CAREY OLSEN

Duties of a director under British Virgin Islands law

Service area / Corporate
Location / British Virgin Islands
Date / July 2017

Introduction

The purpose of this guide is to give the reader a broad overview of the duties and liabilities imposed on a director of a company incorporated in the British Virgin Islands ("BVI").

The BVI Business Companies Act, 2004 (the "Act") provides that, subject to a BVI company's memorandum and articles of association ("M&A"), the directors of a company have all the powers necessary for managing, directing and supervising, the business and affairs of the company.

The duties and liabilities set out below apply equally to directors, "de facto" directors (persons acting as a director and carrying out the functions of a director, but who have not been formally appointed), and purported "nominee" directors. Please note that BVI law does not recognise the concept of "nominee director". If a person is appointed as a director, he will have all of the same duties and liabilities imposed on a director, despite the nominee tag.

In addition, a director remains liable in respect of any acts or omissions or decisions made whilst he was a director, even after he has resigned as a director.

Directors' duties

Fiduciary duties

A director is required to act honestly, in good faith and in a manner which he believes is in the best interests of the company. In addition, a director must exercise his powers for a proper purpose and shall not act, or agree to the company acting, in a manner that contravenes BVI legislation or the company's M&A.

Where expressly permitted to do so by the company's M&A, BVI law allows the director of a subsidiary company to act in the best interest of its holding company, rather than the company itself. The Act also allows a director of a company involved in a joint venture to act in the best interest of the shareholder(s), even if his actions are not in the best interest of the company (provided he is authorised to do so by the company's M&A).

The directors' duties are owed to the company itself, which may be equated to the collective interests of the shareholders. The fiduciary duties are not owed to other companies with which the company is associated, to other directors, or to any individual shareholder. However, on insolvency (or doubtful solvency) the director's duties switch from what is considered to be in the best interest of the company, to what is in the best interest of the company's creditors.

Duty of care

In addition to the fiduciary duties, each director owes a duty of care, diligence and skill to the company. The duties of care, diligence and skill have been traditionally regarded as subjective (i.e. the director must exhibit such skill as he actually possesses). However, more recently it is clear that a director is required to exercise his powers and perform his duties in a way that a reasonable director would do in the same circumstances (taking into account the nature of the company, the decision being made as well as the position of the director and the nature of the responsibilities being undertaken). Failure to perform his duties in this manner may leave the director liable for damages, if the company suffers a loss as a result of his actions.

When carrying out his duties, a director may rely on various records, financial information and any professional or expert advice given to him. However, this only applies when the director acts in good faith and makes proper inquiry in relation to this information. A director cannot rely on any information or professional advice which he knows is incorrect or should not be relied on.

Disclosure of interest

The Act provides that a director shall " forthwith, after becoming aware of the fact that he is interested in a transaction entered into or to be entered into by the company, disclose the interest to the board of the company".

A director is therefore required to disclose any interest that he may have in a transaction, which the company is entering into, to the other directors. Failure to do so means the transaction may be deemed void and the director commits an offence (liable to a fine of US$10,000). Despite the requirement to disclose such interests, the director may still attend meetings at which the transactions is considered, vote on such transactions and sign any documents which relate to the transactions, on behalf of the company.

There are a few exceptions where this disclosure requirement does not apply, namely where the transaction is:

- between the director and the company
- entered into in the ordinary course of the company's business and on usual terms and conditions.

Company's financial position

A director should be aware of the company's financial position at all times to avoid:

- insolvent trading
- entering into voidable transactions (where a company enters into a transaction prior to it going into liquidation, or where such transaction renders the company insolvent)
- fraudulent trading (where the company has undertaken business with the intent to defraud creditors or for any fraudulent purpose in the context of a liquidation); and/or
- misfeasance.

In such situations, a director may:

- be liable to the company
- disqualified from acting as a director
- and/or prohibited from being directly or indirectly involved in the management of a company in the future.

Maintaining records and registers

The directors must ensure that the company maintains records that are sufficient to show and explain the company's transactions and which will, at any time, enable the financial position of the company to be determined with reasonable accuracy. Such records must be maintained for five years and must include accounts in relation to: (i) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place; (ii) all sales and purchases of goods by the company; and (iii) the assets and liabilities of the company. The company does not need to adhere to any specific accounting procedures (e.g. GAAP), and can use whatever accounting standards it determines to be appropriate for the jurisdictions in which it operates.

A company that contravenes its statutory record-keeping obligations commits an offence and is liable to a fine of US$10,000.

The directors must also keep minutes of meetings, and ensure that the company's M&A, copies of the company's registers of members and directors, and copies of all notices and other documents filed by the company (for the previous ten years) are maintained at the office of its registered agent.

Directors' liabilities

The consequences of breaching the directors' duties are not always specified in the Act. However, the BVI is a Common Law jurisdiction and therefore positions in Common Law and equity will be considered. For example, for breaches of the equitable duties, a director may be held accountable for any profits he makes as a result of such breach; and for breaches of common law duties, a director will be liable to compensate the company for the loss it suffers as a result of the breach.

As a general rule, a director is not liable for any debts, obligations or defaults of the BVI company. However, a director may still be personally liable for such debts, liabilities or obligations that:

- arise from his own negligence, fraud or breach of his duties; or

Continued

- arise when the company has no members (any person that does business in its name or on its behalf (i.e. a director) may be personally liable for the payment of all debts of the company contracted during that time); or
- occur because he failed to supervise the activities of a director that has breached his duties, in circumstances where his duty of care obliges him to do so, or where he has knowingly participated in or has sanctioned conduct which constitutes a breach of duty (in these circumstances a comparatively slight degree of participation is sufficient to create liability); or
- are owed to third parties (both in contract and tort) should he deliberately makes misrepresentations on behalf of or in the name of the company.

In addition, if a distribution is made at a time when the company was unable to satisfy the solvency test, such distribution may be clawed back from the members. If the director was aware that the company was unable to satisfy the solvency test when the distribution was made, he will be personally liable to repay an amount equal to the distribution (less what was recovered from the members) to the company.

Other remedies are also available against a director, including: injunctions to prevent him taking improper action; orders compelling him to comply with his statutory fiduciary duty to act in the best interest of the company; and restitution to the company of any of its property held by him.

Mitigate liability

Individuals appointed as directors of a BVI company should familiarise themselves with their legal duties and establish effective corporate governance protocols to avoid any liability. Directors may also wish to consider insurance coverage to mitigate any liability that they may be exposed to as a director. This is even more pertinent where a company is in financial difficulty and of questionable solvency., In these circumstances, any proposed transaction should be carefully scrutinised so as to prevent voidable transactions being entered into, or the company engaging in insolvent trading.

Whenever a director is unsure of his position regarding the duties imposed on him under BVI law, he should take professional advice at the earliest opportunity. He may also wish to consider appointing a professional corporate or non-executive director to the company's board. Carey Olsen works closely with HB Corporate Services Ltd, which provides professional corporate and non-executive directors to BVI companies.

FIND US

Carey Olsen (BVI) L.P.
Rodus Building
PO Box 3093
Road Town
Tortola VG1110
British Virgin Islands

T +1 284 394 4030
E bvi@careyolsen.com

FOLLOW US

Visit our corporate team at careyolsen.com

PLEASE NOTE

This briefing is only intended to provide a very general overview of the matters to which it relates. It is not intended as legal advice and should not be relied on as such. © Carey Olsen 2020.