Directors and their general duties

Inside

Who is a director?
What are the general duties of a director?
Are there any special requirements for particular transactions with directors?
Some specific duties in relation to the company's accounts
Other potential liabilities
Remedies for breach
How can a director obtain relief from liability?
Is there anything else?

English law imposes high standards of behaviour on company directors, and they must put the interests of the company before their own. Their duties are derived from both statute and case law. In addition to general duties, there are extensive specific duties.

1 Who is a director?

The Companies Act 2006 (CA2006) defines a "director" to include any person occupying the position of director, by whatever name called (section 250 CA2006).

A person who is formally appointed as a director will be a director. In addition, someone who is acting as a director without having been formally appointed (called a de facto director) will also, generally, come within this definition.

Are there any qualifications for being a director?

Currently both companies and individuals can be directors.

There are very few circumstances in which a person may not be appointed as a director:

- the person must not have been disqualified by a court from acting as a company director (unless a court has given them permission in relation to a particular company);
- the person must not be an undischarged bankrupt (except with leave of the court);
- the person must not be under the age of 16;
- a company must have at least one director who is a natural person; and
- a company's articles may set requirements. For example, a director may be required to hold a certain number of the company's shares.

The Government intends to introduce a prohibition on appointing corporate directors.

To date, there have been three consultations in relation to the exceptions to the prohibition on corporate directors. In the most recent consultation (which was launched in December 2020), the Government indicated that it intends to bring forward regulations that create a principles-based exception alongside the commencement of the prohibition on corporate directors. The principles envisaged as a starting point are that a company can be appointed as a director if both all of its directors, in turn, are natural persons; and those persons are, prior to the corporate director appointment, subject to the Companies House identity verification process. It is also proposed that UK and overseas entities are subject to the same requirements. The most recent consultation sought views on these proposals and closed in February 2021.

There is no date set for publication of the Government's response to the consultation nor the implementation of the prohibition; but the Government has indicated that it will be sensitive to the additional pressures that companies have faced as a result of the Covid-19 pandemic.

What are the differences between an executive director and a non-executive director?

Executive directors are involved in the day to day management of the company's business. They are also employees of the company, usually working full time. They will have additional rights and duties as employees and under their employment contract with the company.

Non-executive directors are not involved in the day to day management of the company. They may have particular skills to contribute, perhaps in relation to business strategy or financial matters. They often offer an independent viewpoint on matters discussed at board level and oversee the overall effectiveness of the

executive directors' management of the company. They would be engaged, usually on a part time basis, under a services agreement, which would give them additional rights and duties, but not as an employee.

The law does not make any distinction between executive and non-executive directors in relation to their duties as a director. Therefore, it is not the case that the legal duties of non-executive directors are less onerous than those of executive directors. However, in relation to the duty to exercise reasonable care, skill and diligence (see below), the law does take into account any particular expertise that a certain director has.

What is a nominee director?

Often, investors, holding companies or lenders appoint nominee directors to their investee, subsidiary or borrower, as the case may be. The nominee director will still owe all the duties as a director of the company, notwithstanding that the nominee director considers that duties are also owed (perhaps primarily) to the nominee director's appointor. The nominee's position is often made more difficult if they are also an employee and/or director of, and thus also owes additional duties to, the appointor. These difficulties may not be insurmountable. See the section below on a director's duty to avoid a conflict of interest.

What is a shadow director and do they have the same duties as directors?

A "**shadow director**" is a person in accordance with whose directions or instructions the directors of the company are accustomed to act. However, a person is not to be regarded as a shadow director by reason only that the directors act on advice given by the person in a professional capacity. In general, a holding company will not be a shadow director of its subsidiary (section 251 CA2006).

The CA2006 extends some, but not all, of its requirements in relation to directors to shadow directors. It also provides (not very helpfully) that "the general duties apply to a shadow director … where and to the extent that they are capable of so applying" (section 170(5) CA2006).

2 What are the general duties of a director?

The CA2006 sets out the principal general duties of a director. These statutory duties are cumulative, meaning that they must all be addressed separately. Apart from the duty of care, skill and diligence, all these general duties are duties of fidelity, honesty and loyalty, similar to the duties owed by trustees or agents, who must put the company's interests before their own.

Who are the duties owed to?

Directors owe their general duties to the company, whether those duties come under statute (section 170 CA2006) or case law. This means that only the company will be able to enforce them. In certain circumstances, a shareholder may be able to bring a derivative claim on behalf of the company to enforce those duties (sections 260 to 264 CA2006).

What are the director's statutory general duties?

A director has the statutory duties to:

- act within powers (section 171);
- promote the success of the company (section 172);
- exercise independent judgment (section 173);
- exercise reasonable care, skill and diligence (section 174);
- avoid conflicts of interest (section 175);
- not accept benefits from third parties (section 176); and
- declare their interest in a proposed or existing transaction or arrangement with the company (sections 177 and 182).

We explain these duties in a little more detail below.

Duty to act within powers (section 171 CA2006)

Directors are under a duty to act in accordance with the company's constitution and to exercise their powers only for the purposes for which they were conferred.

"**Constitution**" for the purposes of these general duties has a wide meaning. It means the company's articles of association and most shareholder and director resolutions (section 257 CA2006).

Duty to promote the success of the company (section 172 CA2006)

This duty has two elements:

- a director must act in the way the director considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole; and
- in doing so, the director must have regard (amongst other matters) to the following six factors:
    - the likely consequences of any decision in the long term;
    - the interests of the company's employees;
    - the need to foster the company's business relationships with suppliers, customers and others;
    - the impact of the company's operations on the community and the environment;
    - the desirability of the company maintaining a reputation for high standards of business conduct; and
    - the need to act fairly as between members of the company.

As HM Government states in its explanatory notes to CA2006 "The decision as to what will promote the success of the company, and what constitutes such success, is one for the directors' good faith judgment. This ensures that business decisions on, for example, strategy and tactics are for the directors, and not subject to decision by the courts, subject to good faith."

A final point to note is that, if the company is insolvent or threatened by insolvency, the directors would be required to consider, or act in, the interests of creditors, but the duty is still owed to the company (section 172(3) CA2006).

Duty to exercise independent judgment (section 173 CA2006)

A director may consider the advice of others. In some cases, not taking advice may be a breach of duty. Ultimately a director must exercise their own judgment in making any decision. However, this duty is not infringed by the director acting in accordance with an agreement, duly entered into by the company, that restricts the future exercise of discretion by its directors, or in a manner authorised by the company's constitution.

A nominee director, for example, will need to make sure that they are not swayed by the interests of their appointor in any decision made as director of the company; otherwise the director could be in breach of this duty.

The directors can delegate their functions, as long as they do so in accordance with the company's constitution (section 257 CA2006).

Duty to exercise reasonable care, skill and diligence (section 174 CA2006)

A director must exercise the care, skill and diligence that would be exercised by a reasonably diligent person with both:

- the general knowledge, skill and experience that may reasonably be expected of a person in the same position as the director; and

- the director's own general knowledge, skill and experience.

This means that, if a director has a particular skill (for example, if the director is a qualified accountant), the director will be expected to exercise that skill, as well as the level of skill expected of a director.

As long as a director observes this standard of care, the director should be entitled to trust others in positions of responsibility (for example co-directors) unless there is a reason to distrust them. However, where the director has power to delegate, and has delegated, functions to others, the director still has a duty to supervise those others in the performance of the delegated functions.

Duty to avoid conflicts of interest (section 175 CA2006)

A director must avoid a situation in which they have, or can have, a direct or indirect interest (or duty) that conflicts, or possibly may conflict, with the interests of the company. This includes situations where any property, information or opportunity is exploited, even if the company itself could not have taken, or chooses not to take, advantage of it.

This duty does not apply to a conflict arising in relation to a transaction or arrangement with the company. This means that if the director has declared an interest in a transaction with the company, under the duty to declare an interest described below, the director would not usually need to be further concerned with this duty to avoid a conflict situation in relation to that transaction.

In addition, the director is not in breach of this duty if a conflict of interest is unlikely to arise from the situation or if the matter has been authorised in advance. The CA2006 permits authorisation by the other directors (that is, by board resolution) as long as neither the director in question nor any other director who is interested in the matter votes on that authorising resolution.

In the case of a private company, those independent directors will be able to authorise conflict situations if the company's articles do not prohibit them from doing so and, if the company was incorporated before 1 October 2008, if its shareholders have passed a resolution giving the directors the power to authorise conflicts.

The directors of a public company will be able to authorise such conflict situations if the company's articles specifically permit them to do so.

If the directors do not have the power to authorise a conflict, it should still be possible for the conflict to be authorised by shareholders' resolution after full disclosure of the details (section 180(4) CA2006). Any interested director who is also a shareholder would be able to vote on such a shareholders' authorisation resolution. This is to be contrasted with ratification by shareholders' resolution after the director's breach, where the relevant director, if also a shareholder, and any other shareholder connected with the director, is prohibited from voting on the ratification resolution (section 239 CA2006).

In addition, it is possible for a company's articles (such as regulation 85 of the 1985 Table A) to permit certain conflict situations, usually with the requirement for the relevant director to make full disclosure to the board (section 180(4) CA2006).

A director may have an indirect conflict of interest through someone connected with the director. Therefore, a director should inform their connected persons (described below) of that risk and ask their connected persons to keep the director suitably informed. In addition, a director should remain aware of their own outside interests and regularly review the extent to which they may have a conflict.

Duty not to accept benefits from third parties (section 176 CA2006)

A director must not accept a benefit from a third party conferred by reason of them either being a director or doing (or not doing) anything as a director. A “third party” is, essentially, any person other than the company or another member of its group.

The duty is not infringed if a conflict of interest is unlikely to arise from the benefit, such as moderate corporate entertainment.

Such a third party benefit could be a commission paid to the director personally in the course of the director negotiating a business transaction on the company's behalf. Or it could be profit arising from the director taking up a business opportunity in a personal capacity that had arisen in the director's capacity as a director of the company.

Unlike the above duty to avoid a conflict situation, the other directors are not able to authorise such a third party benefit; so prior shareholders' approval after full disclosure (or possibly a ratification resolution of the shareholders – see below) will be needed, or the company's articles (such as regulation 85 of the 1985 Table A) could authorise it, subject to disclosure to the board.

If the director is in breach of this duty, and has not obtained shareholders' authorisation, at the least the director will be liable to account to the company for the value of the benefit, even if the company could not have received the benefit itself.

A company may wish to consider introducing policies and guidance for its directors under which they would have to disclose to the board in the first instance any potential or actual significant benefit that they accept, or are considering accepting, from a third party. Such policies would sit alongside the company's anti-bribery policy.

Duty to declare interest in proposed or existing transaction or arrangement with the company (sections 177 and 182 CA2006)

A director, who is in any way interested in a proposed or existing transaction or arrangement with the company, must declare the nature and extent of that interest to the other directors.

These duties apply to an indirect, as well as a direct, interest. So, if a director's spouse or other connected person (described below) is to enter into a transaction with the company, the director must disclose that interest.

The declaration can be made either at a meeting or by notice to the directors. If it is in the form of a general notice, it should be presented to the next directors' meeting (section 185 CA2006).

There is no need for the director to declare an interest if:

- it is unlikely that a conflict will arise; or
- the other directors are already aware, or ought reasonably to be aware, of it; or
- the director is not aware of it. It should be noted in that regard however that a director will be deemed to be aware of such an interest, if the director ought reasonably to be aware of it.

A director does not need to disclose an interest in an existing transaction if the director has already disclosed an interest in the transaction when it was proposed; but the director must make a further disclosure, in relation to either a proposed or existing transaction, if the first disclosure becomes inaccurate or incomplete.

The declaration of an interest in a proposed transaction or arrangement must be made before the transaction or arrangement is entered into. The declaration of a director's interest in an existing transaction must be made as soon as reasonably practicable and it is a criminal offence if the required disclosure is not made. There is no criminal penalty for non-disclosure in relation to a proposed transaction.

In relation to a proposed, but not existing, transaction, a director will not need to obtain shareholders' approval, as long as the required disclosure is made. However, shareholders' approval will be required if the company's articles require it (section 180(1) CA2006) and/or if the transaction comes within the special provisions requiring shareholders' approval (described below) and/or if the proposed transaction is with a sole director (see the next paragraph).

These disclosure duties do not apply to a sole director as the requirement is disclosure to the "other directors". This means that shareholders' approval (or a suitable provision in the company's articles) will be required for a proposed transaction with a sole director.

Can a director take part in board meetings relating to a matter in which they have a conflict of interest?

A company's articles should specify whether or not a director may participate in a board decision relating to a matter in which the director has a material interest and which conflicts or may conflict with the interests of the company. The 1985 Table A and the current default articles (the Model Articles) prohibit a director from voting in those circumstances (with some narrow exceptions). Many private companies exclude these default provisions in their articles of association, and instead include provisions which allow directors to vote on matters with respect to which they have a conflict, provided they have disclosed their interest or conflict.

This question is separate from, although linked to, the above director's duties to avoid conflicts, not to accept benefits from third parties, to declare interests in transactions with the company and the special requirements for particular transactions explained below.

3 Are there any special requirements for particular transactions with directors?

There are specific statutory requirements for shareholders' approval, by ordinary resolution, before a company can enter into the following four types of transaction with a director, or in some cases, a person connected with the director. These provisions are intended to avoid an unauthorised conflict of interest arising.

Generally, the director must comply with both the general duties, described above, and these specific requirements. However, if shareholders' approval is given, or if it is not required for one of these transactions because an exception applies, then the director does not also have to address the statutory general duties to avoid conflicts and not to accept benefits from third parties (section 180(2)).

- **Long-term service contracts (sections 188 and 189 CA2006)**

  A directors' service contract having a fixed term of more than two years must first be approved by shareholders, after a memorandum setting out the proposed contract has been made available to them. Otherwise, the contract is terminable by the company on reasonable notice.

- **Substantial property transactions (sections 190 to 196 CA2006)**

  A company may not enter into an arrangement under which a director, or a person connected with the director, buys from or sells to the company a non-cash asset with a value in excess of:

  - 10% of the company's net asset value and more than £5,000; or
  - £100,000

  unless shareholders' approval has first been obtained in advance, or the arrangement is conditional on shareholders' approval.

  If the required shareholders' approval is not obtained in advance, the arrangement is voidable at the instance of the company, unless within a reasonable period the contravention is subsequently affirmed (ratified) by shareholders' resolution. Commentaries suggest that this affirmation should relieve the director from the monetary liabilities to account to the company for any gain that the director has made and to indemnify the company for any loss.

- **Loans and credit transactions (sections 197 to 214 CA2006)**

  These rules essentially require a company to obtain shareholders' approval before it makes, or guarantees, a loan to a director or, in the case of a public company, to a person connected with a director. A memorandum setting out details of the transaction must be made available to shareholders.

  There are additional rules that apply only to public companies (or groups which include public companies). These catch quasi-loans and credit transactions. A quasi-loan is where a company agrees to pay money on a director's behalf, or to reimburse another person for money spent on the

director's behalf, such that the director becomes indebted to the company as a result. A credit transaction is one where the company supplies goods or land to a director on deferred payment terms.

Shareholders' approval is not required for loans to a director:

- of up to £10,000; or
- to cover company business expenditure of up to £50,000; or
- to cover expenditure in defence against legal proceedings pending a finding of guilt or liability on the part of the director; or
- to cover expenditure in defending against an investigation or action by a regulatory authority, in connection with any alleged negligence, default, breach of duty or breach of trust by the director in relation to the company.

If the required shareholders' approval is not obtained, the transaction is voidable at the instance of the company, unless within a reasonable period the contravention is subsequently affirmed (ratified) by shareholders' resolution. Commentaries suggest that this affirmation should relieve the director from the monetary liabilities to account to the company for any gain that the director has made and to indemnify the company for any loss.

- **Payments for loss of office (sections 215 to 222 CA2006)**

A company may not make a payment (including a non-cash benefit) to a director, or a person connected with the director, as compensation for loss of office or employment or in connection with the director’s retirement, unless the payment has been approved by the shareholders. A memorandum setting out detailed particulars must be made available to shareholders.

This rule also applies to such a payment, by any person, not just the company, for loss of office in connection with either the transfer of the whole or any part of the business or assets of the company or the transfer of shares in the company resulting from a takeover bid. For example, the rule would apply to a director receiving more for their shares than other sellers in a share sale. In that event, the bidder (if already a shareholder) is not entitled to vote on the resolution approving the payment (sections 216(2) and 219(4) CA2006).

Payments in discharge of certain prior legal obligations or in settling claims arising from termination of employment (under a settlement agreement, for example) or by way of pension are not caught by this rule, and nor is a payment of up to £200.

Contravention of this rule will result in the director concerned being liable to return any unauthorised payments

It is important not to overlook this rule when preparing for terminations, company business sales or takeover bids. In general, if the departure arrangements involve a director receiving any benefit to which they are not legally entitled, it will need shareholders' approval.

Who are persons “connected” with a director?

These include:

- members of the director’s family: a spouse or civil partner, parents, children or step-children, any other person with whom they live as partner in an enduring family relationship and the children or stepchildren, under 18, of that other person;
- a body corporate in which the director and other persons connected with the director together are interested in 20% of the equity shares or votes in that body corporate;
- a trustee of a trust the beneficiaries of which include the director or the director’s connected persons;
- a partner of the director or the director’s connected persons; and

- a firm that is a legal person and in which the director or certain of the director's connected persons is a partner,

  (section 252 CA2006).

4 Some specific duties in relation to the company's accounts

The CA2006 requires a company to keep adequate accounting records and imposes criminal liability on the company's officers (which includes the directors) for failure to comply (sections 386 and 387 CA2006).

The directors must not approve the company's annual accounts unless they are satisfied that those accounts give a true and fair view of the assets, liabilities, financial position and profit or loss of the company and, in the case of group accounts, of the undertakings included in the consolidation as a whole, so far as concerns the company's shareholders (section 393 CA2006).

If the accounts are audited, the directors' report in the annual accounts must include a statement as to disclosure to the auditors from each of the directors that:

- so far as the directors are aware, there is no relevant audit information of which the company's auditors are unaware; and
- the directors have taken all reasonable steps to ascertain any relevant audit information and to ensure that the company's auditors are aware of that information.

If the statement as to disclosure to the auditors is false, a director who knew that, or was reckless as to whether, it was false and failed to take reasonable steps to prevent the report from being approved, is guilty of an offence (section 418 CA2006).

Whether or not the accounts are audited, a director may be made liable to compensate the company for any loss suffered by it as a result of any untrue or misleading statement in, or omission from, a directors' report, if the director knew, or was reckless as to whether, the statement was untrue or misleading, or knew the omission to be dishonest (section 463 CA2006).

It is the responsibility of the directors to send the company's annual accounts to Companies House, in the case of a private company, within 9 months after the end of the relevant accounting reference period. For public companies, that period is 6 months (sections 441, 442 and 451 CA2006).

5 Other potential liabilities

If a company fails to deliver to Companies House its annual confirmation statement by its due date, each director may be criminally liable unless they are able to show that all reasonable steps to avoid the offence were taken (sections 853A and 853L CA2006). The CA2006 imposes similar penalties on directors who allow the company to be in breach of its other Companies House filing obligations.

The company itself is also required to keep certain information and some of it is to be made available for inspection. An example of this is the company's obligation to maintain its register of shareholders (section 113 CA2006) and its register of people with significant control of the company (section 790M CA2006). Directors may be criminally liable for any default.

Persistent default by a director in relation to these provisions may result in disqualification from being a director (Company Directors Disqualification Act 1986).

Directors may be liable to penalties if the company does not comply with the requirements in relation trading disclosures, such as the company's name appearing on its place of business, and its name and other details

on its emails, other correspondence and website (regulation 28 The Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015).

A company is required to keep minutes of all proceedings at meetings of its directors (section 248 CA2006). Board minutes cannot normally be inspected by shareholders. However, they may be used as evidence in the event of an allegation of breach of directors' duties. Minutes should record the directors' consideration of an issue and the reasons for their decision.

Health and safety

A director may be criminally liable for breaches of health and safety legislation committed by the company if the offence was committed with the consent, connivance or neglect of the director. A court may also order a director's disqualification at its discretion with no further investigation or evidence.

6 Remedies for breach

We have indicated above some of the consequences of breach of the particular duties described in this guide.

In summary, if a director is in breach of any of their duties, the director may be personally liable to account to the company for any profit that the director has made or benefit that the director has received, or to pay compensation to the company for any loss suffered by it. A director may also be required to hand back to the company any of its property that has been misappropriated, and any contracts with the company and in which the director has failed to disclose an interest may not be enforceable against the company.

A breach of a specific statutory duty carries the penalties as set out in the legislation in question. Depending on the nature of the obligation, a fine, imprisonment or disqualification may be applicable.

7 How can a director obtain relief from liability?

Ratification

Ratification applies where the breach has already taken place. If capable of ratification, breach by a director of their duties may be ratified by a shareholders' resolution. However, neither the director nor any person connected with the director, if a shareholder, may vote on the resolution to ratify (section 239 CA2006).

This is not the same as shareholders' authorisation prior to a potential breach. So, this voting restriction on the director, or anyone connected with the director, does not apply to a shareholders' resolution authorising a potential breach beforehand, such as a resolution in relation to a director's conflict.

As to whether a breach is capable of ratification (or prior authorisation), this is a matter of case law, which is somewhat hazy on this point. However, it is fairly clear that a breach involving a director's dishonesty (or fraud) would not be ratifiable, nor would any breach that results in the company doing something unlawful or beyond its powers. In addition, the ratification resolution would be invalid if it was brought about by unfair or improper means or was illegal or fraudulent or oppressive towards those shareholders who opposed it.

Court's discretion

The court has discretion to relieve a director from liability for negligence, default, breach of duty or breach of trust if it considers that the director has acted honestly and reasonably, and that, having regard to all the circumstances of the case, the director ought fairly to be excused (section 1157 CA2006).

There are few reported cases dealing with this provision. In one case, the director had transferred the assets of a company (that subsequently went into liquidation) to another company that the director controlled, and which later became insolvent, for a deferred consideration. Although the judge held that the director was not in breach of their duties, the judge decided that, even if the director had been in breach, relief under section 1157 would have been granted. The director had acted honestly and reasonably, and on advice, in entering

into the transaction and the liquidator had adopted the contract. The case is **Re Pro4Sport Ltd (in liquidation), Hedger v Adams** *[2015] EWHC 2540*.

Indemnity or insurance

A director cannot be exempted from liability for any negligence, default, breach of duty or breach of trust by the director in relation to the company (section 232(1) CA2006).

Generally, a company cannot indemnify any of its, or its associated companies', directors from any such liability in relation to the company of which the person is a director (section 232(2) CA2006); except that:

- a company may purchase insurance against any such liability for any of its directors, or its associated companies' directors (section 233 CA2006);
- a company may indemnify any of its directors against liability incurred by the director to a third party, which is not either the company or an associated company (section 234 CA2006 – a qualifying third party indemnity provision – QTPIP), as long as the company is not indemnifying the director against:
  - a criminal fine or regulatory penalty; or
  - any liability: in defending criminal proceedings in which the director is convicted; in defending civil proceedings, brought by the company or an associated company, in which judgment is given against the director; or in connection with an unsuccessful application for relief from liability; and
- a company may indemnify a director of a company that is a trustee of an occupational pension scheme (section 235 CA2006 – qualifying pension scheme indemnity provision – QPSIP) as long as the company is not indemnifying the director against:
  - a criminal fine or regulatory penalty;
  - any liability in defending criminal proceedings in which the director is convicted.

These permitted indemnity provisions must be disclosed in the directors' report in the annual accounts and must also be made available for inspection by shareholders (sections 236 to 238 CA2006).

Another permitted exception to these restrictions is that a company may include provisions in its articles for dealing with conflicts of interest (section 232(4) CA2006).

If a claim is made against the director, the company could, in theory, lend the director the defence costs (see under loans above) and, upon the loan becoming repayable on the finding of guilt or liability on the director's part, an indemnity, if permitted, could be used to cover those costs and any further liability that the director may have become subject to, unless it is a liability against which the company cannot indemnify.

It is possible for a company to obtain, and pay for, directors' and officers' liability insurance (D&O insurance) for its directors. Any director could use this for funding defence costs and any other liability that the director incurs, whether or not it is a liability that the company could have indemnified the director against. This would of course always be subject to the policy's terms. These commonly exclude cover for criminal fines, regulatory penalties and fraud and dishonesty. Such policies also often exclude claims by the company or any of its associates.

8 Is there anything else?

We have focused in this guide on the main duties and the key implications for a director of a company.

In certain circumstances, for example, if the company were to be in financial difficulties or if its shares were publicly traded, the directors would have additional duties and potential liabilities.

In addition, it should be noted that numerous other duties, obligations and potential liabilities have been imposed on directors of companies in England and Wales throughout legislation.

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