted by all Guernsey directors of companies as a matter of good corporate governance.

Finally, it is important for directors to remain aware of the industry in which they operate and of any additional guidance or codes of conduct as they are published. For example, the Association of Investment Companies has also published a code of corporate governance (which has been endorsed by the GFSC) and for entities listed on The International Stock Exchange, the Listing Rules contain a number of principles applicable to directors of issuers. A copy of the Ogier briefing on changes to the AIC Code is [here](#).

Should you have any questions or require specific advice on your circumstances, please do not hesitate to get in contact with the authors or your usual contacts at Ogier.

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