

Jersey directors' duties in light of the coronavirus (COVID-19)

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Advice for directors (COVID-19)

Many companies are facing new and challenging circumstances given the fast-moving COVID-19 situation. It is likely that during the coming weeks you and your fellow board members will be called upon to make difficult decisions. This is a critical time during which it is imperative to ensure you are focused on the key issues and equipped to act prudently and in accordance with your duties.

What are your duties?

At all times the directors have a statutory duty to act honestly and in good faith with a view to the best interests of the company (which means the interests of its members as a whole, and not just one particular member or group of them) and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. If the company is in or nearing financial difficulty, the directors are subject to additional duties and may be required to take steps to safeguard the interests of the company's creditors. When exercising fiduciary duties, the directors of a company that is, or is likely to become, insolvent on a cashflow basis should have regard to the interests of creditors as a whole (not just one particular creditor or group of them). Furthermore, whilst the legal test is a cashflow solvency test, for companies in the zone of insolvency the directors will also need to have regard to the balance sheet position in discharging their duties.

Could directors be subject to personal liabilities?

Where the company is insolvent/bankrupt and there has been wrongful or fraudulent trading, the responsible directors can, in the case of wrongful trading, be made personally liable for the company's debts and, in the case of fraudulent trading, be made personally liable to make such contributions to the company's assets as the court thinks proper. It is a defence in relation to wrongful trading for a director to show that the director took reasonable steps (note: this is different from the UK position, where a director must take "every step" that a reasonable person in comparable circumstances ought to take), with a view to minimising the potential loss to the company's creditors, once the director became aware that the company was in the zone of insolvency. It is therefore crucial to make sure the interests of creditors are being considered carefully if your company finds itself in or nearing this situation.

What can you do to discharge your duties to the company/creditors and protect yourself?

The board should always act prudently, carefully considering the issues and accurately minuting its deliberations, but best practice is especially crucial at this time. Practical steps you should consider taking include:

Have frequent meetings (including by phone/video call if necessary)

How frequent is appropriate will depend on your business, but the situation is changing quickly so there is likely to be more occasion to meet. Check your company constitution allows telephone/virtual board meetings. Remember that exchanges of emails/text messages can all contribute to board decision making. Keep records of these.

Seek the advice of experts

Do you have employees? Are you regulated by the FCA/JFSC or similar? Do you need to restructure? Do you need to borrow money? Engage experts to assist the board with what you might need to consider in relation to your particular business – the directors alone might not have all the necessary expertise in these specialised areas. This may help to mitigate wider losses and/or liabilities.

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Consider your options

Is it possible to engage with your existing creditors and discuss repayment terms? Do you need to stop trading? Can you adapt your business to keep trading in these difficult times? You need to avoid the risk of wrongful/fraudulent trading, so make a realistic assessment of whether you have a chance of trading through this or need to stop incurring liabilities and take steps to protect creditors instead.

Think carefully about new borrowing/other transactions

Jersey law makes preferences, extortionate credit transactions and transactions at an undervalue voidable in the event of an insolvency. You should be very careful about pursuing attractive short-term measures if they might put the company into further difficulty down the line or might constitute wrongful trading.

Keep detailed records

It will be crucial for the directors to be able to show that they were discharging their duties properly and considering all relevant issues at all times if the company later ends up becoming insolvent. Minutes of board meetings, proper accounting records and records of other board discussions will be what you rely upon to show this in future.

Don't forget your other obligations, but keep an eye out for government/regulator leeway

As well as keeping up your internal records, do not lose sight of your other obligations, e.g. in relation to public/regulatory filings, and other "business as usual" requirements, such as tax residency protocols in your constitution or elsewhere regarding management and control, the location of meetings and/or the location of participants who are dialling in. Keep in mind that governmental or regulatory authorities might relax some of their requirements; for instance, the Jersey taxes office has confirmed that where operating practices have to be adjusted to compensate for the outbreak of COVID-19, that will not mean a company has failed to meet the economic substance test or to maintain its tax residence, provided the adjustments are to the extent required to mitigate the threats from the outbreak and any changes are temporary.

Resigning might not be the answer

You can still be liable for your actions during your time as a director after you leave the board. The safer course will likely be to continue to act prudently and thoughtfully in accordance with your duties and make sure the company takes the appropriate action, whether that is to continue trading or not.

At Carey Olsen we have extensive experience advising companies in difficulty and their directors. If you would like to discuss your situation, please contact us using the details below.

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