

PERSONALISED LEGAL ASSISTANCE

Professional legal and property consulting

SONNENBERG & ASSOCIATES PROPERTY AND LEGAL ADVICE NEWSLETTER 58

1. Legal Quotes

"The Plaintiff and Defendant in an action at law are two men ducking their heads in a bucket, and daring each other to remain longest under water." [Samuel Johnson]

"A man with a club is a law-maker." [Jack London, *The Call of the Wild*]

"No laws, however stringent, can make the idle industrious, the thriftless provident, or the drunken sober." [Samuel Smiles]

2. Legal thought for the day

If an apple a day keeps the doctor away, how many orchards does it take for a lawyer?

3. Inspiring quote

"Efforts and courage are not enough without purpose and direction." [John F Kennedy]

"Once you have made the decision to move on, don't look back. You'll never find your future in the rear view mirror." [unknown]

"Today's mighty oak is just yesterday's nut that held its ground." [David Icke]

4. Duties of directors under the new Companies Act

The duties are mainly the common law obligations of **fiduciary duty**, and **the duties of care, skill and diligence** (see below, which are **repeated in section 76(3) of the New Act**), **which have now become statutory obligations under the New Act**. The duty of disclosure (section 234 of the Old Act), is brought forward in section 75 of the New Act.

- 1. Fiduciary duties:** these duties are owed to the company as a result of the control that directors exercise over the assets of the company, and the power that is held by the directors in acting on behalf of the company. Fiduciary duties are non-negotiable and cannot be waived in any manner or form. These duties include:
 - The duty not to exceed ones powers as director;
 - The duty to exercise ones powers for the proper purpose, i.e. to act bona fide in the interests of the company;
 - The duty to exercise an independent and unfettered discretion;
 - The duty to account for profits (and not to make secret or incidental profits);
 - The duty not to act on behalf of company in any matter where a conflict exists with ones duties to the company.
- 2. The duty of care and skill and diligence:** a director is obliged to display either the same care as a reasonable person would display in the conduct of his/her own affairs, or that degree of skill which may be reasonably expected from a person of his/her knowledge and experience.
- 3. The duty of disclosure** (Section 75 of the New Act): directors are obligated to make known all direct or indirect and/or material interests which they may have in any contract which is to be concluded or has already been concluded by the company.

Section 76 of the New Act sets out **the standards of conduct required to be performed and exercised by a director**. More specifically, section 76(2) places a positive obligation on a director to **avoid any conflict of interests** with the company. This obligation is two-fold, namely that a director must:

- not use the position of director to gain any personal advantage for the director or for another person other than the company or a wholly-owned subsidiary of the company; or knowingly

- cause harm to the company or a subsidiary of the company; and
- communicate to the board, at the earliest moment possible, any information that comes to the director's attention, unless he/she reasonably believes that such information is immaterial to the company or is generally available to the public or known to other directors; or unless he/she is bound not to disclose that information by a legal or ethical obligation of confidentiality.

Section 76(3) (c) expressly states that **a director, when acting on behalf of the company, should perform all of his/her functions and powers in good faith, for a proper purpose, in the best interests of the company, and with the requisite degree of care, skill and diligence that may reasonably be expected of a person holding such office, with the same level of knowledge and skill as that director.**

Liabilities of a director who breaches his fiduciary duties (Section 77 of the New Act):

Breaches under sections 75, 76(2) and 76(3)(a) and (b) of the New Act attract **common law liability**.

Any breach of section 76(3)(c) by a director attracts delictual liability, as would a breach of any other provision of the New Act or the company's memorandum of incorporation.

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