



CPA Australia – Fiji Institute of Accountants  
Technical Workshop

## Duties and Responsibilities of Company Officers

**Presented by:** Viren Kapadia, Sherani & Co, Solicitors, Suva  
**Date** : 19<sup>th</sup> September 2009  
**Place** : Warwick Fiji, Korolevu

### 1. Introduction

- 1.1 I have been asked to speak to you today on the “Duties and Responsibilities of Company Officers”. As the topic is so wide I have taken the liberty to concentrate on directors duties under the Companies Act 1983 (the Act) and the Common Law. There are many other legislation such as the Capital Markets Development Authority Act and the Income Tax Act to name just two which impose duties and responsibilities on company officers. However to cover the whole range of specific legislation that create liabilities for company officers would take too much time and space and is best left to be dealt with separately on another occasion.
- 1.2 The legislation and the common law governing companies and in particular duties and responsibilities of directors and secretaries is very complex. I will set out the fundamental duties and responsibilities as developed by common law and then list out for you some of the major statutory duties imposed on company officers under the Act. In Fiji, to some extent, the Act has consolidated the law relating to incorporation, regulation and winding up of companies. However a large portion of the law relating to duties and responsibilities of company officers is still common law based. I hope by the end of this paper you have a good idea of the duties and responsibilities of company officers under the Act and the Common Law.

---

## 2. Memorandum and Articles of Association and Doctrine of Ultra Vires

Most companies in Fiji are limited by shares. Each of the shareholders are owners of the company and may also be referred to as members. The activities of the company are primarily governed by the Memorandum and Articles of Association. The Memorandum is the company's constitution which governs its relationship with the outside world. The objects clause within the Memorandum is what defines the powers of the company. All directors of companies should be familiar with the scope of these powers as they may be held personally liable for any activities undertaken which are outside the objects clause and which may be found to be ultra vires. The company's Articles regulate the internal organization of the company. The standard Articles are set out in Schedule A of the Act. The directors derive their powers from the Articles. Article 80 of Schedule A vests the management of the company to the directors. The shareholders in a general meeting only have residual reversionary powers to act derived inherently under Common Law as incorporators of the company. It is always prudent to check on the Memorandum and Articles of Association of a company when considering the powers of company directors. There are many instances of heavily amended Memorandum and Articles of Association which require special consideration.

2.2 A major principle of company law following on from the "veil of incorporation" is the doctrine of ultra vires. Companies are artificial legal persons and early common law considered it necessary to restrict their powers to specified objects to protect shareholders and third parties. An ultra vires contract has been held not to be binding on the company. Nor is it able to become intra vires by reasons of estoppel, lapse of time, rectification, acquiescence or delay ("See **York Corporation v Harry Latham & Sons Limited** (1924) 1 Chancery Reports 557 at 573").

2.3 In the Companies Act Sections 7, 8 and 10 of the Act deal with objects of the company. Section 10 of the Act now enables a company by special resolution to alter the provisions of the Memorandum with respect to its objects and powers.

Section 7 implies to every company certain ancillary and incidental powers in addition to those already contained in their Memorandum unless expressly excluded or modified. Section 8 deals with ultra vires transactions and states that they are not invalid by reason only of the fact that the company was without capacity or power to do the act. However any such lack of capacity or power can only be asserted or relied upon in a proceeding against the company by a member of the company, a debenture holder or on a petition by the Attorney General to wind up the company. This Section has modified the harshness of the common law to some extent for third parties.

### **3. Common Law Duties and Responsibilities**

- 3.1 I will first of all set out the common law duties and responsibilities and later deal with the statutory duties and responsibilities under the Act. The current statutory regime concerning directors has been derived from the development of the common law as it related to companies in the United Kingdom in the 19<sup>th</sup> century. This common law has been preserved in Fiji. The Act passed in 1983 is not a code on duties and responsibilities of company officers. We still need to consider the common law as it applies to the fiduciary nature of the directors responsibilities to companies.
- 3.2 Directors are entrusted with the assets of the shareholders. There is a paramount duty to act in good faith and in the best interest of the company. Company here means the shareholders of the company. Directors should not place themselves in a position of conflict between personal and company interest. A director should try to avoid any personal interest in contracts entered into by the company and where such an interest exists, the director is required to make disclosure to the board of directors. Directors are agents of the company and to that relationship most of the ordinary principles of agency apply. These principles are at the core of the fiduciary duties of directors.
- 3.3 One may ask what is good faith and in the best interest of the company. This has caused considerable difficulties with the Courts. I may add that besides

---

directors the principle of fiduciary duty also applies to company secretaries and officers who act as if they are directors of the company.

- 3.4 Good faith simply means honesty. Negligence is not sufficient for bad faith. Short of honesty something like gross recklessness would be needed. A failure to make a genuine attempt to do what a careful director could do would be an act of bad faith. There are a great number of cases where the pursuit by directors of their own or their family's interest rather than the company's had led to a finding of a breach of the duty to act in good faith in the company's interest.
- 3.5 The second limb of the duty requires directors to act in the best interest of the company. A director would be made liable where a decision to enter into a transaction was one which no reasonable person in his position could have made in the company's interest. In the leading case of **Charterbridge Corp v Lloyds Bank Ltd (1970) 1 Ch 62 at 74 Pennycuick J** had this to say on the common law duty:

*"The proper test, I think must be whether an intelligent and honest man in the position of a director of the company, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company".*

- 3.6 The fiduciary duties of directors as gleaned from case law may be briefly summarized into 10 principles as follows:
- (a) The duty to act honestly and in the best interest of the company.
  - (b) The duty to acquaint themselves with their powers and functions
  - (c) The duty to act in accordance with the Memorandum and Articles of the Company.
  - (d) The duty to exercise their powers for a proper purpose.
- However the strictness of the duty of fiduciary care under common law as it has developed out of the law of trust has been modified for company directors. Directors of companies are required to act in the best interest of

---

the company as a whole and not for any specialized interest of specific shareholders or family members. They will not be liable for bad judgment or mere negligence.

- (e) The duty not to fetter the discretion or the powers that they have.  
Not only must a director exercise his own independent judgment in relation to the powers which are vested in him but he must also exercise it on behalf of the company. This also means that company directors are not permitted to delegate their powers to others. They must exercise their powers and functions themselves.
- (f) The directors must avoid conflict of duty and interest in their exercise of their powers and responsibilities towards the company.  
If directors are in a situation where they may be in actual or potential conflict of interest they are obliged to disclose their interest to the board or the shareholders of the company.
- (g) The directors are obliged to act bona fides and must not make a profit or take an advantage for themselves as a result of their position in the company.
- (h) The directors must not misappropriate property of the company for their benefit or for any persons associated with them.
- (i) Directors must exercise ordinary care and skill and if possessed of special knowledge or experience they must use it in the affairs of the company.
- (j) Above all they must have a duty of loyalty to the company.

3.7 The duty imposed upon a fiduciary is a strict one. The only way directors can avoid liability for any conduct that tantamounts to a breach of fiduciary duty is if that conduct was undertaken with the informed consent of the shareholders to whom fiduciary duty was owed. An action in respect of a breach of a common law or statutory duty can be brought by the company as a whole. The

---

shareholders in a general meeting of the company can also bring about the removal of a director who has not carried out his duties to their satisfaction.

- 3.8 To illustrate by way of decided cases the law concerning fiduciary duty I refer to the classic case of **Overend Gurney v Gibbs** (1872) LR5 HL480. This is a leading case concerning powers of directors. The case illustrates that carelessness or at least gross negligence was an ingredient in early company law while at the same time preserving to directors a wide degree of business judgment. In this case the company instituted proceedings against the Defendant director in relation to the purchase by the company of the very property which its Memorandum envisaged should be purchased. The purchase having proved unwise proceedings were brought to make the Defendant director liable. The House of Lords found that there was on the facts no misfeasance by the Defendant director. The Court found that the Defendant director had not misappropriated to himself any portion of the money of the shareholders or with having had any indirect benefit from the engagement he entered into.
- 3.9 This case clearly illustrates that even though a fiduciary duty is imposed on directors, mere carelessness or lack of business judgment will not make a director liable. Directors will not be liable for mere errors of judgment in the course of business.
- 3.10 Another case that illustrates the point is **City Equitable Fire Insurance Company** (1925) CH 407. The company here had been defrauded by its chairman of £1.2 million. The proceedings sought to make liable non-executive directors for lack of supervision. The Court held that while directors have to act reasonably they have only to reach the standard of care of someone with their knowledge and experience. In summary the Court held that:
- (a) Directors are not liable for mere errors of judgments.
  - (b) Directors are not bound to give continuous attention to the affairs of the company

- (c) Directors may rely on delegates to perform their task properly and honestly
- (d) Directors must retain oversight of the state of the company's assets.
- (e) While directors have to act reasonably they only have to reach the standard of care of someone with their state of knowledge and experience.

The Court in this case held some of the non-executive directors culpable for having relied, in presenting accounts to the company in general meeting and in recommending a dividend, on the assurances of the chairman, without themselves having had prepared an independently confirmed statement of the company's assets.

- 3.11 Another classic statement of the common law concerning director's duties is to be found in the judgment of Lord Crainworth LC in the leading case **Aberdeen Railway Company v Blaikie Brothers (1954)** 149 ER 32 at page 39:

**"The directors are a body to whom is delegated the duty of managing the general affairs of the company.**

**A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interest of the corporation whose affairs they are conducting.**

**Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interest of those whom he is bound to protect.**

**So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into."**

- 3.12 This statement of law was cited with approval by Mr. Justice Fatiaki, as he then was, in the case **Frank Skerlec v Charles Tompkins (1999)** FJHC 134 in a judgment delivered on the 19<sup>th</sup> May 1999 in the High Court of Fiji.

3.13 I may add that directors generally do not owe a duty of care to creditors of the company. In most cases a breach of duty will only be pursued after a company is wound up. However there is one New Zealand case of **Nicholson v Permakraft** (1985) 1 NZLR 242 at 249 that suggests that the common law duty may be extended in a situation where the directors are trading even though the company is insolvent.

## **4. Statutory Duties and Responsibilities**

### **4.1 Consolidation of the Duties**

The Act to a large extent has consolidated the duties and responsibilities of company officers while at the same time preserving the common law as it relates to fiduciary duties of directors in the management of the company and in their dealings with third parties and shareholders. To set out all of the statutory duties imposed by the Act in the body of this paper would not be practicable. I have therefore taken the liberty to list by way of a summary all of the offences and penalties under the Act as Appendix 1 to this paper. You can go through it in your own time and on an as and when required basis for easy reference. You will also find in Appendix 2 a brief summary of the key filing requirements imposed on company officers. I propose here to set out some of the more important duties imposed on company officers by the Act.

### **4.2 Definition of a Director and Secretary**

A director must be a natural person. In the case of a private company at least one director must be ordinarily resident in Fiji (Section 180). A person giving advise to directors of a company in a professional capacity is not deemed to be a director (Section 2(2)). Similarly a secretary of a company must be a natural person who has attained the age of 21 years and must be ordinarily resident in Fiji (Section 181). By Section 182 acts of a director or manager are valid notwithstanding that a defect may be discovered afterwards in their appointment or qualification. The post of secretary and director cannot be combined (Section 181). The general

---

age limits for a director of a public company or private company that is a subsidiary of a public company is a minimum age of 21 and a maximum age of 75. However an exemption is allowed when such a director is appointed by special resolution at a general meeting and his age is stated in the notice. Such a resolution is necessary for every year the appointment continues (Section 187).

#### **4.3 Disqualification and Removal**

Directors are disqualified from appointment of office if they are convicted of certain offences or in the course of a winding up they have been found guilty of fraudulent trading or fraud in relation to the company or a breach of a duty of care owed to the company (Section 190). They may be removed from office by ordinary resolution at a general meeting of which special notice has been given (Section 186). Directors may also be removed by order of the Court pursuant to Section 190.

#### **4.4 Disclosure of Financial Affairs**

Section 149 requires the keeping of proper books of accounts. This encompasses the wider duty of disclosure of financial affairs required from an incorporated entity. By Section 149 (2) the phrase “proper books of accounts” is defined as “such books as are necessary to give a true and fair view of the state of the company’s affairs and to explain its transactions”. This is a logical consequence of Section 151 (1) whereby responsibilities are placed on the directors to ensure that financial statements show a true and fair view. The keeping of proper books of account is also the subject of disclosure requirements under Schedule 7 of the Act. Section 149 states that a company shall retain the books of accounts for a period of 7 years after the financial year to which they relate. It also states that these books of accounts shall be keep at the registered office of the company or such other place so long as it is in Fiji.

#### **4.5 Directors Report**

By Section 157 every balance sheet of a company is to be signed on behalf of the board by two of the directors of the company. A profit and loss account is to be annexed to the balance sheet (Section 158). Under Section 159 the directors

---

report must disclose the state of the companies affairs, the amount recommend as dividends and the amount proposed for transfer to reserves. By Section 159 (2) the directors must disclose, if material and not harmful to the company, any change in the nature of the company's business. This is to be done so as to warn shareholders whether the activities of the company have changed during the past 12 months without advice or reference to the general meeting.

#### 4.6 **Audit**

By Section 130 (4) private companies are exempt from the requirements of an audit. The contents of an audit report are governed by the Eight Schedule to the Act.

#### 4.7 **Prohibited Acts of Directors**

The directors are not permitted to do or cause to be done by the company certain things.

##### (a) **Tax free payments (Section 191)**

The company is not permitted to pay a director remuneration free of income tax or other tax on income except under a contract which was in force 2 years before the commencement of the Act or for payments which were due at that time.

##### (b) **Loans (Section 192)**

A company may not make a loan or provide a guarantee for security to director for a loan except where:

- it is a private company
- it is to provide funds to meet business expenses or to properly perform his duties as a director and is approved in a general meeting
- it is a loan made in the ordinary course of business by a company whose ordinary business includes the lending of money

- 
- it is a loan, guarantee or security entered into under the old Act.

Section 58 allows a private company to make loans to shareholders or directors to enable them to purchase shares in the company held by an existing shareholder or a person entitled to them by reason of the debt or bankruptcy of the shareholder.

(c) **Compensation (Sections 193 and 194)**

Compensation for loss of office or retirement by way of payment or transfer of property is not permitted unless approved in a general meeting.

#### 4.8 **General Liabilities of Directors**

Section 324 provides that if it appears that the business has been carried on with the intent to defraud creditors or for any other fraudulent purposes, the Court may order that any person knowingly party to it, be personally responsible without any limitation of liability for all or any of the debts and liabilities of the company. This is in addition to him being liable to prosecution. This is a particularly important provision in the Act which can be used in the course of a winding up of a company. For example if it can be shown by the Plaintiff that the directors have been issuing cheques which were being dishonoured, it would be relatively easy to prove the intent to defraud creditors. The Court can order that the debts due and payable by the company are to be paid personally by either the directors of the company or the manager of the company. There are similar provisions in Sections 325 and 326 of the Act concerning misapplication or retention of money or property of the company by the promoters of the company or by any past or present director, manager or liquidator or officer of the company. I may add here that Section 403 of the Act exonerates an officer of a company from liability in respect of negligence, default, breach of duty or breach of trust if he can show that he acted honestly and reasonably and that having regard to all the circumstances of the case he ought fairly to be excused for negligence, default, breach of duty or breach of trust.

---

#### 4.9 Winding Up Notice

I wish to emphasize the onerous responsibility on company officers to deal expeditiously with a winding up notice once served on the company. This is particularly relevant for accountants as Accounting firms are often registered offices of many companies. There have been numerous cases in our Courts where officers of the company have not paid sufficient attention and diligence in dealing with the service of a Section 221 winding up notice on the company resulting in a winding up petition being filed within 3 weeks of service of the notice and the consequential advertisement in the local newspapers and the gazette of the winding up petition causing embarrassment to the company officers. Upon service of a winding up notice the company officers must take immediate steps to decide whether the debt is justly payable or whether it is substantially disputed. If it is substantially disputed a letter must be sent immediately to the creditor or the solicitors acting for the creditor setting out in detail why the debt is disputed. If after that the creditor wishes to pursue a winding up petition then the debtor company must immediately file an application in the High Court of Fiji for a stay of the winding up proceedings on the grounds that the debt is substantially disputed.

A winding up notice pursuant to Section 221 must be physically served (i.e not by post, fax or e-mail) on the registered office of the company and must be signed by the creditor or someone authorized by the creditor in writing as agent. If it is merely signed by the solicitors it is invalid.

### 5. Conclusion

5.1 I hope that you now have a better understanding of the duties and responsibilities of company officers in Fiji. The Appendix to this paper will give you the complete range of Sections of the Act that create criminal offences and penalties on the part of company officers for acts and omissions under the Act. The Act has been in existence for some 25 years and I am of the view that it is time to re-look at the Act in the light of the reforms of the corporation laws that have been carried out in New Zealand, Australia and the United Kingdom. These countries have done

---

away with doctrine of ultra vires and tightened provisions relating to duties and responsibilities of directors and company officers in the financial management of the company. For example in Fiji there is no penalty for fraudulent trading where the facts are discovered in circumstances other than in the course of winding up. Insider trading provisions do not exist in the Act although they are now applicable to public companies under the Capital Markets Development Authority Act. The reforms are also necessary in the post Enron and WorldCom corporate environment where corporate governance issues are now in the limelight. Challenges to the duties and responsibilities of directors have been far and apart in Fiji. The difficulty primarily lies in the poor infrastructure as it applies to the implementation of the Act. Governmental resources have not been forthcoming in this regard. I hope this brief review of the duties and responsibilities of company officers will also stimulate further discussion amongst the accounting community on the reform of the Companies Act in Fiji.

## Appendix 1

### Sections of Companies Act of Fiji involving offences or penalties for Company Officers

Section	Description
10	Alteration of Memorandum
12	Articles of Association of unlimited and limited by guarantee companies
22	Change of Name
28,29	Supply of copies Memorandum and Articles
34	Statement in lieu of prospectus
42,44,47,48,49,380	Prospectus
51,52,53,55	Allotment of Shares
55	Accounting for application monies
56	Return of Allotments
57	Prohibition on Commission on subscription
58	Prohibition on purchase of own shares
60,61,66,67,75,82,84	Shares and share capital
88,89	Personation of Shareholders and forged warrants
91	Inspection of register of debenture holders
99,100,102,106	Registration of Charges
105	Registration of Receivers
107	Omission of entry on Company Register
108	Right to inspect register
109	Registered Name and office
110,111	Situation of Registered Office
112	Statement of paid up Capital
113	Commencement of Business
114,115,117,118	Register and Index of Members
123,124	Branch Register
127,128,129, 130	Annual Return

<b>Section</b>	<b>Description</b>
132, 133, 138,142, 145, 147, 148	Meetings & proceedings
149,150,151,152	Accounts
157,158,159,160	Balance Sheets
164	Auditors
167,168,177	Investigations by Registrar
178	Restrictions on shares and debentures
180,181,183,184	Directors & Secretaries
188	Disclosure of Age
189,190	Undischarged bankrupts and fraudulent persons
195,200,201	Disclosure in connection with transfer of shares and property
197	Register of directors shareholdings
202	Register of Directors and Secretaries
204	Unlimited liability statement by Director
208,209	Compromises with Creditors
210	Compromise and Arrangements
233,273,287,319,320,321,322, 323,324,328,330,333,339	Winding Up
347	Disqualification of Receiver
350	Notification of appointment of Receiver
353	Statements and Accounts
354	Receivers
375	Penalties for foreign company defaults
377,378,379,380	Prospectus
385	Inspection of Documents
390	Keeping of registers
393	Penalties for false statements
394	Improper use of "Limited"
395	Default fines

## Appendix 2

### Summary of Filing Requirements under the Companies Act:

<u>Document</u>	<u>Filing date</u>	<u>Penalties</u>
Annual Return	Within 42 days of AGM	Default fine \$20 per day
Notice of register of members if not kept at registered office	Within 14 days of setting up or change	as above
Notice of branch register of members	Within 1 month of setting up or change	as above
Particulars of directors and secretaries	Within 14 days of change	as above
Notice of changes to share capital	Within 30 days of change	as above
Notice of registered office	Within 14 days of change	as above
Notice of change of name	Within 14 days of change	Default fine \$10 per day
Registration of charges	Within 42 days of creation	Default fine \$100 per day
Statutory report	At least 14 days before statutory meeting	Fine \$100
Special resolutions	Within 30 days of passing	Default fine \$4 per day
Resolution of non-appointment of auditor by a private company	Within 30 days of passing	as above
Return as to allotments	Within 60 days of allotment	Default fine \$10 per day