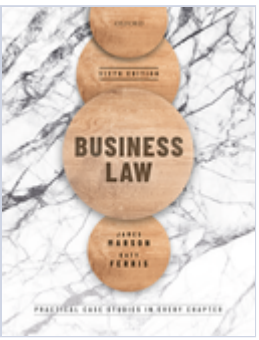

Business Law (6th edn)
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17. The Management of Corporations

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Abstract

This chapter considers corporate management and focuses on the regulation of those who govern the company, and the protection of the shareholders, who have no automatic right of management. The actual 'running' of the company is left to the directors, a relatively small number of persons who may take individual responsibility for aspects of the company's business or may oversee the company as a whole. Directors have significant powers when acting for the company, and whilst a corporation possesses its own separate legal personality, independent of those who manage it, the actions of the company are performed, under authority provided by statute and the company's constitution, by its directors. The chapter identifies the appointment of directors and their duties as codified from the common law into the Companies Act (CA) 2006, and the provisions for removing a director.

Keywords: corporate management, shareholders, right of management, directors, legal personality, corporation, Companies Act 2006, CA

The director and the company secretary are two major roles performed in the management of a corporation. The Companies Act (CA) 2006 identifies the powers and duties on these office holders, and it identifies, where relevant, any specific qualifications that must be held to fill the role. Whilst most companies have shareholders (although of course CA 2006 calls such people 'members' as companies need not have shareholders) who 'own' the company, it is the directors who 'run' the company, based on the powers conferred upon them, along with the secretary, who may perform many of the daily administrative tasks that

are required. As every company must have at least one director who is a natural person, knowledge of their role in the company is of crucial significance, as are the protections available to the shareholders to ensure they are not unfairly prejudiced by the directors' actions.

Business Scenario 17

Vertigo plc is a company involved in property development. Its main objectives are in the residential sector but occasionally it acquires and develops land for commercial and leisure projects. Its board of directors comprises Faith, Godfrey, and Tafadzwa, and the following events have affected the company:

Godfrey owns a 20 per cent stake in Duracello plc, a company that provides power supply systems for commercial buildings. When the board of Vertigo plc agree a new contract with Duracello plc, which Godfrey voted in favour of, he failed to declare his interest.

Vertigo plc has decided at the latest board meeting to move the sourcing of its mobile solutions (phones and tablets) from Germany to Taiwan. These items are made to Vertigo plc's specifications and then shipped to the UK. The decision was made based on costs and no consideration was made to the environmental impact or the longer-term effect of the decision.

Tafadzwa entered into an agreement with Ritblat plc where he personally receives a 15 per cent 'commission' on the basis of orders from Vertigo plc for the purchase of kitchen units used in Vertigo's developments. In the past eight months, Tafadzwa has received £150,000 in commissions from Ritblat plc without declaring this information to the board.

Horizons plc is another property development company which has had previous dealings with Vertigo plc. Horizons plc offered to sell a plot of land to Vertigo plc for £800,000 but that offer was declined at a board meeting due to finance issues. However, Faith, seeing the opportunity for development of the plot, formed her own company (New Ventures plc) which purchased the land for the asking price. Later, when Vertigo plc had the finances in place, it wished to purchase the land offered by Horizons plc. It is approached by New Ventures plc which offers the land for a price of £1.2 million. Vertigo plc agrees the purchase.

The shareholders have recently discovered these facts.

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Learning Outcomes

- Explain the appointment process of a director and secretary of a company (**17.2.3**; **17.5**)
- Identify the duties imposed on directors and how the Companies Act 2006 has added to the obligations established through the common law (**17.2.7–17.2.8**)
- Explain how a director may lose their directorship and the consequences of the disqualification of the director from a company (**17.2.9**; **17.2.12–17.2.13**)
- Identify the protection of shareholders and the powers they possess in a company (**17.4–17.4.3**)

- Explain the responsibilities of a company secretary and the limitations of their authority (**17.5–17.5.1**).

17.1 Introduction

This chapter considers corporate management and focuses on the regulation of those who govern the company, and the protection of the shareholders (who have no automatic right of management). The actual 'running' of the company is left to the directors, a relatively small number of persons who may take individual responsibility for aspects of the company's business, or may oversee the company as a whole. Directors have significant powers when acting for the company, and whilst a corporation possesses its own separate legal personality, independent of those who manage it, the actions of the company are performed, under authority provided by statute and the company's constitution, by its directors. The chapter identifies the appointment of directors and their duties (codified from the common law into the Companies Act 2006), and the provisions for removing a director. It further identifies another officer of significance—the company secretary. Under CA 2006 private companies are no longer required to have a company secretary, although public companies must still have such an officer. They are of importance in corporate governance, and may provide a beneficial service to any company.

The governance of a company will also include consideration of the protection of the companies' shareholders and their rights in relation to the company. This includes their powers to appoint or remove directors, voting at meetings and other rights in the exercise of power with regard to the direction and control of the company, and also how protection may be sought, particularly in relation to minority shareholders who may be exposed to risk through the powers granted to directors.

17.2 Directors of a company

The nature of a company is predicated on the concept of it possessing its own legal personality and this being independent of the person(s) who exercise the power to take the decisions of the company. These specific tasks, whilst performed in the company's name and on its behalf, have to be exercised by people. Therefore, CA 2006 requires that, upon formation, the company submits numerous documents to the Registrar of Companies, including the articles of association that identifies, *inter alia*, the nature of the company, what it intends to do, and other matters regarding the powers of those who 'run' the company. These positions are then filled by the directors. Directors possess the authority to act as the company's agent and perform the tasks required. As the shareholders may consist (although not necessarily so) of a large and diverse
p. 426 population, it would be impractical ↵ for each to have a management capacity and hence they appoint the directors who may exercise the powers conferred on the position by the company. They may also wish to remove the director from the position and hence they are provided with the mechanisms to achieve this.

Automatic Self-Cleansing Filter Syndicate Co. Ltd v Cuninghame (1906)

Facts:

The claimant held 1202 of the company's 2700 shares. He wished for the company to sell assets to another company and managed to persuade members totalling 1502 shares to vote in favour of his resolution. The directors were opposed to the resolution and this led to the claim, in the name of the company, against the directors, including Cuninghame.

Authority for:

The constitution of the company gave the general power of its management to the directors, it provided for a three-quarter majority of votes to remove a director, but was silent as to the ability of shareholders to issue directions to directors. The Court of Appeal held accordingly that the directors were entitled to reject this instruction.

When the registration documents are submitted to the Registrar, these must include who will hold the position of director (as companies cannot be registered in the absence of directors). It should also be recognized at this stage that the director of a company might be (and very often is) a shareholder of the company, although there is no requirement for this. The position of director is defined in CA 2006 so as to ensure that the relevant powers and obligations associated with this position are recognized and applied despite any alternative title that the officer of the company may have (such as manager): 'It does not matter much what you call them, so long as you understand what their true position is, which is that they are merely commercial men, managing a trading concern for the benefit of themselves, and all other shareholders in it.' (Jessel MR, *Re Arthur Average Association for British, Foreign and Colonial Ships* [1875]).

17.2.1 Types of Director

There are different types of director of companies and they are often described with reference to their position and their responsibilities to the company. Directors can be executive and non-executive directors. An executive director is so called due to their activities and because they undertake special responsibilities in the company. For example, a company may have an operations director, managing director, and a finance director. These directors take charge over the aspect or function of the company (although there is no legal requirement to have such 'executive' directors and, whilst unlikely, the board could delegate these functions to the company's employees). The non-executive directors have no specific function over an area of the business or take an active part in the company's management; rather they perform tasks such as attending meetings, taking a constructive part in the board's decision-making, or they may 'lend' their name to the ↵ business to increase its standing with customers. Therefore, the executive directors have both executive and non-executive functions.

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Companies may also appoint ‘shadow directors’ who are defined as ‘a person in accordance with whose directions the directors of the company are accustomed to act’ (CA 2006, s. 251). This position will not extend to those who give their advice to the board in a professional capacity (such as a lawyer) and may include, for example, a major shareholder upon whose advice the directors would act. The term ‘de facto’ director refers to persons who are not appointed as directors but who operate as one. The classification is important as a person in this position will be subject to the same duties as a formally appointed director and subject to the ethical codes of various bodies (including, e.g, national accounting bodies). Instruction as to determining a de facto director was provided in the following case:

Popely & Popely v Popely and Others (2019)

Facts:

The facts of the case are quite complex and can largely be overlooked. The significance of the case is the instruction from the court as to when someone is a ‘de facto’ director when they are involved in the carrying out of a wrongful act.

Authority for:

For the court, the following factors will determine whether a person who has assumed the role of a director is operating as a ‘de facto’ director:

- whether the act as carried out by the de facto director could only have been done by someone in the capacity of a director;
- whether the act is in the form of directions/instructions to a properly appointed director. In such circumstances the act will be one of a shadow director (the distinction occurs as there are certain acts which are carried out by a shadow director which cannot be carried out by a de facto director);
- whether the act is done in another capacity (such as by an employee or agent) which cannot be carried out by a de facto director.

17.2.2 Number of Directors

Companies are required under CA 2006 to have at least one director in the case of private companies, and two directors in the case of public companies (CA 2006, s. 154). At least one of the directors of the company must be a natural person (as companies may hold directorships of other companies—CA 2006, s. 155).

17.2.3 Appointment of Directors

The company's promoters include the details of the directors for the company with the registration documents. These documents include the details of the company's first directors, and the articles will include
p. 428 the company's provisions for the appointment and ↵ removal of future directors of the company. The articles of association allow for the appointment of directors and authority for such action is usually through an ordinary resolution at a general meeting, although other mechanisms such as a written procedure may be equally valid. (For a director's removal a **written resolution** is not an appropriate instrument.)

A director must be at least 16 years of age, although this does not affect the validity of an appointment that is not to take effect until the person reaches this age (CA 2006, s. 157). Any appointment in contravention of this section is void, although this does not affect the liability of a person who purports to act as a director or acts as a shadow director.

When a public company intends to appoint a director(s), it may not appoint two or more directors at a general meeting through a single resolution, unless a resolution that it should be made has been unanimously agreed (CA 2006, s. 160). This requirement must be followed, as any resolution that is passed in contravention of this section is void even if no one voted against the appointment of the directors.

The appointment of directors will usually result in one director taking charge for the whole company rather than its constituent parts (where relevant) and this person has traditionally been called the managing director. Due to the nature of the position, its significance, and the authority it bestows, the appointment is controlled through the articles and is made by the board (although the board can vary and curtail any powers associated with the position). The rationale for a managing director's appointment is simply that it is often convenient for the company to have a director who can take executive leadership.

17.2.4 Registration of Directors

Every company is required to maintain a register of its directors and contain the information required under ss. 163, 164, and 166 of CA 2006 (CA 2006, s. 162). This register must be available for inspection at the company's registered office or at another location as provided under s. 1136. Inspection by any member of the company must be available without charge, or to any other person on payment of a fee. Failure to comply with these requirements constitutes an offence by the company and every company officer (including shadow directors). A court is also empowered to order the register for inspection where there has been a refusal of inspection.

17.2.5 Directors' Pay and Contracts

There is no legal requirement for a director to be paid for their activities as a director. For example, a non-executive director is not necessarily paid for their services. Where payment is provided this is generally done through a contract between the company and the director, and due to the fiduciary relationship between the director and the company, the director is not permitted to make any profit that has not been expressly identified in the agreement. Fees and expenses may be paid, but in relation to executive directors, payment is traditionally made through a contract of service (an employee) and as such, it is a contract that must be

personally performed by the post-holder (CA 2006, s. 227). In terms of the payments made under a contract of service, CA 2006 requires that a copy of the contract is maintained at the company's registered address or other place specified under s. 1136, for every directors' service contract, and whilst this need not be in writing, the very least that is required is a written memorandum setting out the terms of the contract (CA 2006, s. 228).

p. 429 ↵ The Enterprise and Regulatory Reform Act 2013 sought to empower shareholders to engage more effectively with companies regarding pay. It allows shareholders to:

- make binding votes on pay policy and exit payments (to enable them to hold companies to account and prevent rewards for failure); and therefore it ...
- boosts transparency so that what people are paid is easily understood and the link between pay and performance is clearly drawn.

17.2.6 Directors' Duties

CA 2006 had a significant impact on the duties imposed on directors through codification and extension of duties that, prior to the enactment of CA 2006, had been developed through the common law. The provisions under Part 10A of CA 2006 (other than the issues of conflict of interest, the directors' residential addresses, and age of the directors) came into effect on 1 October 2007.

17.2.7 Directors' Duties Under the Companies Act 2006

Chapter 2 of CA 2006 identifies the duties of the directors and that the duties under ss. 171–177 (see **Table 17.1**) are owed by the director to the company (rather than those outside of the company). In *Cullen Investments Limited and Others v Brown and Others*, the High Court heard the case of brothers who breached their duties as directors by diverting a commercial opportunity for their own benefit (which should have been made to the company). Whilst it is open for the courts to relieve directors from their liability if they had acted honestly and reasonably, this was not the case here. The test of honesty is subjective—did the director believe their conduct would not breach their duties? Reasonableness is an objective test—did the director meet the standards expected of a competent director?

Table 17.1 Duties of directors

Directors' duties	CA 2006
To act within their powers	s. 171
To promote the success of the company	s. 172
To exercise independent judgement	s. 173
To exercise reasonable care, skill, and diligence	s. 174
To avoid conflicts of interest	s. 175

Directors' duties	CA 2006
Not to accept benefits from third parties	s. 176
To declare interest in proposed transaction or arrangement	s. 177
To disclose interests in existing transaction/arrangement	s. 182

Section 170 continues that the general duties imposed on directors are to be interpreted and applied in the same way as the common law rules and equitable principles on which they were based. Therefore, some of the previous cases are identified, but as these were decided under the common law it is important to be vigilant for case law derived specifically from the legislation. These duties also apply to shadow directors where the corresponding common duties and equitable principles apply to them.

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17.2.7.1 Duty to act within their powers

The director must act in accordance with the company's constitution (now the articles of association rather than the memorandum—CA 2006, s. 171) and only exercise powers for the purposes for which they had been conferred. As such, where authority is provided for a specific purpose, the power must only be used for this purpose and will not be extended (even if the director acted in good faith and in the best interests of the company).

17.2.7.2 Duty to promote the success of the company

This was based on the common law duty of the director acting in good faith (CA 2006, s. 172). The Act requires the director to fulfil this requirement in the way they consider would be most likely to promote the success of the company for the benefit of its members as a whole. In so doing the director must have regard to the likely consequences of decisions in the long term including:

- the interests of the company's employees;
- the need to foster relationships with outside organizations (suppliers/customers and so on);
- the impact of the company's operations on the community and environment;
- the company's reputation; and
- the need to act fairly as between the members of the company.

Note: this is not an exhaustive list but provides examples of the requirements the section of the Act places on the director.

Consider

A director is under a duty to promote the success of the company. It appears that each of the directors involved in the scenario has breached this duty.

This section of the CA 2006 goes further than the common law upon which it is based and places a positive duty on the director not only to act in the interests of the members, but also, in certain circumstances, to consider or act in the interests of the company's creditors (and taking into account others beyond the members, such as the company's employees). Therefore, the company should ensure that evidence may be produced to demonstrate that at meetings and where decisions are made, regard had been taken of such groups.

This requirement may serve to instil an obligation of more strategic thinking on the part of directors, who will consider the wider implications of their actions for the company's stakeholders, and consider the folly of short-term decision-making compared with taking a long-term view of the company's actions. For example, the shareholders may wish to gain dividends from the profits, or seek for products to be sourced from the cheapest suppliers with a disregard as to the wider effects that this may have to their relations with suppliers, the environmental impact of the actions, and the long-term viability and sustainability of such measures.

To facilitate compliance in this area it may be wise for the board to ensure each director (and non-executive
p. 431 director) is aware of the responsibilities under this section of the Act, and those ↵ under the company's constitution. The director should have the knowledge of the requirements for the full consideration of s. 172 of CA 2006 and establish practices for decision-making subject to these obligations. This may also require establishing a review process to provide for transparency of decisions and analysis of how/why the director acted in the way they did. If failings are discovered, then a system of review and action is also a prudent step.

The case of *Hellard and Others v Carvalho* demonstrates how the interpretation of ss. 171–172 of CA 2006 will be given effect in the courts.

Hellard and Others v Carvalho (2013)

Facts:

Here, the liquidators of an insolvent company, which had been run by Mr Carvalho (as the company's Principal Director), brought an action against Carvalho on the basis of misfeasance due to payments he made between November 2005 and October 2008. The payments included the repayment of debts to creditors such as Carvalho's father, himself, companies under his control, and it also included a Christmas bonus to a key employee.

The case surrounded the rationale to make these payments, which were of Carvalho's own decision-making without any regard to the best interests of the company. Carvalho, as a director, was under a duty (articulated in s. 172) to act in good faith in a way that would promote the success of the company and should have known, or realistically appreciated, that the company was insolvent or may become unable to repay its debts. Carvalho was found to be in breach of s. 172 in failing to keep adequate records and was judged according to a director in his position. Simply because he failed to maintain records and operate his management in an informal manner did not allow the assessment of his directorship to be at a lower standard as may exist for other directors (e.g. more junior directors or those without the power of a principal director). He was, further, in breach of s. 171 in failing to exercise the powers as a director for the purposes in which they were given and was ordered to repay substantial sums to the company.

Authority for:

This case readily demonstrates the necessity of effective management, paper trails and evidence of decision-making, and continued vigilance of the company's affairs—especially when in financial difficulties.

Consider

The directors have not recorded their compliance with CA 2006, s. 172. Nothing was recorded in the minutes. Whilst the section is sufficiently broad so as not, necessarily, to have constituted a breach by the directors' disregard for purchasing goods from Taiwan and shipping them to the UK, it should be remarked that the directors have thought of the environmental impact of this decision. This action, along with the other potential breaches, should be recorded in the board meetings to demonstrate compliance with the duty.

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17.2.7.3 Duty to exercise independent judgement

The director has an obligation to exercise independent judgement, although this will not be infringed by their acting in accordance with an agreement entered into with the company that restricts the future exercise of discretion by its directors, or in a way authorized by the constitution of the company (CA 2006, s. 173). As such, this is a further example of the law codifying existing requirements in the common law, but it reinforces the director's duty to act for the best interests of the company, and not necessarily follow the instructions of shareholders, whose interests may be selfish and not concerned for the company. This situation comes to prominence, as the shareholders appoint the director, and where this appointment has been made on a personal basis, the director must remain independent of the person(s) that made the appointment.

17.2.7.4 Duty to exercise reasonable care, skill, and diligence

The director has to exercise reasonable care, skill, and diligence (CA 2006, s. 174). This duty is based on what a reasonably diligent person with the general knowledge, skills, and experience for carrying out the functions required of the director to the company would consider, and the general knowledge, skill, and experience possessed by the specific director.

Re Brazilian Rubber Plantations and Estates Ltd (1911)

Facts:

Due to the directors' lack of qualifications and business acumen, the company lost a substantial amount of money following a poor investment in rubber plantations in Brazil. The directors were sued for their negligence.

Authority for:

The court held that the directors were to be held to a subjective test of their duty to exercise care and skill. A director need only exercise the care and skill that could be reasonably expected of them in terms of their knowledge and experience.

As such, where the director purports to possess special skills or knowledge, then this will be the standard against which they are assessed. Where no such special skills/knowledge are claimed, the standard test of how a 'reasonable' director would have acted will be applied. Therefore, a directorship (whether executive or non-executive) of a company is a very important role involving significant responsibilities, and it should not be accepted without consideration of the implications of the position and the obligations to the company—with reference made to CA 2006 and the company's constitution. Diligence was already a common law duty and requires the director to be vigilant for acts that require appropriate investigations to be made and questions to be answered. A director will fail in their duty by not taking the appropriate steps when faced with such
p. 433 scenarios. ↵

Re Railway and General Light Improvement Co., Marzetti's Case (1880)

Facts:

A director had been signing cheques without knowing what the money was for.

Authority for:

The court found a director negligent for signing cheques without knowing what the money was for and without making inquiries which a person in his position would have made.

17.2.7.5 Duty to avoid conflicts of interest

A director has an obligation to avoid situations where they have, or can have, a direct or indirect interest that conflicts (or has the potential to conflict) with the interests of the company (CA 2006, s. 175).

Consider

How does the fact that New Ventures plc is agreeing the sale affect the duties on Faith? Does the company having a separate legal personality remove any obligations on Faith under CA 2006, ss. 175 and 177? No—unless this is authorized by the directors and Faith is not to have any part of the discussion nor should she vote on the measure.

This duty applies particularly to the exploitation of any property, information, or opportunity and it is immaterial whether or not the company could take advantage of the property, information, or opportunity. However, there are limits to this duty and it does not apply in relation to a transaction or arrangement between the director and the company itself. Further, the duty is not infringed if the situation cannot reasonably be regarded as likely to give rise to a conflict or if the matter has been authorized by the directors. Such authorization may be given by the directors where:

1. the company is a private company (and nothing in the company's constitution invalidates such authorization) by the matter being proposed to and authorized by the directors; or
2. the company is a public company (and its constitution includes provision enabling the directors to authorize the matter) by the matter being proposed to, and authorized by, them in accordance with the constitution.

The authorization is only effective if any requirement as to the quorum at the meeting (where the matter is considered) is met without the director in question or any other director, and the matter was agreed to without their voting (or would have been agreed if their votes had not been counted). This section of the Act, with reference to a conflict of interest, includes conflicts of duty. Where the duty may become problematic is
p. 434 where a ↵ director holds directorships with several companies who may trade, or be in some other way involved with the business of the company in question. Separating the director's duty in such examples may be a challenging undertaking and the exercise of care will be needed to ensure adequate (but complete) disclosure is provided. As such, this section extends the requirements of the common law by imposing a positive duty on the director to avoid any unauthorized conflicts of interest, and it makes authorization of any conflict to be determined by the company's directors rather than the shareholders.

Consider

There is a possible breach of CA 2006, s. 175 where Faith has a conflict of interest with Vertigo plc. She has exploited or taken advantage of an opportunity which has become available due to her being a director of the company. Further, it is no defence to argue that as Vertigo plc could or did not take advantage of this, she is free to do so.

17.2.7.6 Duty not to accept benefits from third parties

A director of a company is not allowed to accept a benefit from a third party that is due to them being a director of the company and their acts or omissions as a director (CA 2006, s. 176). 'Third party' is interpreted as a person other than the company itself, an associated body corporate, or a person acting on behalf of the company or an associated body corporate. However, the duty is not infringed where the acceptance of a benefit 'cannot reasonably be regarded as likely to give rise to a conflict of interest'.

The conflict of interest here, as with s. 175, includes a conflict of duties. This duty will be concerned with benefits such as bribes (in cash or in kind) that will impact on the impartiality of the director in acting for the company. Where a benefit is provided to the director and not the company, the director's objectivity may be compromised. This provides an obligation on the director not to accept bribes, but this was a duty long established in the common law, and what the Act requires is for the director to consult with the company's constitution to determine those actions that are acceptable, and those that are not. This is likely to be a particularly interesting aspect of the directors' duties under CA 2006, but for the affected director, transparency of any gifts provided and how decisions were made may ensure they do not transgress their obligations in this area.

Consider

Tafadzwa, in receiving commission payments, is in breach of CA 2006, s. 176. This action constitutes a benefit from a third party and will be a breach of this duty unless the payment could not reasonably be considered as likely to raise a conflict of interests. The result is that Tafadzwa will have to account to the company for any benefit received.

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17.2.7.7 Duty to declare interest in proposed transaction or arrangement

The director has a duty if in any way, directly or indirectly, they have an interest in a proposed transaction or arrangement with the company (CA 2006, s. 177). This interest must be declared to the other directors with specific regard to the nature and extent of the interest. The declaration may be made in the following way, although others may be used:

1. at a meeting of the directors; or
2. by notice to the directors in accordance with s. 184 (notice in writing) or s. 185 (general notice).

The declaration must be complete and accurate and if it proves to be, or subsequently becomes, incomplete and/or inaccurate, then a further declaration is required. There are limits placed on this obligation and the director need not declare an interest where it cannot be reasonably regarded as likely to give rise to a conflict of interest; where the other directors are already aware (or ought reasonably to be aware) of the conflict; or where it concerns terms of the director's service contract that have been, or are to be, considered by a meeting of the directors, or by a committee of directors appointed for the purpose under the company's constitution.

Consider

Godfrey has a 20 per cent shareholding in another company, Duracello plc. CA 2006, s. 177 requires directors with an interest in a proposed contract to declare this to the members of the board. This must occur prior to the agreement being concluded, therefore Godfrey can avoid a breach of his duty if either the other directors knew of his relationship with Duracello plc, or Godfrey informs them prior to any contract being entered.

17.2.8 Duty of the Director to Disclose Interests in Contracts

Beyond the codification of the common law duties imposed on directors, CA 2006 imposes duties of disclosure on the director who has an interest (direct or indirect) in a contract or proposed contract with the company (CA 2006, s. 182). This disclosure must be made as soon as is reasonably practicable (such as where the matter is first discussed by the board) and include the nature and extent of the interest, and be made at a meeting of the directors; or by notice in writing; or by general notice. The provisions of such disclosures apply to loans, quasi-loans, and credit transactions and arrangements.

17.2.9 Civil Consequences of a Breach of the Duties

Where there is a breach (or threatened breach) of the duties identified in ss. 171–177, the consequences are the same as provided in the common law rules or equitable principles (CA 2006, s. 178). Further, the duties under s. 174 regarding reasonable care, skill, and diligence are enforceable, as are the other fiduciary duties that a director owes the company. Except where otherwise provided, more than one of the general duties may apply in any given case (CA 2006, s. 179). Note that in most circumstances, directors do not have fiduciary duties to
p. 436 shareholders. ↵

Vald. Nielsen Holding A/S and Another v Baldorino and Others (2019)

Facts:

The executive management team of the defendant was alleged to have misled the claimants as to the sale and price of its business. The argument was, unusually, that the claimants had been subject to a substantial undervalue of the company and of false representations by the three defendants who led the management buy-out. This is known as a 'defrauded seller' situation and the claimants wanted to recover damages on account of the profits received by the defendant directors. The argument being the directors were in breach of their fiduciary duties. The High Court disagreed that the directors here owed a fiduciary duty to their shareholders but did award the claimants £6.5 million in damages for the fraud.

Authority for:

Generally, directors do not owe a fiduciary duty to their shareholders. The duty can be established, however, through a special relationship between the director and shareholder. This is not created through the directors' better knowledge of the company's financial state of affairs; their ability to potentially affect the shareholders; or that the director is purchasing shares from a shareholder. These are usual features of such relationships.

Typically, a fiduciary relationship is seen in smaller companies where family/personal relationships exist at the time of the transaction between the two groups.

Where the director has transgressed the requirements under this part of the Act, they may be liable to compensate the company for any losses sustained due to the director's breach. This may be the case even where the director had acted in good faith and where they believed the actions were taken in the company's best interests. This may be particularly so where the director has, for example, disregarded the consequences of their actions to the environmental impact which has led to the company being held liable for the consequential damage. The company will have a responsibility for any costs but may seek to reclaim these from the director's breach of their statutory duty (see **13.9**). It must also be remembered that even beyond the responsibilities of the director to the company and any imposition of responsibility through CA 2006, a director who disregards these duties may suffer a disqualification if they appear unfit to fulfil the role of director (Company Directors Disqualification Act 1986).

It is also possible for the members of the company to provide their consent, approval, or authorization of the director's actions (CA 2006, s. 180). Where the duty to avoid conflicts of interest is complied with through the authorization of the directors (CA 2006, s. 175); and the duty to declare an interest in a proposed transaction or arrangement is complied with, the transaction or arrangement is not liable to be set aside by virtue of any common law rule or equitable principle requiring the consent or approval of the company's members (CA 2006, s. 177). This is subject to provisions of the company's constitution that may require such consent or

approval (CA 2006, s. 180). The compliance with these general rules does not remove the requirement of approval of the provisions of Chapter 4 of CA 2006 (regarding transactions requiring the approval of members).

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17.2.10 The Meetings of Directors

The board of directors' meetings are where important decisions affecting the company can be addressed. Each of the directors of the company must be given notice of the meeting, and the directors are empowered to call a meeting when necessary. Every company is required to record the minutes of the meetings and these records must be maintained for 10 years (CA 2006, s. 248). The minutes of the meetings are an important record of the proceedings and where authenticated by the chairperson, they may be used as evidence of the proceedings at that meeting regarding the validity of appointments, that the proceedings are deemed to have duly taken place, and so on (CA 2006, s. 249). The decisions taken at the meetings are based on a voting system and it is assumed that each director has one vote, unless the articles of the company provide differently, and the resolution is passed with a majority. Where the votes are split, the chairperson has the option to exercise their vote in favour of the resolution and it will be deemed that the resolution has been passed, or not and the resolution will fail.

17.2.11 Indemnifying the Directors

The enactment of the Companies (Audit Investigation and Community Enterprises) Act 2004 introduced provisions for the **indemnity** of directors. Whilst they were given effect on 6 April 2005, they have now been included in CA 2006 and appear in ss. 232–239. These protections assist the directors by providing that the company will repay any costs incurred (in certain circumstances) by the director in the course of their duties.

Consider

The shareholders have the ability to ratify the breaches of the directors due to the power conferred in CA 2006, s. 239. This ratification, however, cannot involve the director using their vote as a member of the company.

A key element of indemnification is that not only can the company protect the director, but also even where it is unable to excuse the director from liability in cases of negligence, default, breach of duty, or breach of trust, the High Court or County Court possess this power under s. 1157. The section states that where the officer of the company or a person employed as an auditor (whether an officer of the company or not) appears to be liable, but they acted honestly and reasonably, and having regard to all the circumstances of the case they ought fairly to be excused, the court may relieve them wholly or in part from this liability as it thinks fit. The officer/person may apply to the court for relief where they believe a claim may be made against them (on the

instances listed earlier). The court may, if it is being tried by a judge with a jury, and they are satisfied that the defendant should be able to rely on the relief provided under s. 1157, withdraw the case from the jury and enter a judgment, including costs, as it thinks proper.

17.2.12 Removal of a Director

Directors may leave office for numerous reasons. They may die in office or may resign (although once a resignation has been accepted the director cannot retract it); and on the dissolution of the company the
p. 438 directors are automatically dismissed. ↵

Glossop v Glossop (1907)

Facts:

A director provided notice of resignation. The question for the court was whether this could be withdrawn.

Authority for:

Once a director has provided their notice of resignation, it may not be withdrawn except with the consent of the board. However, if the articles of the company so provide, a resignation which is only effective by the consent of the board may allow it to be withdrawn before its acceptance.

The articles of the company may provide for a proportion or number of directors to retire annually (retirement by rotation) and these directors may then be replaced or re-elected to office. However, the company, through the other directors' action or the members, may wish to remove a director before their term of office has expired.

A director may be removed from office through an ordinary resolution to that effect. Special notice is to be provided of 28 days to the company secretary of the resolution and the meeting at which the resolution is to be passed must be called with at least 21 days' notice. However, as a director may also be a shareholder with voting rights, their removal may prove to be problematic.

Bushell v Faith (1970)

Facts:

A company had 300 shares split equally between a brother and his two sisters who were the company's directors. When the sisters wished to remove the brother as director they issued a resolution to this effect. However, the articles of association provided that where a director was to be

removed from office, in the vote to move this resolution, the affected director's shares should carry three votes per share. This was perfectly legal and hence following the vote the two sisters' votes accounted for 200 votes, whilst the brother's 100 shares accounted for 300 votes. The House of Lords held therefore that the vote to remove the director had been defeated. It should be noted that it is possible to provide for this arrangement of voting, but also the articles of the company may be changed through a special resolution to circumvent this problem of entrenching a director.

Authority for:

It is perfectly legal to include a clause into the articles that affords protection to a director/minority shareholder from early removal from office. However, it is also possible to later alter this clause in accordance with the articles.

When the director is removed, this section of the Act is not to be taken as depriving the removed person of
p. 439 any compensation or damages payable in respect of the termination ↵ of the appointment. A director removed in this way may protest and upon receipt of the notice of an intended resolution to remove them from office, the company must send a copy as soon as is reasonably practicable to the director concerned (CA 2006, s. 169). CA 2006 also provides the director with the right to be heard on the resolution at the meeting. They may also, upon this notice, provide a written representation to the company (not exceeding a reasonable length) and request that this is notified to the members of the company. If the use of this procedure would be to abuse the rights provided in s. 169, the representations need not be sent out.

Beyond the use of CA 2006 for this removal, there may be provision in the company's articles to achieve the same result. For example, the company may incorporate a clause into the articles that the director could be removed with a majority vote by the board by notice in writing. The main use of a removal through the articles rather than through s. 168 is simply that in the case of subsidiary companies, a holding company is not entitled to use s. 168 to remove directors of the subsidiary, but it is achievable through the articles.

17.2.13 Disqualification of Directors

The legislation used to prevent a director holding office is the Company Directors Disqualification Act 1986 and it may be applied to both natural persons and to corporations that hold directorships. When the person is subject to a disqualification order, they are prevented from taking any part in the management of a company, they may not promote a company, and they are prevented from acting as an insolvency practitioner. To ensure that persons dealing with companies are protected, Companies House maintains a register of all disqualification orders and this is freely available to members of the public.

Examples of the offences that may lead to disqualification include:

- the conviction of an indictable offence in connection with the promotion, formation, management, or liquidation of a company, or with the management or receivership of the company's property (s. 2). Orders made on this ground at a Magistrates' Court last for five years.

- where the director has been persistently in default in providing the required annual returns or accounts to the Registrar, they may be subject to an order lasting no longer than five years (s. 3).
- three convictions in a five-year period satisfies the requirement of a persistent breach.
- if an officer or receiver of a company in liquidation has been guilty of fraud in relation to the company, or has breached their directors' duties, or committed an offence of knowingly being a party to fraudulent trading, the court may issue an order for a maximum term of up to 15 years (s. 4).

Note that these offences do not need to be supported with a criminal conviction for the order to be imposed. If the person acting as a director (or shadow director) had been engaged in conduct that led to a company becoming insolvent and it is considered they are unfit to act in a management capacity, an order may be made (for not less than two years—s. 6). The action that leads to a person being disqualified for unfitness is not restricted to actions taken in the United Kingdom—its jurisdiction is much broader (*Re Seagull Manufacturing Co. (No. 2)* [1994]). It is also possible for the articles to establish grounds for the disqualification of a director.

17.3 Directors' liability to shareholders

The directors of a company and the company secretary owe duties to the company as a whole rather than to the individual shareholders (who make up the company) and as such the shareholders are unlikely to be able to claim directly against the director based on their conduct. Exceptions to this rule exist, for example where the director has made a contract between themselves and the shareholders, and this may establish an agency relationship, with the consequent liability for breach of duty.

Allen v Hyatt (1914)

Facts:

The directors of the company induced its shareholders to provide to them options to purchase their shares. This was proposed on the basis of the directors negotiating the sale to another company. However, rather than selling the shares directly to this other company, the directors used the options to purchase the shares personally and then to sell them to the company.

Authority for:

The directors had made themselves agents for the shareholders and therefore had to account to them for the profits they made on the sales.

There appears to be a potential problem then between the decisions taken by the directors and the amount of influence that can be exerted by the shareholders, and this may be even more marked where the shareholders are in a minority—who or what mechanism protects their interests?

17.4 Minority protection

Shareholders have the right, and the company is obliged in certain circumstances, to place a resolution at a general meeting and have this voted upon by the members (the shareholders). However, directors may also be shareholders and they may form a majority and hence would find it relatively easy to pass through the resolutions that require a simple majority, or even those requiring a 75 per cent majority. This problem led to the famous case of *Foss v Harbottle*.

Foss v Harbottle (1843)

Facts:

p. 441 Two directors sold part of their own land to the company. Following this was a claim by minority shareholders that the price paid by the company was too high. These affected ↵ shareholders brought a claim against the directors concerned but the court refused to hear the action. It held that the interest in the case belonged to the company, and if the company believed the directors had acted wrongfully, then it should determine whether to bring the action—not the minority shareholders.

Authority for:

This is known as a derivative claim, where one party attempts to sue another party on the basis of losses suffered by a third party (CA 2006, s. 260). The claim failed in *Foss*, but there have been many advances since the case was heard, with many exceptions to the general rule established that, whilst it remains 'good law', its usefulness has been significantly curtailed.

CA 2006 has introduced protections for minority shareholders where a shareholder may initiate proceedings against a director on the company's behalf, (a derivative claim) in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty, or breach of trust by a director of the company (this also includes a former director and a shadow director). However, as this is a claim through the shareholders on the company's behalf, any award will be provided to the company, albeit that the shareholder claimant will be able to recover any expenses incurred in the action.

In order to use this procedure, CA 2006 identifies requirements that must be satisfied. The first is that the member must obtain the court's permission to proceed with their action (CA 2006, s. 261). This first stage is used to determine whether a prima facie case exists against the director. Where this is satisfied, the case continues and the court may give directions as to the evidence to be provided by the company, and at the hearing the court may give permission for the claim to continue on the terms it sees fit, refuse permission and dismiss the claim, or adjourn proceedings and give any directions it thinks fit.

Section 263 identifies situations where permission must be refused, and these occur where the court is satisfied that:

1. a person acting in accordance with s. 172 (duty to promote the success of the company) would not seek to continue the claim; or
2. where the cause of action arises from an act or omission that is yet to occur, the act or omission has been authorized by the company; or
3. where the cause of action arises from an act or omission that has already occurred, the act or omission (i) was authorized by the company before it occurred, or (ii) has been ratified by the company since it occurred.

Another area of protection available to the minority shareholder, rather than a derivative claim, is a claim that their rights have been 'unfairly prejudiced' by the way in which the company is being run.

17.4.1 Unfair Prejudice

The protection of members against unfair prejudice is contained in Part 30 of CA 2006 and provides a right for
p. 442 members to petition a court that the company's affairs are being ↵ conducted in a manner that is likely to unfairly prejudice the interests of members generally, or some part of its members (including at least themselves). The member may also petition on the basis that an actual or proposed act or omission of the company is or would be so prejudicial (CA 2006, s. 994). This section of the Act also applies to a person who is not a member of the company but to whom shares in it have been transferred as they apply to a member of a company. CA 2006 also provides a right for the Secretary of State to exercise powers to petition the court where they believe the rights of members are being unfairly prejudiced (CA 2006, s. 995). Where the court is satisfied that the petition is well founded, it is empowered (CA 2006, s. 996(2)):

(a) to order as it thinks fit relief in respect of the matters complained of such as to regulate the conduct of the company's affairs in the future, such as altering the articles to prevent future abuses.

Re HR Harmer (1959)

Facts:

Mr Harmer established a stamp business. Later he established a company and sold the business to it. The directors were Harmer and his two sons, and Harmer and his wife (who would vote in accordance with her husband's instructions) held over 75 per cent of the shares. Harmer was a poor director, he would ignore the views of his other directors, he established a business in Australia which faltered whilst selling another successful business based in the US. Given the history of bullying and poor management, his sons petitioned the court for unfair prejudice.

Authority for:

The court ordered Harmer to have no further interference with the running of the company, he was granted the title 'president' but possessed no powers, and the company was to purchase his shares.

It is also important to note that under this section, the court having changed the articles will not enable the company to change them again through a special resolution—it will be necessary to request the court's permission to alter them again (s. 996(2)(d));

(b) (i) to require the company to refrain from doing or continuing an act complained of (e.g. to stop directors' unusually high salaries that are preventing dividends being provided to the shareholders);

(ii) to require the company to do an act that the petitioner has complained it has omitted to do (e.g. to adhere to resolutions of the board);

(c) to authorize civil proceedings to be brought in the name of (and on behalf of) the company by such person(s) and on such terms as the court may direct (e.g. to avoid the *Foss* situation and enable a claim in the company's name, rather than the shareholder);

(d) to provide for the purchase of shares of any members of the company by other members (or by the company itself); and in the case of purchase by the company, the reduction of the company's share capital accordingly.

p. 443 ↵ This section of CA 2006 restates the law that had already been included in CA 1985 and incorporates a wide range of activities likely to adversely affect shareholders, particularly minority shareholders. The directors may be negligent in their management of the company that may, if the facts support it, lead to unfair prejudice; the directors may pay themselves salaries that reduce or remove entirely the members' dividends ...

Re Sam Weller & Sons Ltd (1989)

Facts:

Shareholders who were not involved in the management of the company were dissatisfied with the dividend which had remained at the same level for 37 years.

Authority for:

The court established that this situation could amount to conduct unfairly prejudicial to the interest of those shareholders who did not participate in management. It also noted that this position should not be construed so that a shareholder who does not receive any other benefits from the company (besides the dividends) is automatically entitled to comply, but the claim must be founded on unfairly prejudicial conduct.

... and shares could be provided to directors on much more favourable terms than available to members; and so on. Many of the cases based on the unfair prejudice principle have focused on where a major shareholder has been refused a management role with the company or removed from the board of directors.

Ebrahimi v Westbourne Galleries (1972)

Facts:

Mr Ebrahimi and business partner transferred their successful partnership to a company which they formed. They were the only directors and each held 500 £1 shares. Later, the son of the business partner was made the third director and issued with 100 shares from the other directors' shareholdings. The directors were paid from the profits and thus no dividends were paid. Later, the other directors removed Ebrahimi as a director and, whilst holding 400 shares, no dividends were paid and his holding was seen as worthless. He petitioned the court to have the company wound up so he could recover his share of the assets of the company.

Authority for:

Despite the removal of the director from his office in accordance with the Companies Act, it was considered a just and equitable ground to wind up the company. The company was established on the basis of the original business relationship and it was understood that this relationship, with regards the management of the company, would continue.

p. 444 ↵ Where a director (and shareholder) of a company has been removed so that they can no longer take an active part in its management, the court has often ruled that the majority shareholders must purchase the shares of the removed director (but not necessarily a director who has not been removed and simply disagrees with the direction of the company), to allow the affected director to invest their money in another company, although such rulings do not prevent a petition for the winding-up of the company on just and equitable grounds.

O'Neill v Phillips (1999)

Facts:

Mr Philips was the sole owner of 100 £1 shares in a company and he hired Mr O'Neill as a manual worker. O'Neill impressed Philips so much that he was promoted and soon was made a director with a 25 per cent holding of the company's shares. O'Neill was informed that on Philips' retirement, he would take over the running of the company and receive 50 per cent of the profits. After Philips' retirement, O'Neill did become the sole director but after a period of financial decline, Philips used his majority voting rights to appoint himself managing director. O'Neill was not to receive 50 per cent of the profits—rather he would receive his salary and dividends for his 25 per cent shareholding. O'Neill claimed unfair prejudice on the part of Philips.

Authority for:

The House of Lords concluded that this was not a case of unfair prejudice. O'Neill had not been excluded from the business and the promise of 50 per cent of the profits of the company was not contractually binding. Even though O'Neill had lost trust in Philips, this was not a ground for concluding unfairly prejudicial conduct.

17.4.2 Property Transactions by the Company

Protection is provided through Part 10, Chapter 4 of CA 2006 regarding the members' approval of substantial property transactions. A company may not enter into an arrangement (not restricted to legally binding contractual agreements) under which a director (including shadow directors) of the company or of its holding company, or a person connected with the director, acquires or is to acquire from the company (whether directly or indirectly) a substantial non-cash asset (meaning an asset whose value exceeds 10 per cent of the company's asset value and is more than £5,000; or it exceeds £100,000—CA 2006, s. 191). The company is also prevented from entering into an agreement for it to acquire a substantial non-cash asset from a director or person connected with them. In both of these situations, the transaction is only allowed where it has been approved by the members through passing an ordinary resolution at a general meeting, or is conditional on such approval being obtained. Therefore, arrangements can be made that will proceed if and when the formal approval of the members has been realized. Where the transaction has been entered into in contravention of s. 190, but within a reasonable time it is affirmed by a resolution of the members, then the transaction or arrangement may not be avoided.

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17.4.3 Loans, Quasi-loans, and Credit Transactions

CA 2006 continues from outlining where a substantial property transfer will or will not be permitted to identify the regulation of a company providing directors with loans and credit. This provision used to be prohibited, but CA 2006 allows for such transactions insofar as they are supported by the members of the company through an ordinary or written resolution.

A quasi-loan is a transaction under which one party (the creditor) agrees to pay, or pays, a sum for another (the borrower); or they agree to reimburse (or do reimburse), otherwise than in pursuance of an agreement, expenditure incurred by another party for another (the borrower—CA 2006, s. 199). This, essentially, can be interpreted as the company agreeing to pay a director's personal expenses, where the director agrees to pay the money back at a later date. This can involve personal loans where the nature of the item is purely for the director's personal consumption or it could be a loan associated with a cost that the director incurs as part of their work (such as travel costs that are not considered expenses reclaimable under the contract of service). A credit transaction (CA 2006, s. 202) is where a creditor supplies or sells under hire-purchase goods or land for their personal use and allows for deferred payments over a given period of time. Section 197 outlines the criteria for allowing such a loan. More recently, the Court of Appeal confirmed that issuing of dividends can amount to a transaction.

BTI 2014 LLC v Sequana S.A. and Others (2019)

Facts:

The case involved a company which paid a dividend to its sole shareholder and holding company when, at the time of the payment, the company had ceased trading and had outstanding liabilities. The basis of the claim heard at the Court of Appeal was that the issuing of the dividend, used in part to reduce a debt owed to the shareholder to allow the company to be sold, was done so at an undervalue. Further, it was argued that this action was done with the intention to put assets beyond the reach of creditors. A second argument presented was that the directors, in taking this action, had breached their duty to have regard to the company's creditors.

Authority for:

The Court of Appeal held that in these circumstances no duty to consider the company's creditors had arisen. The company was not sufficiently close to insolvency for the common law duty to emerge. However, the payment of a dividend by a company to its shareholders did amount to a transaction at an undervalue for the purposes of insolvency law. Transactions can be a unilateral act—such as issuing a dividend.

17.5 The secretary

CA 2006 made an important change to the previous requirements under the Companies Acts by removing the requirement for private (but not public) companies to have a secretary. However, even though a private company is not required to have a secretary ↵ (CA 2006, s. 270), the powers and duties attributable to a director and a secretary cannot be performed by one person (a sole director) acting in both capacities as director and secretary. As a consequence, whilst the company may legally have just one member, it is required to have at least two officers of director and secretary. The secretary is also considered to be an employee of the company and this must be taken into account with regard to the rights of employees and the duties on employers (see Part 7), and also if the company is wound up this employment status has implications for the payments of creditors.

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17.5.1 Appointment

A private company is entitled to make an appointment of a secretary, and where it chooses to do so, that officer of the company has to undertake statutory duties and those imposed through the articles, and they have authorization to perform various functions on the company's behalf. The board of directors will choose the secretary (a power usually authorized in the company's articles) and will usually determine the terms and conditions upon which the appointment is to be made, including the term of office. This decision is usually

made at a general meeting and passed through an ordinary resolution. The company secretary does not take part in the management of the company (although they do have responsibilities for the company) but the position does provide certain powers (these are generally restricted to administrative tasks).

A public company must have a secretary (CA 2006, s. 271). Unlike a secretary for a private company, a public secretary must have the qualifications required to hold such a position (CA 2006, s. 273):

1. they have held the office of secretary of a public company for at least three of the five years immediately preceding their appointment as secretary;
2. they are a member of any of the bodies specified in subsection (3)—bodies representing the many chartered institutes of accountants;
3. they are a barrister, advocate, or solicitor called or admitted in any part of the United Kingdom;
4. they are a person who, by virtue of their holding or having held any other position or their being a member of any other body, appears to the directors to be capable of discharging the functions of secretary of the company.

It is also a requirement under CA 2006 that the company maintains a register of company secretaries and not simply include them in the Register of Directors, as was the previous practice (CA 2006, s. 275). This must be kept at the company's registered office or another specified place under s. 1136 and the company must inform the Registrar of where it is being held.

In the absence of a company secretary, the duties that would have previously been undertaken by this officer may be carried out by any other person that the company's board of directors so wish (so in essence the company has a secretary, but just not in name). It is possible for a company to occupy the position of secretary, but this will not be allowed where it is acting as secretary of a company run by a sole director and this sole director is also the sole director or secretary of the other company. Where there is no secretary because of some temporary vacancy or the secretary is incapable of acting in this capacity, an assistant, deputy secretary, or some other person such as a director may be authorized by the directors to fulfil this role (CA 2006, s. 274).

p. 447 ↵ The main role of the secretary is to undertake many of the administrative burdens that a limited company has to comply with as a result of its members enjoying limited liability status. The secretary completes these documents, signs them, and returns them on the company's behalf. These include maintaining the company's registers, arranging the company's meetings and forwarding the notices of these meetings and any resolutions to be moved to the members, and submitting the company's annual return.

The secretary has the power to bind the company in contracts, even in the absence of any authority in this respect, where this relates to administrative proceedings such as employing staff and hiring transport. This power is associated with the usual authority of such a position (under agency) and will only extend that far. Where the secretary attempts to bind the company on issues which would be obviously beyond their authority such as taking loans on the company's behalf and registering the transfer of the company's shares, as these would be powers vested in the directors rather than the secretary, the secretary enjoys no powers in this respect. However, the law of agency applies in these situations and the company must ensure that third parties are not misled as to the authority possessed by the secretary.

Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd (1971)

Facts:

The secretary of a company was required to hire cars as part of the business of the company. They further used their position to order the use of cars for personal business. When the company discovered this fact, it wished to avoid having to settle the bill and considered the secretary liable.

Authority for:

The court held the company was liable. The company secretary was not a mere clerk and had the apparent authority to enter into such contracts.

Conclusion

This chapter has sought to identify the nature of a director's role in a company, the powers they possess, where these powers derive, and the obligations imposed on the director by the enactment of CA 2006. The secretary of the company is also an important position, and whilst there is no longer an obligation on private companies to have a secretary, public companies still have such a duty and there are specific qualifications that are required to be satisfied where a public company employs a secretary.

Summary of main points

Directors

- Directors exercise the specific tasks in the running of the company.
- The members (such as shareholders) 'own' the company but have no automatic rights of management.
- Directors may or may not be shareholders of the company.

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Types of director

- Directors may be executive, non-executive, and shadow.

Number of directors

- A private company is required to have at least one director.
- A public company is required to have at least two directors.

Appointment

- Directors may be the promoter(s) of the company when it is first registered.
- Directors may be added to the company to increase expertise to the company's management or where additional responsibilities have to be performed.
- Directors may be appointed in accordance with the company's articles, usually through an ordinary resolution at a general meeting, but other mechanisms such as a written procedure may be valid.
- Directors must be over the age of 16 to be appointed to hold the position.
- A public company may not appoint two or more directors at a general meeting through a single resolution unless a resolution that it should be made has been unanimously agreed.
- Whilst corporations may be a director, every company must have at least one director who is a natural person.

Registration

- Every company is required to maintain a register of the directors which is available for inspection.

Directors' pay and contracts

- Directors may not necessarily receive remuneration but where pay is given the details must be maintained by the company and be available for inspection.
- Directors' length of contract, over a fixed term of two years' duration or more, may be terminated by providing reasonable notice.

Directors' duties

- The common law duties have been codified and expanded through CA 2006.
- The duties include:
  - to act within their powers;
  - to promote the success of the company;

- to exercise independent judgement;
- to exercise reasonable care, skill, and diligence;
- to avoid conflicts of interest;
- not to accept benefits from third parties.

- Directors must declare an interest in proposed transactions or arrangements that do, or may, cause a conflict.

Meetings of directors

- Each of the directors must be given notice of the meetings.
- The company must keep the minutes of the proceedings at the meeting, and maintain those for at least 10 years.
- Decisions at meetings are based on a voting system.

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Indemnifying directors

- A company may indemnify a director when it concerns the provision of insurance, a qualifying third-party indemnity provision, or a qualifying pension scheme indemnity provision.
- Fines imposed through the criminal law or civil fines by regulatory authorities will not be indemnified.

Removal of a director

- Directors may retire annually (retirement by rotation) or through resignation, or through being removed before the expiration of their term of office.
- The director may be removed through an ordinary resolution and special notice of the resolution where it is provided to the company 28 days before the meeting (and where 21 days' notice is given of the meeting).

Disqualification

- The Company Directors Disqualification Act 1986 applies to both natural persons and corporations that hold directorships.
- Once disqualified the person may not take part in the management of a company for the period of disqualification.

Directors' liability to shareholders

- Directors are responsible to the company as a whole, not to individual shareholders.
- Minority protection is provided through CA 2006 to restrict directors' acts that may adversely affect their position. Shareholders may bring a claim against directors in the company's name (a derivative claim) or may claim that a directors' acts or omission would be unfairly prejudicial to the shareholder.

The company secretary

- Private companies are no longer required to have a company secretary, although a sole director cannot also be the company secretary.
- Public companies must have a company secretary and this officer must satisfy statutory requirements in relation to their qualifications.
- The board of directors are usually empowered to appoint the secretary.
- Companies are required to maintain a separate Register of Secretaries.
- The secretary undertakes many of the administrative burdens of the company, signing documents and returning them to the Registrar as required by law.

Summary questions

Essay questions

1. Discuss the implications for directors' duties to the company since the enactment of the Companies Act 2006. Explain where the statute has expanded the duties previously established through the common law, and what steps the company should take to ensure compliance with the Act.
2. How may members of a company remove a director before the expiry of their term of office? What protection is afforded to directors when faced with such a resolution?

Problem questions

1. John is the managing director of Widgets and Gadgets Plc and is aware that the company is the target of a takeover by Build 'em up, Knock 'em down Plc. John does not believe that such a takeover would be in the best interests of the company and therefore a board decision is made to increase the allotment of shares under an employee share scheme. This will increase the shareholding of the company and prevent the takeover.

   Advise Widgets and Gadgets Plc on the implications of this action.

2. Sarah is the company secretary of Picture Perfect Ltd, an advertising agency. The company regularly hires limousines to collect important clients from their offices and airports. Without authorization from the company, Sarah hires several cars to transport herself and her friends on nights out on the company's business account with the hire firm. When the company receives the invoice, Sarah's actions are discovered and the company refuses to pay the bill.

   Advise the parties of their rights and obligations.

You can find guidance on how to answer these questions **here** *<https://oup-arc.com/access/content/marson6e-student-resources/marson6e-chapter-17-indicative-answers-to-end-of-chapter-questions?options=name>*.

Further reading

Books and articles

Almadani, M. (2009) 'Derivative Action: Does the Companies Act 2006 Offer a Way Forward?' *Company Lawyer*, Vol. 30, No. 5, p. 131.

Cheung, R. (2008) 'Corporate Wrongs Litigated in the Context of Unfair Prejudice Claims: Reforming the Unfair Prejudice Remedy for the Redress of Corporate Wrongs' *Company Lawyer*, Vol. 29, No. 4, p. 98.

Hadjinestoros, M. (2008) 'Exploitation of Business Opportunities: How the UK Courts Ensure that Directors Remain Loyal to Their Companies' *International Company and Commercial Law Review*, Vol. 19, No. 2, p. 70.

Keay, A. (2007) 'Company Directors Behaving Poorly: Disciplinary Options for Shareholders' *Journal of Business Law*, Sept., p. 656.

Websites, Twitter, and YouTube channels

http://www.bitc.org.uk *<http://www.bitc.org.uk>*

@BITC1

https://www.youtube.com/user/1BITC *<https://www.youtube.com/user/1BITC>*

This governmental organization (Business in the Community) enables companies to become members and share practices of effective corporate values, translating these into models of management that are applicable in modern business.

http://www.companieshouse.gov.uk *<http://www.companieshouse.gov.uk>*

@CompaniesHouse

https://www.youtube.com/user/TheCompaniesHouse *<https://www.youtube.com/user/TheCompaniesHouse>*

Information regarding the establishing of business organizations, forms to speed up the process, the requirements for returning documents to the Registrar, other information of interest to companies and their members, and general company advice.

p. 451 ↵ https://www.gov.uk/limited-company-formation/directors-and-company-secretaries <https://www.gov.uk/limited-company-formation/directors-and-company-secretaries>

Government website providing details on appointing a company secretary and the role and duties of this officer.

http://www.iod.com <http://www.iod.com>

@The_IoD

https://www.youtube.com/user/iodchannel <https://www.youtube.com/user/iodchannel>

The Institute of Directors is a body that supports and represents individual private directors.

http://www.legislation.gov.uk/ukpga/2006/46/contents <http://www.legislation.gov.uk/ukpga/2006/46/contents>

The Companies Act 2006.

Online Resources

Visit the online resources <https://oup-arc.com/access/marson6e-student-resources#tag_chapter-17> for further resources relating to this chapter, including self-test questions, an interactive glossary, and key case flashcards.

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