



## DISQUALIFYING A COMPANY DIRECTOR

In the wake of a spiraling financial crisis, greater pressure is being placed on company directors to properly exercise their responsibilities, by virtue of statute and otherwise. The board of directors is considered the 'mind and will' of the company and is appointed to manage its day-to-day affairs. The board is appointed on behalf of and is directly accountable to the shareholders. Once every year the board is required to report to the shareholders on the progress, plans and performance of the company, at its Annual General Meeting (AGM) in accordance with statute. This is often where directors are appointed, re-elected or removed by shareholders.

One of the key functions of the directors is to ensure that the company is prosperous. Where directors maintain focus on fulfilling the objectives of the company, meeting their statutory mandate while collectively directing the company's affairs and observing best practices in their offices, the rewards are usually positive. A high degree of public interest in corporate best practices and effective corporate governance has been inspired for example, by the enforcement of existing regulations and the PSOJ's Corporate Governance Code. This generally augurs well for the economic prosperity of companies and the business environment in general.

The standard duty of care as required under section 174 of the Jamaican Companies Act, 2004 (the "Act") is that:

"(1) Every director and officer of a company in exercising his powers and discharging his duties shall:

(a) act honestly and in good faith with a view to the best interest of the company, and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, including, but not limited to the general knowledge, skill and experience of the director or officer.

(2) A director or officer of a company shall not be in breach of his duty under this section if the director or officer exercised due care, diligence and skill in the performance of that duty or believed in the existence of facts that, if true, would render the director's or officer's conduct reasonably prudent.

(3) For the purposes of this section, a director or officer shall be deemed to have acted with due care, diligence and skill where, in the absence of fraud or bad faith, the director or officer reasonably relied in good faith on documents relating to the company's affairs, including financial statements, reports of experts or on information presented by other directors or, where appropriate, other officers and professionals.

(4) In determining what are the best interests of the company, a director or officer may have regard to the interests of the company's shareholders and employees and the community in which the company operates.

(5) The duties imposed by subsection (1) on the directors or officers of a company are owed to the company alone.

(6) Where pursuant to a contract of service with a company, a director or officer is required to perform management functions, the terms of that contract may require the director or officer in the exercise of those functions, to observe a higher standard than that specified in subsection (1)".

### Grounds for Disqualification of Directors

The Act sets out the requirements for the qualification, appointment, removal and disqualification of company directors. It also provides that an un-discharged bankrupt is not allowed to act as a director and that a director may be disqualified by order of the Court as well as for persistent breaches of the Companies Act.

### **Court-Disqualified Directors**

A complaint may be made to the Registrar by the shareholders, members of the board of directors, creditors of the company, the liquidator of the company or the Trustee in bankruptcy, that a person is unfit to be concerned in the management of the company.

Where such a complaint is made in writing, properly setting out the grounds on which it is made, the Registrar is required to investigate the matter and afford to the complainants an opportunity to be heard. If satisfied that there are sufficient grounds for a hearing of the matter by the Court, the Registrar may issue a certificate to that effect to the shareholders, liquidator, Trustee, members or creditors, as the case may be and they shall have the right to make an application to the Court on the matter.

A shareholder, member or creditor who is aggrieved by the decision of the Registrar may appeal that decision to the Master in Chamber.

Also, if the Registrar is satisfied that a person is unfit to be concerned in the management of a company, the Registrar may make an application to the Court on the matter.

### **Orders of the Court**

On the application of the Registrar, where it appears to the Court that a person is unfit to be concerned with the management of a company, the Court may make an order that such a person is to be a director of the company, or in any way, directly or indirectly, be concerned with the management of the company, without the prior authorization of the Court.

In determining whether or not to make the order, the Act stipulates that the Court shall have regard to the following:

- (a) any misfeasance or breach of any fiduciary or other duty by the director in relation to the company;
- (b) any misapplications or retention by the director of, or any conduct by the director giving rise to an obligation to account for, any money or other property of the company;
- (c) the extent of the director's responsibility for any failure by the company to comply with the provisions of this Act in relation to the keeping and maintenance of accounting records;
- (d) whether the director has knowingly been party to carrying on the business of the company in a manner for which he may be liable (whether he has been convicted or not) under section 322 (i.e. responsibility for fraudulent trading) {insertion mine}; and
- (e) such other circumstances as maybe prescribed.

Procedurally, no application may be made for an order disqualifying a director unless the Registrar or any person intending to apply first gives the director concerned no less than ten (10) days' notice of the intention to make the application.

### **Undischarged Bankrupt**

Under the Act, if an undischarged bankrupt acts as director of, or directly or indirectly takes part in, or is concerned in the management of, any company except with the leave of the Court, he shall be liable on conviction on indictment to imprisonment for a term not exceeding two (2) years, or on summary conviction before a

Resident Magistrate to imprisonment with or without hard labour for a term not exceeding two (2) years or to a fine not exceeding two hundred thousand dollars, or to both such imprisonment and fine.

### **Disqualification for Persistent Breaches of Act**

The Act allows the Court to make a disqualification order against a director where it appears to the Court that he has been persistently in default in relation to provisions of the Act requiring any return, account or other document to be filed with, delivered or sent, or notice of any matter to be given, to the Registrar.

On an application to the Court for an order to be made for disqualification of a director on the ground of persistent breaches of the Act, the fact that a director has been persistently in default may be conclusively proved by showing that in the five years ending with the date of the application he has been adjudged guilty (whether or not on the same occasion) of three or more defaults in relation to those obligations under the Act mentioned in the foregoing paragraph.

The Act provides that a director is to be treated under subsection as being adjudged guilty of a default in relation to any of these provisions if:

"(a) he is convicted (whether on indictment or summarily) of an offence consisting in a contravention of or failure on his part to comply with that provision; or

(b) a default order is made against him under any provision of this Act requiring the submission of returns, notices or other documents to the Registrar, in respect of any such contravention of or failure on his part to comply with that provision.

...In this section "Court" means any court having jurisdiction to wind up any of the companies in relation to which the offence or other default has been or is alleged to have been committed.

A disqualification order may be made under in these circumstances for a period not exceeding five (5) years.

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