

## BUSINESS LAW – COMPANY LAW (lecture 9) – Directors and Business Ethics

**Director:** acts as an agent for the company; will incur liability on behalf of the company, not personal liability; section 250 CA 2006: director includes any person occupying the position of director, by whatever name called; not limited to those that have been formally appointed (De Jure), but those who have been given the position (De Facto). *Re Lo-Line Electric Motors Ltd* – would include governors and managers. If not carrying out functions/decisions/management, may not be a director as a matter of fact.

### TYPES OF DIRECTORS

**Executive director** – have been appointed and management responsibilities; extensive executive powers; board of directors exercise management of company, even if against wishes of shareholders; may be delegated to specific individual directors; usually full time; employment states.

**Non-executive** – not obligatory, but best practice; fee paid – not employees; independent and objective view of proper management of business and financial integrity of business; same duties and liabilities as executive directors.

**De Jure Directors** – formally and validly appointed subject to the articles of association by ordinary resolution or by decision of the directors; decision taking as a board, as a sub-committee of the Board, as individuals.

\*Private co: min 1 director. Public co: min 2 directors (s154). A corporation can be appointed a director BUT at least 1 director must be a natural person (s155). Min age – 16 (s157). No maximum age (cf s293 CA 1985). Acts of directors are valid notwithstanding defects in their appointment (s161)

**De Facto Director** – directors as a matter of fact. Having been appointed formally, but acting as a director.

\*The director must be shown to have undertaken functions over and above a managerial role – *Re Hydrodam (Corby) Ltd*

\*Factors taken into consideration (*SoS for Trade and Industry v Tjolle*): whether or not the company held the individual out as a director; the individual was in a position to commit the co to major obligations on the basis of access to management accounts; use the title of 'director'; whether they took part in management decisions at board level and made corporate decisions and was this individual part of a corporate governing structure?

**Shadow Director** – s251(1) a person in accordance with whose directions or instructions the directors of the company are accustomed to act.

\**Re Hydrodam (Corby) Ltd* – s251(1) to apply 4 factors to take into account.

\**Ultraframe(UK) Ltd v Fielding* – shadow directors will not automatically owe a fiduciary duties to the company.

### The Board of Directors:

\*Board meetings – the mind of the company; recommending dividends; all directors must attend board meetings; shareholders do not attend.

\*Minimum numbers – stated in articles of association; board can't act if minimum not there; default CA provides minimum of 2 if A of A do not mention this.

\*The Chairman of the Board – gets casting vote to defuse deadlock; board will appoint chairman.

### TERMINATION OF OFFICE

\***Removal** – CA168(1) shareholders have power to remove a director before expiration of his period office. S168(5)(a) CA 2006 – cant remove his rights to claim for compensation in respect of termination. This cannot be excluded. Have to give at least 28 days notice. Director has a right to attach a statement. *Bushell v Faith* – shares = amount of votes.

\***Resignation** – can occur at any time.

\***Retirement** – public companies – at the end of a set period and rotation.

\***Vacating office** – as required by the articles/statute eg bankruptcy.

\***Disqualification** – Company Directors' Disqualification Act 1986.

### DIRECTORS' DUTIES

\*Sources of directors' duties – equity, common law, statute

\*s170(1)- the general duties specified in s171-177 are owed by a director of a company to the company – *Fercival v Wright* – Duty to: act within powers; to promote the success of the company; to exercise independent judgment; exercise reasonable care, skill & diligence; to avoid conflicts of interest; to not accept benefits from third parties; to declare interest in proposed transactions.

\*s170(2)- a person who ceases to be a director continues to be subject to the duty in s175/176.

\**IDC v Cooley* – Resignation is no defence to an action for breach of conflict/benefits from third parties.

\*s171 – a director of a co must: act in accordance with the co's constitution and only exercise powers for the purposes for which they are conferred.

\*Duty to act within the co's constitution. s171 includes articles of association and decisions taken in accordance with the articles (shareholder resolutions).

\*Duty to act for 'proper purposes' – *Howard Smith Ltd v Ampol Petroleum Ltd* – unconstitutional for directors to use their fiduciary powers over the shares in the co for the purpose of destroying an existing majority or creating a new majority.

\* *Extrasure Travel Insurances Ltd v Scattergood* – identify the: power whose exercise is in question; proper purpose for which that power was delegated to the directors; substantial purpose for which the power was in fact exercised; decide whether purpose was proper.

\*The 'proper purposes' doctrine encapsulated in s171 is an incident of the central fiduciary duty of directors to promote the success of the co.

\*The power of directors to issue shares may be exercised for reasons other than raising capital provided those reasons relate to a purpose benefiting the co as a whole.