Guidelines for Jersey Directors

Fifth edition

By

Advocate Robert Gardner and

Advocate Edward Drummond

www.iod.je

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Updated by Bedell Cristin to 1st January 2018

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Points of contact and further suggested reading are set out in Appendix 6.

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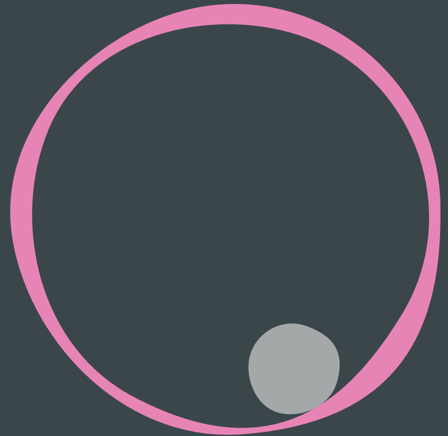

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Introduction

The following points should be made in relation to these updated guidelines:

(i) They have been drafted for directors (wherever situate) of Jersey registered companies. There are many directors based in Jersey who provide services to companies registered both in and outside Jersey. Care must be taken, as different rules will apply to non-Jersey companies, albeit there may well be similarities with the position applicable to Jersey companies, especially when looking at the underlying principles.

(ii) They are in general terms relevant to all Jersey registered companies, whether trading or holding companies, public or private, large or small, regulated or unregulated, although materially different considerations will inevitably apply depending on the type of company under consideration.

(iii) They are not intended to be a substitute for the specialised legal advice that many circumstances will demand.

(iv) References are made to developments in case law in jurisdictions other than Jersey, in particular England. This is because Jersey law in general draws on many external legal influences and, so far as company law and directors' duties are concerned, the influence of English law is very strong. There are also material similarities (as well as important differences) in aspects of the legislation, so the way English legislation is interpreted may be informative. Jersey company law is heavily based on statute, principally the Companies (Jersey) Law 1991 and on case law of the Royal Court of Jersey and Jersey customary law. The Companies Law has been frequently amended. Indeed, as at the time of writing there have been eleven major amending laws and other laws and regulations amending the Companies Law.

(v) References to certain statutes have been shortened for ease of reading so the Companies (Jersey) Law 1991 is simply referred to as the "Companies Law" and the Bankruptcy (Désastre) (Jersey) Law 1990, as the "Désastre Law". Where a statute is referred to it will include all amendments. Court cases are given their official references, so Jersey cases can be identified from those of other jurisdictions. JCA refers to the Jersey Court of Appeal and JJ, JRC and UJ refer to Jersey Royal Court cases. A reference to the JLR is to the official Jersey Law reports.

The authors wish to thank Tom Harris and Scott Tolliss, both of Bedell Cristin, for their assistance and hard work in researching developments in the law relating to directors both in Jersey and in other jurisdictions. Any errors or omissions remain the responsibility of the authors.

30 April 2018

Copies of this publication can be obtained by contacting IoD Jersey Branch at www.iod.je

Chapter 1: The Company

1.1 The nature of companies

A director is first and foremost an officer of a company. In order, therefore, to understand the duties and responsibilities of directors, it is important to understand the distinguishing characteristics of companies.

A company is an entity that possesses a legal personality distinct from its individual members, a concept known as corporate personality. Companies are statutory creations: a company can only exist in accordance with the statutes that govern the creation and existence of companies.

Apart from rare cases of corporations specially created by individual statutes, in Jersey "a company" means a company given corporate personality by the Companies Law or by its predecessor the "Lois (1861 à 1968) sur les Sociétés à Responsabilité Limitée". Those statutes conferred legal status upon companies, and thus gave their shareholders limited liability, making them what has been generally known as limited liability companies or, more simply, limited companies.

1.2 Limited liability of members

It is possible to establish a number of different types of company in Jersey that have neither shareholders nor limited liability as characteristics. Although it has become second nature to think of companies as being "limited" - to many, being limited is the defining characteristic of a company - it is important to recognise that the limited company is now just one of a range of types of company that can be established in Jersey, and holding shares just one of the methods by which an interest in a Jersey company may be held.

That said, the vast majority of companies formed in Jersey are limited by shares, and the liability of shareholders is therefore limited to amounts already paid up and any amount unpaid on their shares. Where shares are partly paid, therefore, shareholders can be required to pay the balance of their nominal capital into the company. Where shares are fully paid no further liability arises unless the shareholder has received a benefit from the company in breach of provisions of the Companies Law or been party to such a breach. Nominee shareholders should therefore ensure the shares they hold are fully paid up and that they are not recipients of payments or benefits from the company in breach of the Companies Law: otherwise they may become personally liable for sums unpaid or received by them. In the ordinary course of events, a shareholder is simply an investor in a company, and his risk is purely financial: he may lose the money he has invested, or promised to invest, in the company.

A company possesses legal capacity to act as a legal entity distinct from its members. In return for relinquishing a degree of control over their investment, the shareholders receive the benefits of limited liability. The company's ability to meet its liabilities is limited to the assets it holds at any given time: once these are exhausted, the company, if it has remaining liabilities, will be insolvent. It is only the liability of a shareholder for the company's liabilities that is limited. It is only in very exceptional cases

that the corporate veil can be lifted or pierced so that there is a look through to shareholders. See Re Esteem Settlement 2003 JLR 188 at 228 to 249. There is no limit to the damages for which a director may be held liable, as director, at the instance of the company or of an interested third party. Breaches of certain provisions of the Companies Law will constitute a criminal offence for which a director may be punished by fine and/or imprisonment. For this reason it is imperative that all directors act prudently and reach the standards that the law demands of them.

1.3 Types of companies

The different types of company are guarantee companies, unlimited companies, so-called “hybrid” companies and cell companies. A brief description of the main features of these types of company follows, though a full examination of these relatively new types of company is beyond the scope of this publication. Prospective directors should be aware that different types of companies may be especially suited to particular types of transaction or activity and should ensure that such company is suited to the activities it will undertake.

Guarantee companies are companies where the liability of a member is limited, not to the amount (if any) left unpaid on the shares held by that member, but to the amount that member has guaranteed. This presents a new form of potential liability and potential investors would be well advised to seek additional legal advice before undertaking this responsibility.

Unlimited companies can be private or public companies, issuing par or no par value shares, though an unlimited company will not be permitted to have guarantor members or members holding limited shares. As the name suggests, an unlimited company will have unlimited liability; the members of the company effectively underwrite the company’s liabilities to the extent of their own personal assets.

Hybrid companies are companies that possess both guarantor members and shareholders and can be widely used and are versatile vehicles. From a director’s perspective, one important aspect of the introduction of guarantor and unlimited members of companies is that the liability of members in the event of the company’s insolvency is likely to be greater than the liability they would face were they members of an ordinary, limited company. Directors of such companies should be aware that, in the event of insolvency, should members seek to bring a claim against the directors, they may seek to recover these increased losses.

A cell company is able to ring-fence assets and liabilities for particular purposes. It may be a protected cell company or an incorporated cell company. A Jersey protected cell company is a single legal entity, with the individual cells not themselves having legal personality. Accordingly, the protected cell company can enter into contracts on behalf of a cell. A Jersey incorporated cell company is a highly innovative vehicle and special to Jersey. It is a cell company, each of whose individual cells is itself a separate corporate entity. An incorporated cell company provides an even more robust vehicle than a protected cell company for the compartmentalisation of assets and liabilities.

The special types of company will likely be, by their very nature, of greatest application in complex or specialised areas, and for the sake of brevity and clarity, this guide is primarily aimed at the directors of

companies limited by shares. However, in general, the principles that guide the duties, responsibilities and liabilities of directors remain much the same, regardless of the nature of the company.

Companies are either private or public companies. Any company with more than two shareholders can be a public company by stating so in its memorandum.

Generally, under the Companies Law, private companies are only permitted to have up to thirty members. Any company with more than thirty members is treated as a public company and is subject to certain additional provisions that apply only to public companies. However, a private company can seek advance consent to increase its membership beyond thirty, and a public company with more than thirty members can seek dispensation to become a private company. The Jersey Financial Services Commission will allow private companies to exist with more than thirty members if it is satisfied that the affairs of the company can be properly regarded as the domestic concerns of its members, for example for a "share transfer property company" where a company owns a block of flats and each shareholder has a right to a flat. It will be within the discretion of the Jersey Financial Services Commission as to whether a company with more than thirty members can become or, once consent is granted, remain a private company.

A private company will also be treated as a public company if it circulates a prospectus relating to its securities or its securities are admitted to trade on a regulated market.

Public companies are subject to an extra layer of regulation. For example, unlike private companies, they must appoint an auditor and must file annual accounts with the Companies Registry. Clearly, directors, acting together with the company secretary, must take care to ensure that private companies do not unwittingly become treated as public companies.

Jersey companies can be and regularly are listed on stock exchanges including London exchanges and on the Channel Islands Stock Exchange.

1.4 The company's best interests

Throughout these guidelines, reference will often be made to the duty of directors to act "in the best interests of the company". As with many commonly used phrases, there is a risk that this duty is stated like a mantra without its meaning being carefully considered, for "the best interests of the company" are not always self-evident. The interests of the company may include fixing remuneration in such a way as to secure the loyalty and independence of the directors - Al Airports International Limited v Pirrwitz 2013 JCA 177. The interests of the company will often be the same as the interests of the current shareholders: primarily, to make a profit and to grow the business of the company.

However, this is not always the case, and in the event of conflict, the director's ultimate duty is to the company, not to the shareholders. The interests of the company may involve consideration of long-term strategies that may not accord with the wishes of the current shareholders: the interests of the company encompass the shareholders of the company present and future. As a result, the directors may from time to time have regard to, for example, the interests of employees and creditors of the

company, to the requirements of the law and to the interests of the community in which the company operates. Indeed some of these factors have been codified as a matter of English law pursuant to the Companies Act 2006 (see paragraph 4.1.9 below). Although the shareholders may own the company, the interests of the company may not be identical to those of any particular set of shareholders. The function of directors is not to “rubber stamp” the proposals of shareholders, and directors should be particularly wary of vociferous majority shareholders. Shareholders may have different rights and priorities by holding different types of shares.

A further difficulty arises when a company is part of a group. For example, how should the nominated board of a subsidiary act in relation to the parent company that appointed them? The correct answer is that they owe their duty to the subsidiary in priority to the interests of other group companies. They are of course, entitled to give due consideration to the view that benefiting the group and its component companies could also benefit their own company. What is in the interests of a company is often a matter of opinion, and the courts recognise this.

Chapter 2: The Directors

2.1 Eligibility and appointment

Every private company must have at least one director, and every public company at least two directors. There are remarkably few restrictions under the general law about who can be a director.

Under Article 73 of the Companies Law, the following persons cannot be a director of a Jersey company: a minor (a person aged less than eighteen); an interdict (someone deemed by the court to be unable to care for themselves); a person disqualified from holding office as a director, for example, a bankrupt under Article 24 of the Désastre Law; certain types of partnership and, under Article 113D of the Companies Law, the auditor of the company. A body corporate can act as a director if it is registered - and therefore regulated - under the Financial Services Law. However, no director of a body corporate director can be a body corporate.

In addition, a company's articles may restrict eligibility further than provided for by the general law, and most companies will therefore exclude such categories as persons of unsound mind who technically may be eligible to be directors. Some articles stipulate that each director must hold a certain number of shares in the company. Occasionally, a company's articles may stipulate the required residence of all, or a majority of, the directors and the place where they must or must not meet (typically for taxation purposes). The articles may also provide for the directors' automatic retirement by rotation or at a specified age.

The method of appointment of a director is usually laid down in the company's articles. Normally the first directors are named in a statement of first directors signed by the subscribers to the company's memorandum but they may be named in the articles. Thereafter, the company in general meeting has a common law power to fill vacancies arising. Normally the articles will also give the directors power to fill vacancies or to appoint extra directors provided the maximum number permitted by the articles is not exceeded, and the articles will usually give the company power to make and confirm appointments of directors at its general meetings. Certain stock exchanges require quoted companies to include in their articles a provision that a person appointed by their directors to fill a vacancy or as an addition to the board may hold office only until the next AGM, when he may be re-elected.

The usual course is for a director to be formally appointed by the company, but it is possible for individuals to be treated by the law as directors without being so appointed. A "director" means "a person occupying the position of director, by whatever name called" (Article 1 of the Companies Law), and a director's acts are valid, "notwithstanding any defect that may afterwards be found in the director's appointment or qualification" (Article 80 of the Companies Law). In short, even though it is an offence not to comply with the formalities of registration of directors' appointments in a company's statutory records, individuals are recognised as directors by virtue of the functions they fulfil and by the authority and power that they in fact exercise. The term "shadow director", which is recognised under English law, is not referred to in the Companies Law. However, directors should not allow a person

who has not been formally appointed as a director to act as if he were a director. Nor should they allow themselves to act in accordance with the instructions or directions of such a person.

Under the Financial Services Law directors and principal persons of regulated activities, such as banking, insurance, investment and trust company business, need to have their appointments approved in advance by the Jersey Financial Services Commission. There are also requirements as to qualifications and experience and the minimum number of principal management personnel needed to conduct each business operation.

Prior to or on appointment it is appropriate for a director:

(a) to review the memorandum and articles and any restrictions imposed by the Jersey Financial Services Commission on incorporation and to review the statutory books generally;

(b) to ensure he has been properly appointed and will have sufficient authority to act;

(c) to have agreed a service contract or at least remuneration and what is expected of him;

(d) to ensure the board meets at appropriate intervals and its business is undertaken appropriately and is duly monitored;

(e) to understand who the shareholders are individually or collectively and the beneficial owners, if different;

(f) to review the statutorily required annual accounts and ensure that they have been produced and approved in a timely way, and if reviewing the management and bookkeeping arrangements to ensure that they are properly maintained; and

(g) to understand the commitments or major commitments, a snapshot asset and liability position and that current cash flow is adequate - i.e. the company is solvent.

This is not an exhaustive list and much will depend on the circumstances so that an appropriate level of judgement is needed.

2.2 Legal status

Companies have legal personality and can therefore enter into legal relationships but they need human agents to bring those relationships into being; they can hold property but need someone to look after it for them; they have requirements imposed on them by statute and therefore need properly designated officers upon whom a duty to ensure their compliance can be imposed; and they need persons to represent their mind and will. These functions usually fall upon the directors, though they may also fall on other officers or employees or third-party consultants. Directors are not automatically employees or members of a company but an individual may be an employee or shareholder of a company as well as being a director.

2.3 Limits on authority

These are on four levels:

(a) acting within the powers of the company itself;

(b) acting within the power authorised by the board;

(c) acting within the power given to any individual director by the board; and

(d) acting within the powers permitted by the Jersey Financial Services Commission where restrictions may have been imposed.

The doctrine of "ultra vires" in relation to Jersey companies was abolished by the Companies Law. The capacity of a company is not limited by anything in its memorandum or articles or by any act of its members and therefore third parties may assume that any Jersey company has the power to enter into any transaction a natural person may enter into.

Notwithstanding the abolition of the ultra vires rule in its application to Jersey companies, the directors will have to observe any limitations on their powers set out in the company's memorandum or articles, or which may be imposed from time to time by board or members' resolutions, and may be liable to the company if they exceed them.

If a transaction is not in the interests of the company, the transaction may not be valid. Hope of future business or advantage is however sufficient for these purposes. See Re Zaki Limited, On the representation of Singla 1987-88 JLR 244.

On, or preferably before, taking office, therefore, directors should familiarise themselves with the memorandum and articles of the company.

An individual director is entitled to receive from the company all information he wishes to obtain to enable him to carry out the duties of the office so long as it is required bona fide in the interests of the company and not for some ancillary purpose (e.g. exclusively for the benefit of the director or of a holding company).

Directors' powers are not individual but collective, though a board can, and does, delegate powers to committees or individual directors and in practice individual directors carry out many of a company's activities. An individual director who acts without the board having delegated the requisite authority may be liable for breach of duty to the company.

A company will therefore be bound by any contract entered into with a third party by any director having the ostensible or apparent authority to enter into contracts of the type in issue, whatever the state of the actual authority of the individual concerned. If the individual concerned does not have the ostensible

authority to act on the company's behalf, the residual requirements placed upon a third party to make reasonable enquiries will probably come into play.

A further type of restriction that must not be overlooked are those conditions that may be imposed on a company at its incorporation by the Jersey Financial Services Commission. The Jersey Financial Services Commission can place restrictions upon the activities of certain types of companies and the identity of the shareholders and directors of companies. All directors should familiarise themselves with any such pre-incorporation conditions that may apply to the company and ensure that these are complied with on an ongoing basis. Regulatory laws governing certain activities, especially financial services, may also restrict what may properly be done.

2.4 Types of director

The responsibility of all directors of a company is equal, but some play a special role. It should be noted that it is not necessary for companies to appoint specific types of director: many companies will simply have two or three directors and appoint one to act as a chairman during meetings or on an ad hoc basis.

2.4.1 The chairman

The chairman may be appointed by the board to preside over the board and will normally, under a provision in the company's articles, also take the chair at general meetings of the company. In this role, the chairman's duty is to ensure that meetings run efficiently, that all relevant matters are discussed for an appropriate length of time, and that decisions are summarised so as to avoid the risk of subsequent dispute or confusion.

The chairman is not only seen as being the chairman of the board, but is also expected to act as the company's leading representative, presenting the collective views of the board to the outside world. The chairman will often play a leading role in structuring the board of directors so as to make an effective team working collectively or in committees.

The chairman may also be empowered to take decisions delegated to him by the board that are required to be taken between board meetings.

2.4.2 Managing director

Many companies' articles contain a provision permitting the directors to appoint one or more managing directors to whom any necessary powers may be delegated and to remunerate them for their services in that capacity. In practice, a managing director is usually the pinnacle of a management structure. The managing director is personally charged with ensuring the success of the company's operations within the strategy determined by the board of which he is a member.

2.4.3 Non-executive director

The creation of boards composed wholly of full-time executives can be a source of weakness if such boards become insular, lacking both the wider perspectives and the broader range of stimuli that an external presence might provide. To enhance the board's sense of general responsibility, and to widen its strategic horizons, every board of a public company should, in the Institute of Directors' view, contain

a proportion of suitable non-executive directors with a minimum of three or one-third of the total number of directors for larger companies and two or one-quarter of the total number of directors for smaller companies. The same considerations apply to any private company, large or small, that wishes to maintain active control over its future and not merely react passively to events. The use of suitable non-executive directors will help a board to pay proper attention to its long-term strategy and direction. These directors should have no business relationship with the company and should not be under the control or influence of any other director or group of directors. They should provide an independent view to the board's deliberations.

Non-executive directors may be connected with the group or may be truly independent with no ties or connections to the company.

A non-executive director can be considered an engaged sceptic. These are usually part-time directors who have a specific experience (e.g. legal, financial or technical). On the basis that they are not involved in the daily management of the company, they can make valuable and objective contributions to board meetings. In particular, if they are to fulfil properly their remits, they should be ready and actively encouraged to question the policy proposals and recommendations of the executive directors with a view to ensuring that policy decisions and the decision-making process are properly thought out and justified. Familiarity can result in management decisions not being properly debated and non-executives are there to guard against this. Their appointment should change the dynamics of the way in which a company board operates. The benefits of having one or two non-executive directors has long been recognised. Ideally non-executive directors should provide an independent view to the board's deliberations. All non-executive directors should note that they are subject to the same duties as executive directors to exercise the requisite standard of skill and diligence. To this extent non-executive directors must be clear as to their specific role and their duties and responsibilities before accepting office.

It is extremely important to be clear what the proper contribution of non-executive directors to a company is. The overriding consideration is that they participate to the full in the board's deliberations. Their legal duty to act bona fide in the interests of the company as a whole is identical to that of their executive colleagues, but within this framework, their independence has three further contributions to make.

The first is to widen the horizons within which the board determines strategy, both by applying the fruits of a wider general experience and by bringing into board discussions any background of specialist skill, knowledge and experience that is relevant to strategy and which the board might otherwise lack.

The second is to take responsibility for monitoring management performance.

The third is to ensure that the board has adequate systems to safeguard the interests of the company where these may conflict with the personal interest of individual directors and to ensure high standards of financial probity.

Having accepted office, non-executive directors should periodically consider whether the quality of information they receive is appropriate and whether it is supplied on a timely basis. They should

also consider whether such information is received long enough before a board meeting for the information to be fully absorbed and considered. If not, non-executive directors must insist that this information is provided in sufficient time to enable the non-executive director to consider and evaluate the material before executive decisions are made. Directors must review all information issued to them before board meetings.

2.4.4 Executive director

Executive directors are members of the board who carry out executive functions and in addition to their board duties are also full-time employees of the company and receive separate remuneration. This is considered in greater detail at Chapter 6 below.

2.4.5 Alternate director

An alternate director is someone empowered to perform the duties of a director in the temporary absence or unavailability of that director. A director may act as an alternate for one or more of his colleagues on the board, and in such circumstances would normally have an additional vote or votes to exercise on their behalf in addition to that cast in his personal capacity. Alternatively, a non-director may be appointed as an alternate.

The authority for the appointment of alternate directors is derived from the company's articles and not from statute. The relevant articles will usually set out, among other things, the manner of an alternate's appointment, the extent of the alternate's powers and whether they are entitled to remuneration from the company or from the director appointing them.

Invariably a person appointed as an alternate director loses the appointment automatically when the appointing or nominating director dies or ceases to hold office. An alternate may also be removed at any time at the discretion of the appointing director.

2.4.6 Shadow director

The term "shadow director", which is recognised under English law, is not referred to in the Companies Law but directors should not allow a person who has not been formally appointed to act as a director nor should they allow themselves to act in accordance with the instructions or directions of such a person. As indicated, the definition of director in Article 1 of the Companies Law is broad and includes a person occupying the position of director by whatever name called. Substance, not form, is therefore important.

2.4.7 De facto director

This is a director who has not been formally appointed but holds himself out as a director, occupies the position of a director, deals with matters that can only be dealt with by directors and is held out by the company as a director. See Re Hydrodam (Corby) Limited [1994] 2 BCLC 180, [1994] BCC 161.

In the recent English case of Smithton Ltd -v- Naggar [2015] 2 BCLC 22 the Court of Appeal gave useful guidance on how to identify a de facto director, saying that there is no definitive test; rather it is a matter of fact and degree, to be ascertained objectively. The question is whether the person is part of the corporate governance system of the company and whether he has assumed the status and function of a director. The court also said that the concepts of shadow and de facto director are different but that

there is some overlap. Whether the company has considered the person to be a director and held him out as such and whether third parties consider the person to be a director are all relevant factors. The case is likely to be highly persuasive in Jersey.

2.4.8 Associate director

The articles or resolutions of the board may provide for senior positions or courtesy titles for persons who are not actual directors, "associate directors" or other titles such as finance director or sales director. In the absence of such authority they are titles but ones that can give rise to apparent authority - and therefore the appearance of greater authority - than is actually the case.

2.5 Directors' accountability

Directors should pay particular attention to any information the company releases publicly. If directors have not exercised due care to ensure that such information is accurate in all material respects and not misleading, they may become personally liable to those who make use of or rely upon such information and as a result suffer loss.

Specific duties are imposed on directors to ensure the accuracy of information set out in documents that offer to sell securities issued by the company to the public. In this context, securities include shares, debentures and any interests and/or rights in shares or debentures. This is a specialised and highly regulated area and it is essential that any company seeking to make a public offering of its securities and its directors obtain all appropriate advice to ensure that the directors can be satisfied that they have discharged all of their duties in this area.

A strong body of public opinion considers that companies and their directors should be more widely 'accountable'. This does not refer to the strict accountability directors already owe the company, but a willingness to act responsibly in a social context and to give an adequate account of the company's affairs to all interested parties. From time to time, high-profile reports have been published, such as the Cadbury (1992), Greenbury (1995), Hampel (1998), Turnbull (1999) and Higgs (2003), reports. Since the international financial crisis, the major report produced on corporate governance is the Walker Report (2009). While these are aimed primarily at addressing the duties of directors under English law, and often place particular emphasis on public companies, these reports nevertheless provide useful guidance as to the manner in which boards should function generally. Although such guidance is not binding, the Jersey courts are likely to attach some weight to the views expressed in these reports, and prudent directors would be wise to ensure that the manner in which the board operates does not diverge markedly from recommendations set out in such reports.

2.6 Induction and training

On appointment, and from time to time, directors should receive the necessary induction and training so that they can be adequately informed of the company's business and its external and internal workings. He can assess what is expected of him and at an early stage make suggestions and comments using fresh eyes and then play a more informed and valuable role as a director. As circumstances change, further updating should be considered.

2.7 Employment and remuneration

A director can be a director and no more - as are many non-executive directors. He can also, however, combine the office with that of a company employee. The question of whether or not a director is also an employee is one of fact but its resolution is important for many reasons. For example, the removal of a director from such office may not necessarily end his employment. Moreover, as an employee he may acquire rights under customary law and employment protection legislation in addition to any rights arising under his contract of employment. Certain benefits - such as the right

to participate in a company's pension scheme - may be available only to employees. In a winding up, employees are entitled to be paid certain amounts in respect of accrued but unpaid wages or salary and holiday pay in priority to other creditors. They may also have some protection, in the case of an employer's insolvency, under the States of Jersey's Insolvency Benefit Scheme. To be an employee, a director should have an employment contract and should work under the control, and subject to the instructions of some other employee or officer or the board of the company.

All employees must have contracts of service. Under the Employment (Jersey) Law 2003 a statement setting out certain prescribed basic terms must be given by an employer to an employee. It is advisable for the contract to deal with such matters as pay, duties and responsibility, working hours, sickness, holidays, pensions, insurance, indemnity, termination and dismissal. Where there is nothing else in writing, the contract is implied and the terms are to be inferred from the conduct of the parties. A director may also be an employee, therefore, when he has a contract of service apart from the directorship. A contract of service may be an employment contract, whether written or unwritten, and whether or not it is described as an employment contract.

Where the company engages staff wholly or mainly in Jersey, directors should be aware of the rights of employees under the Employment (Jersey) Law 2003 and the Employment Relations (Jersey) Law 2007. Where staff are engaged outside Jersey, relevant legislation of that country will be in point, even if the employment contract is expressly governed by Jersey law.

In particular, it should be noted that any director who is also the sole member of the company is obliged to record in writing any contract that director makes with the company (including a contract of employment).

At common law, directors have no automatic entitlement to remuneration for their services or to the reimbursement of expenses. Therefore, they have no automatic right to claim directors' fees for performing their duties. Any right to remuneration must be provided for in the articles of the company. Sometimes the articles provide for specific fees - see Al Airports International Limited v Pirrwitz 2013 JCA 177. Often they provide for fees to be fixed by the board. It is a matter of what is considered best for the particular company involved and, if circumstances alter, the articles can be changed by appropriate resolution. In the absence of an express provision in the articles a director is not entitled to reimbursement of expenses incurred in attending board and general meetings.

In Al Airports International Limited v Pirrwitz 2013 JCA 177 the Jersey Court of Appeal held that directors' remuneration can take many different forms, such as a one off payment at the end of the director's service and can include an ''exit payment'' i.e. a lump sum payable in the event of removal.

Directors, in such capacity, are similarly not automatically entitled to a company pension. A company may, however, include in either the memorandum or the articles a power to pay a pension to directors and their dependants. Even if the board of directors is expressly so authorised to pay a pension, payment may still be unlawful if the directors act in breach of their fiduciary duties towards the company. They must act bona fide in what they consider to be the interests of the company. The same applies to any ex gratia payment or employee benefit arrangement to a director.

2.8 Succession planning and evaluation

To ensure a company remains healthy and vibrant, it is important to refresh membership of the board, to engage new and dynamic approaches and skill sets. Non-executive directors should not be appointed for so long that their strength as independent and objective outsiders is reduced. The board should assess its effectiveness from time to time. This could cover:

(a) the different skills and experience required;
(b) leadership and communication;
(c) its operation;
(d) the working of the board as a whole and of individual directors;
(e) quality and adequacy of board papers;
(f) quality of board discussions;
(g) the effectiveness of committees;
(h) the secretarial and administrative support for the board;
(i) the importance of authority and implementation of decision-making;
(j) the effectiveness of risk and control process;
(k) communication with shareholders, outside advisers, customers and third parties; and
(l) implementation of the evaluation process.

2.9 Resignation

It would be a most unusual board if individual directors did not from time to time disagree on points of policy. A board decision is, however, what it says it is; even when it is not unanimous it is still a decision of the board as a whole and a director has a duty to stand by it once taken.

If a member of the board feels that a decision is wrong commercially or otherwise, his first duty is to have such disagreement discussed and minuted. If a director feels particularly strongly about a point, he should raise the matter at a meeting. If no meeting is scheduled he should consult the company's articles as to an individual director's powers to call or requisition a board meeting and exercise them, circulating his views in advance to the other directors. However, there is no compulsion on the other directors to attend such a meeting, which may therefore lack a quorum and be unable to proceed to business. As a last resort the director might then consider whether it is in the interest of the company

that he should seek the support of sufficient shareholders to requisition a general meeting of the company.

A board cannot function properly if one of its members is continuously at variance with the others over issues of commercial policy and a director in this position may well serve the company best by resigning, though this is not a step that any director should take lightly: a notice of resignation cannot be withdrawn once given.

If a director makes public his misgivings about a company or its business he must take care to avoid making a defamatory statement. If only for this reason, he would be well advised to take legal advice at an early stage. Once a director has resigned he may find it impossible to use information acquired whilst a director to influence shareholders, even if the information is not defamatory, because the court may grant the company, represented by the remaining directors, an injunction to restrain the publication of information the former director received in confidence as a member of the board. A director also owes a general duty of confidentiality to the company in relation to all information about the company and its business that he obtained while in office.

It is of course an entirely different matter if the dissenting director feels that a board decision or policy is not merely commercially unwise, but is unethical, or indeed, unlawful. A director’s first duty to the company in such circumstances lies in taking the lead in acting either to remedy the irregularity or illegality or to prevent it happening in the first place. Directors caught up in such a situation may feel they ought to resign but increasingly they may be expected to continue in office to ensure that the irregularity or illegality has been eliminated.

In attempting this they have a number of possible allies, which include:

(a) professional advisers - everyone who becomes a director should recognise that there may be a time when he may need (and have to pay for) independent professional advice;

(b) the company’s auditors - on issues relating to disclosure and the truth and fairness of published financial information;

(c) the shareholders - shareholders have a number of rights particularly when their interests are being unfairly prejudiced;

(d) the Jersey Financial Services Commission - which has wide powers to order investigations of the company’s affairs;

(e) the relevant stock exchange - in the case of quoted companies.

The distinction between what is commercially unwise and what is unlawful may not always be easy to identify. Conduct that starts out as commercially risky may become conduct that is unlawful and, in particular, may amount to “wrongful trading” under the provisions of Article 177 of the Companies Law and Article 44 of the Désastre Law. A director may not avoid liability under these articles by resigning, unless he resigns before the “time” from which the activity that may amount to wrongful trading starts

(i.e. before the decision against which objection is taken). Waiting for the results of the decision to become apparent may be leaving it too late. If matters have become precarious there may be a duty to continue as a director and resignation could be wrong if harm results, and in any event may place the director at risk. This is an area that is addressed in more detail in Chapters 5 and 6 below.

2.10 Removal

It is not unusual for the articles to provide for directors to retire by rotation and to be eligible for re-election. Beyond this provision, a director's tenure will be governed by the articles, which may provide for removal on the grounds of age, mental illness, prolonged unauthorised absence from meetings, criminal conviction and so on.
Removal may result in a claim for damages for loss of office. If successful there is little guidance on the quantum of the damages.

Directors' powers might be suspended where a foreign court appointed receiver is recognised in Jersey by the Royal Court - In re Ablyazov 2013 (2) JLR N32 and In re Ablyazov 2013 JRC 195

Chapter 3: The Board

3.1 Function

The board is made up of the directors of the company. The board is the “public face” of the company, and must answer to the shareholders if the performance of the company falls below the shareholders’ expectations. The duties of the board are set out in the Companies Law and the articles. These vest the power to manage the business in the board of directors as a whole. An individual or sub group of directors only have actual authority when such authority is authorised by the articles or by resolutions of shareholders or of the board itself. See Re Level One Holding (Jersey) Limited [2007] JRC 106, 2007 JLR Note 39. An individual director, without actual authority, may nevertheless have apparent authority and can bind the company. However, the specific responsibilities of the board are rarely set out in the memorandum and articles of the company.

In summary, the board takes responsibility for:

(a) creating the company’s strategic objectives and strategic policies;

(b) appointing the company’s senior management;

(c) monitoring progress towards the achievement of objectives and compliance with policies;

(d) giving an account of the company’s activities to the parties to whom an account is properly due;

(e) preparing the accounts of the company; and

(f) ensuring the adequacy of the content of prospectuses (offering documents) issued by the company.

These functions and responsibilities can be performed in a number of ways. These are set out below but the lists are only indicative and by no means exhaustive.

3.1.1 Creating strategies for the company by:

(a) determining the business activities in which the company should engage and those it should by positive decision avoid;

(b) ensuring that the company has adequate long-term objectives and strategies;

(c) taking a view, in carrying out its responsibilities to the company, on the necessary balance between the interests of shareholders, employees, customers, suppliers, creditors and the community and ensuring that the company has clearly understood policies in relation to these interests consistent with the achievement of its strategic objectives;

(d) ensuring that the company reviews its business plans in the wider context of the current and likely local, national and international environment and with adequate intelligence as to the activities of its

major competitors and developments in technology;

(e) approving the budgets presented by the management and ensuring that they are compatible with short-term and long-term objectives;

(f) determining the extent and priority of the company's investment in relation to the opportunities and threats ahead, having regard to the resources available;

(g) approving specific major investment and policy proposals and deciding on dividend policy; and

(h) introducing systems to ensure that the company complies with requirements of legislation and regulation relevant to its operations.

3.1.2 Appointing senior management by:

(a) selecting the managing director and other executive directors and officers and determining the terms of their contracts;

(b) ensuring the adequacy of the company's management structure and resources for specific and general tasks;

(c) planning management motivation, development and succession; and

(d) approving senior management's remuneration, and directors' fees and expenses.

3.1.3 Monitoring the company's performance by:

(a) ensuring that the company's information systems are adequate to monitor performance and to provide for sound decisions by board and management;

(b) identifying vulnerabilities in the company's financial position, short-term and long-term, with particular reference to expected profitability, liquidity and solvency;

(c) monitoring management performance against strategic objectives and compliance with board policies and initiating appropriate corrective action as and when necessary; and

(d) ensuring compliance by the company with obligations imposed by applicable laws and regulations and to provide (commensurate with its size) adequate personnel and systems to perform those obligations.

3.1.4 Ensuring the company's accountability by:

(a) ensuring the fullest communication with shareholders;

(b) ensuring that the company complies with its legal obligations as to the disclosure of information and maintains an appropriate level of transparency about its business; and

(c) providing management information in a form that enables the directors to make informed decisions in the discharge of their duties under the law.

3.1.5 Maintaining financial records by:

(a) ensuring the maintenance of full and proper accounting records and bookkeeping to show and explain its transactions in compliance with the legal obligations of the company;

(b) ensuring statutory accounts are prepared within seven months of each financial year end for a public company and ten months for a private company; and

(c) ensuring the accounts are audited for a public company and if applicable for a private company.

3.1.6 Ensuring the adequacy of the content of prospectuses:

There must be full disclosure of all material facts and directors must ensure that there are no material omissions both under the Companies Law and the Collective Investments Funds legislation.

In the case of public companies, typically the board's primary function is strategic planning and decision-making and there will generally be a clear distinction between direction, management and ownership. The directors of public companies operate under a tighter regime since public companies are subjected to more stringent controls than private companies. In private companies a less clear distinction is often, though by no means always, made in practice between ownership, management and direction where the same individuals are responsible for the direction and operation of a company and are also major shareholders.

3.2 Operation

The board should act in accordance with the articles of the company (as well as the Companies (Jersey) Law 1991 (as amended) and other relevant legislation). The articles provide the operating manual for the company and will govern, among other things, the manner in which directors are appointed, how directors should call and conduct meetings and how issues relating to any conflicts of interests a director may have are resolved.

Prior to being appointed, a prospective director should be aware of the contents of the articles and should be satisfied that he can work within them. Articles are often drafted in order to provide the directors with maximum flexibility in relation to the management of the company. Occasionally, however, restrictions are contained in the memorandum or articles (such as, for example, provisions preventing the directors from meeting at short notice or passing board resolutions in writing without holding a meeting) that may curtail powers or operational freedom. If the articles are inappropriate to the activities of the company, or if they prove cumbersome in practice, the directors should consider asking the members of the company to resolve to amend them.

An efficient company secretary can make an invaluable contribution to the operation of the board by removing from the directors' and managers' shoulders much of the burden of the company's day-to-day administration. A good company secretary will ensure the company complies with the statutory requirements imposed upon it and arrange the efficient dispatch of the board's business. In practice, the company secretary will usually be responsible for ensuring that board meetings are duly convened, held and properly minuted, and that any requirement to make filings pursuant to board resolutions

is satisfied. Although a diligent company secretary can greatly assist the directors in these areas, all directors should be aware that they are ultimately liable for ensuring that the company satisfies all of the requirements imposed upon it by statute.

Directors of public companies are required, under Article 82 of the Companies Law, to take reasonable steps to ensure that the company secretary is a person (or corporate body) who or which appears to them to have the requisite knowledge, experience and qualifications (which are set out in that Article) to discharge the functions of secretary of the company.

All directors should have access to the company secretary. Proper delegation and clarification of the secretary's role and responsibility is not only sensible but may result in a director not being liable for the default.

3.3 Collective responsibility

A company is a commercial enterprise and the nature of the enterprise will often determine the manner in which the board conducts itself. In cases where a minority of the directors have provided the majority of the company's funding, and ultimately hold the majority of the company's shares, there may be a temptation to regard the company as the private concern of those individual directors. This temptation must be resisted. The duties of directors are primarily to the company. The interests of the company are not necessarily identical to the interests of the shareholders.

Whilst the board has collective responsibilities for taking major decisions and collectively directing a company's affairs, individual directors should be aware that all directors who accept office are under a positive and continuing obligation to participate in the company's affairs to some degree. The extent of the obligation will depend upon a number of factors, which could include:

(a) the size and activities of the company;

(b) the constitution of the board and the underlying management structure;

(c) the role in the management of the company assumed by the director and the duties expected of a person in that role; and

(d) the experience and skill of the particular director.

Nevertheless, there is a minimum requirement that a director informs himself sufficiently about the company's business to enable him to perform his functions. Accordingly, anyone becoming a director for the first time should appreciate that claiming ignorance of director's duties and responsibilities because they are new to the job is unlikely to be an acceptable defence in the event of difficulties. Accordingly, as a general rule, a director must be clear that he has sufficient understanding of a particular area of responsibility such that he is able to discharge his duty. He must make sure that he has adequate information to be able to make an informed decision. Fundamentally directors should not be afraid to ask for further clarification or explanation. For instance any issues with the historical

accounts might be raised with the finance director or audit committee in the first instance. If in doubt directors should not be afraid to take legal advice.

Each director has a duty to exercise independent thought during the board's deliberations. Once those deliberations are at an end, however, the board as a whole, and each director comprising the board, is bound by the decisions it reaches. A board seeking to achieve a common view about an uncertain future should aim to reach consensus decisions. That is not always possible: in a healthy board there will often be differences of opinion. Individual directors need not agree with every decision taken by the board provided they agree to be bound by and work towards implementing the consensus view.

A good working illustration of what directors should or should not do, so as to show that both they and their company are acting independently and to evidence where central management and control resides, appears from an article by Lord Justice Chadwick who sat in the English Court of Appeal and who was earlier a judge of the Jersey Court of Appeal. See Jersey and Guernsey Law Review, June 2007 article entitled "Control of Special Purpose Vehicles". In essence they must be prepared properly to consider matters before them and to demonstrate that in certain circumstances they would refuse to carry out transactions or activities if asked by beneficial owners, shareholders, advisers or third parties to do so. In other words, an independence of judgement is required even though it will often make good sense for directors to do exactly as their shareholders and others regularly request.

3.4 Directors' meetings

3.4.1 Notice of meetings and quorum

Importantly and subject to any terms in the articles to the contrary, a meeting will generally only be valid if every member of a board is given notice of the meeting, which, although it need not be in writing, must give sufficient notice to comply with any requirement in the articles or prior resolution or otherwise within a reasonable period of notice having regard to all the circumstances. See Baker v Falle 1991 JLR 284. Circulation of a list of pre-arranged dates may be taken as proof of notice (and is good practice in any event). Periods of notice and quorums necessary for the meetings of the board and of shareholders are typically contained in the articles and should generally include provisions allowing meetings to take place at short notice if necessary and appropriately agreed to. A meeting cannot proceed to business unless a quorum is present. Minority shareholder directors cannot prevent their dismissal by refusing to attend a shareholders' meeting so as to make it inquorate. The court can convene a meeting to reduce the quorum to allow the meeting to proceed. See Re Inter-Channel Pharmaceuticals Limited UJ 2002/116A, 2002 JLR Note 25. Subject to the articles, Article 86 of the Companies Law permits the holding of directors' meetings by any method of communication (e.g. telephone or video-conference) provided each participant can hear each of the other participants.

Directors have a general duty to attend meetings and a company's articles may contain provisions for the removal of a director who persistently fails to attend them. All directors are entitled to attend board meetings and cannot be lawfully excluded from them.

3.4.2 Conflicts of interest

Directors must also disclose to the company the nature and extent of any interest they may have in a

transaction entered or proposed to be entered into by the company (or a subsidiary of the company) which to a material extent conflicts or may conflict with the interests of the company (and of which such director is aware), whether such interest is personal, financial or contractual. Failure to disclose any such interest may entitle the company or a member to apply to court to have the transaction concerned set aside and to have the director account to the company for any profit or gain realised (a court may also make such other order as it thinks fit).

3.4.3 Agenda and prior information

Unless the business to be discussed at a meeting is routine, straightforward or urgent, it is good practice - though not a legal requirement - to give notice of the business to be transacted when calling a board meeting.

The constructive use of the agenda, to ensure that the various proper functions of the board are performed on an appropriate cycle and that they appear in the best order, can make a considerable contribution to the efficiency of the board. Some chairmen find it useful to hold an ‘agenda meeting’ with the company secretary and managing director about a week before the board meeting, so as to decide what should and what should not go on the agenda and in what order and generally discuss how the meeting should be conducted.

A director is entitled to any information in relation to the company he requires in order to perform his functions. So long as he has no grounds for suspecting that it is misleading or wrong, he is entitled to rely on the information supplied to him by management. As the time available for board meetings is limited, he needs complete, concise and accurate information and he needs it sufficiently in advance of the meeting to have time to study it. It is sensible for the board to agree a mechanism to ensure that all directors receive the information they require in good time prior to each board meeting. The best practice is to aim to have the company secretary distribute the notice of a meeting, agenda and all relevant information in one package in advance of each meeting, although this may not always be possible.

3.4.4 Minutes

Most board papers will include minutes of the previous meeting, which members of the board will be asked to agree as a true record. Once agreed and signed by the chairman, they are evidence (though not conclusive) of the proceedings to which they relate. Minutes should record the decisions made by the board and the rationale behind those decisions, but it is generally inappropriate to expect minutes to chart in detail every discussion held by the board.

In the event that a company becomes insolvent, the minutes of the company will provide an important record of the steps taken by the directors prior to the insolvency. A director of a company that becomes insolvent may face particular issues and sanctions, as described in Chapter 9. In this context, it is perfectly reasonable for any director who suspects that the financial position of a company is weak to demand that the minutes accurately reflect any concerns he raised at the relevant meeting and the steps taken to address those concerns.

Where a private company has a sole director it is essential to place a signed and dated memorandum of the decision or resolution of that sole director in the minute book to provide evidence of that fact.

Draft minutes can be prepared in advance of a meeting or if afterwards should be prepared soon thereafter and circulated to all board members for comment and approval at the next meeting. It is also useful to prepare a list of actions to be taken as a result of the decisions with clear time frames, individual responsibility and the documents needed.

3.4.5 Central management and control

One of the key tasks of the board is to ensure that central management and control for tax and other reasons resides in the correct place. Generally, this is determined by the place of incorporation, the residence of the directors, where the meetings are held and on the substance of the real decision-making and where this took place as a matter of fact. This is well illustrated where a parent in one country arranges for a subsidiary, perhaps a special purpose vehicle (SPV), set up for only one transaction or purpose, to enter into a transaction at the behest of the parent. The SPV may be in another country with the majority of directors from that country and with the directors' meetings of the SPV being held in that country. What are the tests as to where the substance of the real decision-making occurred? Where was the decision made, especially where the SPV had always done as the parent had asked or demanded? See Wood v Holden [2006] EWCA Civ 26, [2006] 1 WLR 1393 and Mahonia Limited v West LB AG [2004] EWHC 1938 (Comm) involving a Jersey SPV. In brief, the issue as to where central management and control resides will be determined by:

(a) what actually happened not what ought to have happened;

(b) the substance not the form;

(c) the substance being sufficiently evidenced;

(d) an assessment of where real control lies; and

(e) scrutinising the facts in the course of the company's business and trading. Relevant ways to establish this are to consider:

- where the board met;
- its make up;
- what occurred at board meetings;
- whether the meetings were real with sufficient information and appropriate discussion with decisions made by those present;
- whether the decisions were considered in the best interests of the company;
- whether the directors would have refused to carry out any proposal if it was improper or unreasonable;
- whether the directors would have sought amendments if they were unhappy;
- whether the parent controls the subsidiary's decision-making;
- whether there was no legally binding control by the parent company;
- whether individual directors understand their duties under company law and the business in question;
- whether the directors reached their own independent conclusion;
- whether the directors were conscious of their duties when the decision was made; and
- whether it was a question of mindlessly passing resolutions and simply going through the motions.

Factors that are not relevant in determining central management and control include where:

(1) the subsidiary has always done as its parent asked;

(2) the arrangements and proposals emanated from and were fully understood by the parent;

(3) the arrangements principally benefited the parent;

(4) the subsidiary's directors gained personal remuneration;

(5) there was no other reason for the existence of the SPV;

(6) the SPV wanted to please the parent; and

(7) the parent had power to remove the directors of the SPV.

The following cases establish and further illustrate these important principles.

A leading English case on residence for the purpose of income tax and of capital gains tax is De Beers Consolidated Mines Ltd v Howe (Surveyor of Taxes) [1906] AC 455, 5 TC 198 in which Lord Loreburn LC said:

> *"In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company. Otherwise it might have its chief seat of management and its centre of trading in England under the protection of English law, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad… I regard that as the true rule, and the real business is carried on where the central management and control actually abides."*

A more recent English case at a high level is Wood v Holden [2006] EWCA Civ 26 in which the De Beers case was approved and in which Chadwick, L.J. said:

> *"In seeking to determine where 'central management and control' of a company incorporated outside the United Kingdom lies, it is essential to recognise the distinction between cases where management and control of the company is exercised through its own constitutional organs (the board of directors or the general meeting) and cases where functions of those constitutional organs are 'usurped' - in the sense that management and control is exercised independently of, or without regard to, those constitutional organs. And, in cases which fall within the former class, it is essential to recognise the distinction (in concept, at least) between the role of an 'outsider' in proposing, advising and influencing the decisions which the constitutional organs take in fulfilling their functions and the role of an outsider who dictates the decisions which are to be taken. In that context an 'outsider' is a person who is not, himself, a participant in the formal process (a board meeting or a general meeting) through*

which the relevant constitutional organ fulfils its function."

In the context of an arranger of a special purpose vehicle, Mahonia Limited v West LB AG [2004] EWHC 1938 (Comm) shows that there is no usurpation where the board of the company is shown to have been free at all times either to seek amendments to documents presented to it, or to decide whether or not to conclude the transaction proposed to it. Although directors may wish to please an arranger or parent, there will not be usurpation if they are conscious of their duties as directors and can show that if they were unhappy they would require an amendment or refuse to participate. It is not unusual or wrong for a subsidiary to do as requested by its parent. The test is whether there was independent decision-making by the subsidiary.

Where there has been no usurpation of the board of directors, central management and control is generally where the board met. The degree of activity undertaken by the board is not part of the test. Central management and control was likened to the exercise of the controlling brain of the company. See News Datacom Ltd v Atkinson [2006] STC (SCD) 732.

For double tax purposes, for example, where a company is managed by its board, its residence will normally be where it meets. However, if high-level decisions are usually made outside board meetings even by one director in another country although routine matters are dealt with where the board meets, the company may be resident where that one director is resident. The place of effective management is where the real decisions are made. See Laerstate BV v Revenue and Customs Commissioners 2009 UKFTT 209 (TC), [2009] SFTD 551.

In a partnership case (in which similar criteria apply) it was said that it is the place of management that is important, not where contracts were signed. See Mark Higgins Rallying v Revenue and Customs Commissioners [2011] UKFTT 340 (TC), [2011] SFTD 936.

In a trust case (again, where similar criteria apply) it was shown that residence can change. The trust had been resident in Jersey, Mauritius and the United Kingdom. It was necessary to establish those facts and to establish the relevant time of the transaction to test whether tax was payable or not. See Re the Trevor Smallwood Trust [2009] EWHC 777 (Ch), [2009] STC 1222 and [2010] EWCA Civ 778, [2010] STC 2045.

3.5 Information

The ability of the directors to fulfil their role is at least in part dependent upon the quality of information with which they are provided by management and so it is important that there be no doubt as to the extent, quality and form of information required by directors and the individuals responsible for providing it on time.

The issue as to extent of information and documentation as required, often arises in the context of management accounts and statistical returns. One of the greatest dangers to avoid here is that the key information will be obscured in a mass of financial data more suited to management's use than to the board's. A key function of the board is to be able to step back from the day-to-day running of the

business in order to assess the bigger picture. Directors should insist on receiving the information in a form that is consistent with their appointment and functions. For instance, for non-executive directors who are only expected to devote a limited amount of time to their office, it may be appropriate to receive an executive summary of the key issues. It is sensible for boards to periodically assess the extent, quality and form of information and documentation received for directors' meetings. This may be in part determined by the trading environment: in a recession the board may have to pay particular attention to cash balances; in a boom, the board may have to pay particular attention to staff turnover and market salaries. As a general rule, it is key that all directors (whether executive or non-executive) have the clearest possible picture of the financial health of the company.

3.5.1 Information needed to review company policy

The most important documents for conveying such information are plans, budgets and reports. Boards should ensure that they have adequate information about underlying assumptions and particularly about the sensitivity of profits to variations in assumptions. Again, too much information can pose as great a risk as too little: the board's time is limited and all information should be prepared with a view to brevity and clarity.

3.5.2 Information needed to monitor the management of company funds

Jersey companies are frequently formed to hold portfolios of stocks and shares and, where this is the case, an investment adviser or manager is frequently employed. In these circumstances the directors will normally set the long-term investment objectives in the form of income requirements, capital security, or possibly the percentages of the portfolio to be invested in different sectors or in different currencies. It may not be practical for the board to approve the purchase or sale of individual investments, in which case the board should consider delegating that responsibility to an investment manager. They should also formalise a policy for ensuring that the company's funds are being invested in accordance with the laid down objectives and they should carefully monitor the performance of the investment manager/adviser and the portfolio against recognised market benchmarks. They should also demand more detailed information on particular investments if, for example, a large proportion of the company's assets is concentrated in a single investment or if the portfolio contains shares in unquoted companies. If the performance of the portfolio lags behind its peers, or the market as a whole, the board should consider whether a new investment adviser or manager should be appointed. If the portfolio is large and/or diverse, consideration should be given to using more than one adviser.

3.5.3 Information to support proposals for new projects

A board of directors considering a possible new project is entitled to expect information that:

(a) shows how a new project relates to the company's objectives;

(b) sets out a realistic range of options for achieving a particular objective, including alternative financial arrangements; and

(c) has considered all appropriate factors, and which draws attention to those factors of which management is doubtful or that are otherwise uncertain.

If the information provided is insufficiently detailed or clear to satisfy these requirements, then it is a fair assumption that the project itself may not have been properly evaluated.

Before resolving to enter into any transaction it is always sensible for directors to consider the likely risks and benefits that the transaction presents to the company. If a director is uncertain that a transaction is likely to contribute to the profitability of the company, he should demand further information in relation to the proposal and should not agree to the proposal until satisfied that it is in the company's best commercial interests.

3.5.4 Information needed to monitor the management of property
Jersey companies are frequently owners or leaseholders of property whether in Jersey or elsewhere.

Frequently the management is delegated to a professional manager, or in part to beneficial owners or, for example, under the terms of a lease, to a tenant. Preservation of the property in the form of repair and maintenance, insurance, payment of outgoings and compliance with local laws and standards need to be kept in mind.

3.5.5 Who initiates policy?
Management and the board must bring their collective experience together to initiate new policies for the company. Management is not doing its job properly if it fails to bring to the board's attention the threats and opportunities that its day-to-day familiarity with the company's business allows it to identify. At the same time, it is the duty of every board member to bring his fellow directors' attention to the threats and opportunities that wider acquaintance with the business environment may reveal. Management may thus initiate many of the projects by which a company's strategy develops, but the responsibility for accepting or rejecting them rests firmly with the board. The management may from time to time indicate that particular market conditions have created an opportunity that will not remain open for long. This can place the directors in a difficult position: on the one hand, an inert board is likely to frustrate an ambitious management; on the other, many business decisions made in haste often prove to be costly mistakes. There is no easy solution in such situations: management can be an imprecise art rather than an exact science.

3.6 The board's relationship with others

3.6.1 Shareholders
Under typical articles, shareholders have the power to appoint and remove the directors. In practice, in large companies, they confirm appointments made by the board between AGMs.

A director is not a mandated delegate of the shareholders. If a director were in fact a delegate, it would imply that he should forego whatever powers of individual judgement he might have in order to fall in with the wishes and demands of the shareholders. But this is not so. A director who was merely the mouthpiece of the shareholders would be failing in his primary duty, which is to the company. As we have seen, the interests of the company are not necessarily the same as those of the current shareholders.

Once they have subscribed for shares in a company, shareholders usually (though not invariably) forego any detailed control over how such funds are to be used. Having control over the appointment and removal of the company's governing body compensates them for this loss of direct control over

their property. The shareholders, ranking last in order for their income and taking the greatest risk of irrecoverable loss in respect of their capital investment, are a definable group with a significant interest in the company's success. They cannot receive their financial return from the company without the company having first satisfied or made provision for its other creditors.

The relationship between the board and the shareholders is further illustrated by reviewing what decisions are reserved for shareholders as opposed to directors. There may be special provisions in the articles, but generally the Companies Law requires that certain actions can only be taken by shareholders. These are where a special resolution (as opposed to an ordinary resolution of shareholders) is required (which requires at least a two-thirds majority of those attending in person or by proxy and entitled to vote):

(a) to alter the memorandum and articles;

(b) to alter or convert share capital;

(c) to vary class rights;

(d) to purchase or redeem shares;

(e) to merge companies;

(f) for the continuance of a Jersey company overseas;

(g) to summarily wind up a company; and

(h) to place a company into a creditors' winding up;

and where shareholders' approval is required for:

(i) a scheme of compromise or arrangement (requiring a three-quarters majority); and

(j) ratification of an act or omission (requiring unanimous consent of all members).

In the case of Galasys Plc [2016] JRC188 the Royal Court was asked to rule on whether shareholders have a reserve power to act where the board is unable or unwilling to do so and, if so, the extent of the power. The Court found that such a power does exist and that shareholders may appoint further directors to the board in order to resolve board deadlock. Further, shareholders could engage in management matters by passing ordinary resolutions.

The directors or secretary will generally convene a meeting of shareholders and it is important that adequate notice in due time is given. The Companies (Amendment No. 9) (Jersey) Law 2008 reduced the minimum period for calling an AGM or EGM to fourteen days from twenty one days but the articles may require more notice.

Under Article 89 of the Companies Law, directors are duty bound to call a meeting following a requisition of shareholders of ten percent entitled to vote at such a meeting and if they fail to do so the requisitionists can call the meeting. Under Article 94 of the Companies Law the court too has power to call a meeting. Directors or some of them are usually present at shareholders' meetings.

3.6.2 Employees

There is no statutory duty of directors to the company to have direct regard to the interests of employees in general but they must have regard to legislation relating to the company as employer and its duties and obligations to employees. However, in reality, a board of directors cannot direct a company successfully unless they have regard to the interests of employees. What this means in practice is directing the company in such a manner that every individual employee (and in particular those that the board regards as "key" employees) perceives that he is getting a good bargain in terms of pay, security, health and safety and general welfare at work to set against the opportunities he foregoes of working elsewhere or not working at all and ensuring the company complies with applicable legislation relating to these matters. It is clearly advisable to ensure that a degree of communication exists between the employees and the board.

3.6.3 Creditors and suppliers

The board of directors should be responsible for creating and monitoring compliance with the company's policy on terms of payment of creditors and suppliers. It can be damaging to a company to get a reputation as a poor payer and may lead to a deterioration in the terms upon which creditors and suppliers are willing to deal with the company.

3.6.4 Directors may become involved in any compromise with creditors (see Chapter 9).

In an insolvent winding up or a désastre (bankruptcy) of a company, from the time that a director knows that a company has no reasonable prospect of avoiding such procedures or on the facts known to him he is reckless as to whether the company would avoid such procedures, that director must take reasonable steps to minimise the potential loss to the company's creditors. Failure to do so may expose the director concerned to a personal liability to contribute to the company's assets for the benefit of the creditors if the company does indeed become insolvent. This is one of the major risks faced by a director.

3.6.5 The public, the community and the environment.

Whilst there are no Jersey Company statutory provisions or cases specifically requiring fulfilment of a duty to the public, the community and the environment, directors should give due consideration to such matters if only to safeguard a company's reputation. Other relevant statutes include the Competition (Jersey) Law 2005, the Health and Safety at Work (Jersey) Law 1989, Data Protection (Jersey) Law 2005 and the impact of the general criminal law, the law of tort and property law including voisinage. See Rockhampton Apartments Limited and Antler Property C.I. Limited v Gale and Clarke 2007 JLR 332. Some of these duties have been codified as a matter of English law pursuant to the Companies Act 2006 and it is likely that English common law will continue to develop this issue further.

In relation to data protection, the General Data Protection Regulation comes into effect in the UK from 25 May 2018 and equivalent legislation is being brought into force in Jersey (and Guernsey). GDPR involves giving new rights for members of the public to control their data (including the "Right to be

Forgotten”); it imposes new responsibilities on companies for safeguarding the data they process and it harmonises standards across the EU and beyond to help create a “single digital market”. These reforms are wide ranging and affect any organisations which wish to trade into the EU. The potential fines for non-compliance are serious - up to 20 million euros or 4% of global annual turnover in respect of serious contraventions of the rules.

3.7 Delegation and committees

As referred to above, the board is made up of the directors of the company. The board is the public face of the company, and must answer to the shareholders if the performance of the company falls below the shareholders’ expectations. The board has the responsibility for ensuring the company’s prosperity by collectively directing the company’s affairs, while meeting the interests of the shareholders. However, the specific responsibilities of the board collectively and the specific responsibilities of individual directors of the board or committees are rarely confirmed in the articles. It is therefore of paramount importance that the board is able to effectively delegate authority to management and, having done this, to effectively monitor the performance of management thereafter.
Individual directors should be aware that each of them has a responsibility to ensure that this overall objective is achieved. The exercise of the power of delegation does not absolve a director from his duty to supervise the discharge of the delegated function. Failure to achieve this objective is usually the result of poor management, which is usually a result of a dysfunctional board of directors. The effective delegation of authority to management coupled with effective monitoring thereafter are key functions of any board of directors. From a commercial perspective effective delegation is also key to the efficiency of any business.

Obviously the extent of delegation and monitoring will vary enormously dependant upon the type and size of a company and its principal activities.

The board of directors is normally permitted by the articles to delegate its functions further, either to committees, to individual directors or to management. Delegation to committees can cause certain problems, most acutely where an executive committee is formed to carry on the board’s business between meetings. The danger is that in the minds of members of the board the creation of committees may create the idea that because some members’ responsibilities are enhanced, those of the others are diminished. This is not so; the purpose of committees is to address, in greater depth than is possible in full board meetings, certain issues for which the full board retains responsibility.

As a matter of good practice, executive directors should not be responsible for fixing their remuneration as executives. A remuneration committee comprising non-executive directors provides the opportunity for non-executive directors to decide the pay and conditions of service of their executive colleagues in a manner that is demonstrably fair to them and to the shareholders. The chairman should not be present when his own remuneration is under discussion.

Audit committees exist to provide a link between board and internal and external auditors independent of the company’s management, which is responsible for the accounting system that is the subject of the auditor’s scrutiny. Although currently less prevalent in Jersey, audit committees are

common in the UK and the US, where they are mandatory for companies seeking a listing on, for example, the New York Stock Exchange. The primary purposes of such a committee are to assist the board in the proper discharge of its responsibility with regard firstly to the validity of published financial statements and secondly the effectiveness of internal controls. It can also provide an appropriate vehicle for reviewing prospective auditors, for any discussions the auditors may wish to initiate on the scope of external audit and its relationship with internal audit and for negotiating the audit fee. Audit committees should normally be composed wholly of non-executive directors; they thus provide a further useful focus for the work of such directors.

There may also be committees charged with monitoring and reporting on risk, on compliance and any other important and specialist area needed.

By way of summary:

(a) delegating a function does not absolve the board and the individual directors thereof of responsibility;

(b) delegation must be monitored on a regular basis in order to be effective; and

(c) the constitution of committees can assist the board to consider specific issues in greater depth.

3.8 The importance of corporate governance and internal controls

The UK Corporate Governance Code produced by the Financial Reporting Council in September 2012 is primarily designed for companies listed on the FTSE 100, 250 or 350 registers but its principles are instructive for many smaller and private companies. Flexibility, judgement and good sense need to be applied to all these principles. The first version of the Code was produced in 1992 after the Cadbury Report. The Reports by Greenbury, Hampel and now Walker have all influenced the latest Code.

The latest Code says that corporate governance is the system by which companies are directed and controlled. Boards of directors are responsible for the governance of their companies. The shareholders' role in governance is to appoint the directors and the auditors and to satisfy themselves that an appropriate governance structure is in place. The responsibilities of the board include setting the company's strategic aims, providing the leadership to put them into effect, supervising the management of the business and reporting to shareholders on their stewardship. The board's actions are subject to laws, regulations and the shareholders in general meeting.

Corporate governance is therefore about what the board of a company does and how it sets the values of the company, and is to be distinguished from the day-to-day operational management of the company by full-time executives.

The Code is a guide to a number of key components of effective board practice. It is based on the underlying principles of all good governance: accountability, transparency, probity and focus on

the sustainable success of an entity over the longer term. The Code has been enduring, but it is not immutable. Its fitness for purpose in a permanently changing economic and social business environment requires its evaluation at appropriate intervals.

A feature of the Code is to apply the test of "comply or explain". In other words, for those companies to which the Code is designed to apply, it is recognised that judgement and flexibility is important. However, the onus should be on complying with the Code but if there is a departure from it, it must be based on a conscious, reasoned and proper basis. Therefore, the principles are not a rigid set of rules and are intentionally broad. It is how they are applied and implemented in particular circumstances that is important, and they provide abase for good understanding, communication, prudence and effectiveness. They should be understood by all directors. That process can therefore be applied to all companies as appropriate.

The main principles of the Corporate Governance Code are:

(a) Leadership

Every company should be headed by an effective board that is collectively responsible for the long-term success of the company.

There should be a clear division of responsibilities at the head of the company between the running of the board and the executive responsibility for the running of the company's business. No one individual should have unfettered powers of decision.

The chairman is responsible for leadership of the board and ensuring its effectiveness on all aspects of its role.

As part of their role as members of a unitary board, non-executive directors should constructively challenge and help develop proposals on strategy.

(b) Effectiveness

The board and its committees should have the appropriate balance of skills, experience, independence and knowledge of the company to enable them to discharge their respective duties and responsibilities effectively.

There should be a formal, rigorous and transparent procedure for the appointment of new directors to the board.

All directors should be able to allocate sufficient time to the company to discharge their responsibilities effectively.

All directors should receive induction on joining the board and should regularly update and refresh their skills and knowledge.

The board should be supplied in a timely manner with information in a form and of a quality appropriate to enable it to discharge its duties.
The board should undertake a formal and rigorous annual evaluation of its own performance and that of its committees and individual directors.

All directors should be submitted for re-election at regular intervals, subject to continued satisfactory performance.

(c) Accountability

The board should present a fair, balanced and understandable assessment of the company's position and prospects.

The board is responsible for determining the nature and extent of the significant risks it is willing to take in achieving its strategic objectives. The board should maintain sound risk management and internal control systems.

The board should establish formal and transparent arrangements for considering how they should apply the corporate reporting, risk management and internal control principles and for maintaining an appropriate relationship with the company's auditors.

(d) Remuneration

Levels of remuneration should be sufficient to attract, retain and motivate directors of the quality required to run the company successfully, but a company should avoid paying more than is necessary for this purpose. A significant proportion of executive directors' remuneration should be structured so as to link rewards to corporate and individual performance.

There should be a formal and transparent procedure for developing policy on executive remuneration and for fixing the remuneration packages of individual directors. No director should be involved in deciding his own remuneration.

(e) Relations with shareholders

There should be a dialogue with shareholders based on the mutual understanding of objectives. The board as a whole has responsibility for ensuring that a satisfactory dialogue with shareholders takes place.

The board should use the AGM to communicate with investors and to encourage their participation.

To each of these main principles are supporting principles and Code provisions. See www.frc.org.uk.

The Financial Reporting Council has also produced Guidance on Board Effectiveness (March 2011) providing helpful advice, again with listed companies in mind but which contains useful material on:

(a) the role of the board and directors:

- its effectiveness;
- the role of the chairman;
- the role of the senior independent director;
- the role of executive directors;
- the role of non-executive directors;

(b) board support and the role of the company secretary;

(c) decision-making;

(d) board composition and succession planning;

(e) evaluating the performance of the board and its directors;

(f) audit risk and remuneration; and

(g) relationship with shareholders.

Other publications of relevance are Guidance on Audit Committees and Internal Control: Guidance to Directors.

The Walker Report (2009) made recommendations for greater use and engagement of non-executive board members for banks and listed companies in particular in the aftermath of the 2008 credit crisis. Recommendations were made in relation to:

(a) the size of the board, its composition and qualification of non-executive directors and in particular the qualities and experience and the time and training that should be made available;

(b) the functioning of the board and evaluation of its performance and in particular the need for directors to challenge and question at board level and for the chairman to devote sufficient time and attention and have experience and leadership qualities. It is important to evaluate the performance of the board on a formal and rigorous basis;

(c) the role of institutional shareholder communication and engagement, in particular the board should be aware of significant shareholder changes and for the establishment of an approved shareholder stewardship code of principles, including greater communication;

(d) the governance of risk. There should be a separate risk committee from the audit committee. In addition to a chief executive officer (CEO) or a chief financial officer (CFO) there should be a chief reporting officer (CRO) too. There should be a separate annual risk report with the annual report and accounts; and

(e) the responsibility of the remuneration committee. Increased understanding of pay andemployment conditions should be coupled with objectives and risks of “high end” employees and berelated to performance.

The Report proposed that certain recommendations should become regulatory requirements of the Financial Services Authority and included in the Code itself. These provisions reflect the concerns of the time and advance the nature of good governance generally, and on that basis, and subject to appropriate application for a particular company, are helpful to attain better and safer business conduct.

As indicated above, subject to the articles, a board of directors may delegate its functions either to committees, to individual directors or to management. Delegation to committees can cause certain problems and particularly where an executive committee is formed to carry on the board's business between meetings. However, the board remains ultimately responsible. The downfall of Barings Bank and the disqualification of ten directors there provides an excellent example of where a seemingly sophisticated management structure with extended reporting lines can go horribly wrong. The main function of a committee is to focus in greater depth and detail than may be achievable by the board collectively at board meetings, certain functions or issues for which the board retains ultimate responsibility. Accordingly, having delegated functions, the board must thereafter introduce internal controls to ensure that the performance or lack of performance of any committees or individuals delegated with specific functions is properly and effectively monitored, with a view to ensuring satisfactory performance.

3.9 Three practical examples

3.9.1
In 1995 Barings Bank went into administration as a result of the unauthorised trading activities of one trader, Nick Leeson, in Singapore. In Re Barings plc (No. 5), Secretary of State for Trade and Industry v Baker [1999] 1 BCLC 433 it was noted that the management structure within the Barings Group consisted primarily of various managerial committees and as a corollary of this the boards of directors of companies within the group performed a limited management function. The fundamental question raised by the trial judge was why Nick Leeson's trading activities were allowed to continue for so long, undetected and uncontrolled.

It was clear that Barings permitted a high degree of delegation and wherever possible authority was delegated downwards. However, having delegated functions there were no real internal controls in place to ensure the relevant boards maintained effective control of the business. In terms of Nick Leeson's duties and responsibilities, he was in day-to-day charge of both the trading activities and the back office. He was both head trader and in charge of the paperwork including the recording and settling of trades. It is a fundamental precaution in any business involving trading in securities that no one individual should be in a position where he can conduct and settle trades. In disqualification proceedings commenced against the deputy chairman of the Barings Group, who spent as much as eighty percent of his time on client matters as opposed to management, the Court concluded that had he played the positive management role that his duties and responsibilities required him to do, the non-segregation of Leeson's role would inevitably have come to his attention. In the course of the case Judge Parker concluded that the whole of the board and each individual director:

remain responsible for the delegated function or functions and will retain a residual duty of supervision and control.'

In terms of his duty to monitor, the Court confirmed that the deputy chairman had effectively abdicated all his management responsibility to senior executives. He also showed a woefully inadequate understanding of how Nick Leeson's trading activities were supposed to have operated. The deputy chairman and nine of his co-directors had failed absolutely to take any steps to satisfy

themselves of the true position. There was a fundamental failure in terms of the duty to manage. The internal management controls were a complete failure that ultimately led to the collapse of a major banking institution. Barings provides an excellent example of how a sophisticated management structure with extended reporting lines can go wrong.

3.9.2
In Official Receiver v Vass [1999] BCC 516, Mr Cronshaw, a resident director of Sark, was disqualified for twelve years for totally neglecting his duties and responsibilities as a director of a Manchester-based car rental business and other companies. At the time Mr Cronshaw was recorded as holding a total of 1,313 appointments as a director of UK companies. He had agreed to act as a nominee director pursuant to his business of supplying nominee director services from Sark. As a stark lesson to offshore service providers on how not to draft terms of business Mr Cronshaw's terms of business provided, inter alia, that:

(a) he would have no involvement in the management or running of the company;

(b) he would only act on the instructions of his appointer; without making any or substantial, independent contribution or enquiries; and

(c) his role would essentially be restricted to signing forms and filing documents.

The Official Receiver successfully argued that in adopting these terms the nominee director would be prevented from exercising any reasonable degree of supervision or control over the conduct of the company's affairs. The court was not prepared to tolerate the situation whereby an individual accepted so many directorships whilst abrogating all responsibility for how the companies are run. The twelve-year disqualification period was handed down to Mr Crowshaw as a deterrent to others who might engage in similar activities.

3.9.3
The Weavering Macro Fixed Income Fund Limited ("Macro Fund") collapsed into liquidation in 2009 shortly after it was discovered that a high proportion of the assets reflected on its balance sheet, worth over $600m, comprised fictitious interest rate swaps executed with a related BVI company. The Macro Fund was incorporated in the Cayman Islands in April 2003 as an open-ended investment company, with its participating shares admitted to the Irish Stock Exchange. The investment manager was Weavering Capital (UK) Limited (WCUK), an English company that carried on its business from offices in London. WCUK was indirectly owned and controlled by Mr Magnus Peterson, who was the Macro Fund's "principal investment adviser". The Macro Fund also engaged the services of respectable administrators and auditors.

Litigation against the directors ensued in both Cayman and England.

In the Cayman Islands proceedings two directors of the Macro Fund, who were close family relatives of the Macro Fund's promoter and principal investment adviser, were found guilty at first instance of wilful neglect or default, and judgment was awarded against each of them in the sum of £111 million:

Weavering Macro Fixed Income Fund Limited (in liquidation) v Peterson and Ekstrom (Grand Court of the Cayman Islands, 26 August 2011). This sum was represented the irrecoverable amount paid out to redeeming investors after November 2008, the point in time when the court found that the Master Fund ought to be have been placed into liquidation.

The decision was successfully appealed by the directors and judgment was handed down on 12 February 2015.

Whilst both courts held that the directors were in breach of their duty of skill and care in failing to discover the identity of the counterparty, they diverged when applying the exclusion of liability clause in the Articles of Association to the facts. This would absolve the directors unless they were guilty of ''wilful neglect or default'. The legal test (Re City Equitable Fire Insurance [1925] Ch 407] was common ground: a director cannot not be guilty of ''wilful neglect or default' unless he either: (i) knows that he is committing and intends to commit a breach of duty or (ii) is recklessly careless as to whether he is in breach. The Grand Court held that the directors were liable on the first limb in that they consciously chose not to read the 2008 quarterly report which would have revealed the identity of the counterparty. The Court of Appeal disagreed and held that they had neither consciously chosen not to perform their duties nor were recklessly careless.

Plainly directors need to consider the terms of any exemption clauses, the applicable terms contained in the Articles of Association and the law applying to the company concerned.

Separately, the investment manager WCUK went into administration and thereafter liquidation, and successful claims for damages of $450 million were pursued against Mr Peterson and other directors (including his wife) and a senior employee for breaches of their duties. In Weavering Capital (UK) Ltd (in liquidation) v Peterson [2012] EWHC 1480 (Ch) (upheld on appeal in Weavering Capital (UK) Ltd (in liquidation) v Dabhia [2013] EWCA Civ 71), Mrs Justice Proudman stated that Mr Peterson had committed the fraud "out of a sense of invincibility, self-belief, and a gambler's mentality." Mrs Peterson was a "very clever woman and one with significant knowledge and understanding of derivatives" who was unable to escape liability by saying that she only had a limited role in the management of WCUK and was not alerted to wrongdoing by her husband. Another director who was "out of his depth" was found to be in breach of his duties to WCUK as a director, by failing to acquire a sufficient knowledge and understanding of its business and failing to satisfy himself as to the details and propriety of the trades being entered into. He was also liable in the tort of negligence for failing to act with reasonable care, skill and diligence and for negligently making false representations to investors. Finally, the "over-promoted" senior employee who was "doing his incompetent best" was found not to be liable for dishonest assistance but was "plainly negligent".

Carlyle Capital Corporation, a Guernsey company (''CCC''), collapsed into compulsory liquidation on 17 March 2008 leaving creditors a deficiency of $350million, having lost $1.3billion in 8 months. In 2010 the liquidators launched proceedings against multiple parties (which comprised 187 different claims). These included actions against 7 directors and shadow directors for breach of fiduciary duty and /or gross negligence. Following a lengthy trial, judgment of the Royal Court was delivered 4 September 2017 and the Court dismissed all of the claims.

The Court confirmed that, so far as breach of fiduciary duties are concerned, the test is entirely subjective - directors must act in what they honestly consider to be the best interests of the company. So long as that test is met, directors avoid liability for breach of fiduciary duty even if, objectively viewed, the act complained of was not in the best interests of the company.

The (non-fiduciary) duty to exercise reasonable skill and care on the other hand is assessed by reference to both subjective and objective factors of: (i) a director’s actual knowledge, skill and experience and (ii) the knowledge, skill and experience that may be expected of someone fulfilling that director’s role.

Chapter 4: Directors' duties

4.1 General duties

Directors have fiduciary duties and are in a position of trust but are not trustees as such. They owe a duty of loyalty to the company.

4.1.1 Honesty, diligence and others

No single statute exhaustively details or defines the duties of directors of a Jersey company. Part 14 of the Companies Law group together some general provisions about appointment, removal, qualifications, duties and responsibilities of directors. Other more specific requirements are imposed on directors elsewhere in the Companies Law and in other relevant legislation, in particular in the Désastre Law. Many of the most important features of a director's duties are, however, based on case law. On the general question of directors' duties the Royal Court of Jersey will look to existing Jersey case law and in the absence of such, will look for guidance to English common law on the question of directors' duties generally. Further, a large number of duties are created by enactments well outside the traditional ambit of company law.

Outside of the specific statutory duties that will be discussed in the second part of this chapter, the main directors' duties are helpfully set out in Article 74 of the Companies Law, which provides that directors shall, in exercising their powers and discharging their duties:

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

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

These statutory duties reflect (though do not replace) the fiduciary and common law duties that had evolved prior to the introduction of the Companies Law. These are well described in Madoff Securities International Limited (in liquidation) v Raven & others [2013] EWHC 3147.

4.1.2 Honesty

Directors must not use their powers for an improper purpose, take personal advantage of the company's opportunities, misapply the company's assets or allow their personal interests to conflict with those of the company or, if they do, they must disclose to the company the nature and extent of any actual or potential conflict of interests. A director holds a fiduciary position: the court expects a very high standard of honesty from all fiduciaries and will apply very stringent tests as to what constitutes impropriety, personal advantage or misapplication.

4.1.3 Good faith and proper purpose

A director will have performed his duty if the transaction about to be approved is for the benefit of the company, provided the transaction is not the result of an improper use of the director's powers. This is an objective test. In Re Zaki Limited, On the representation of Singla 1987-8 JLR 244, the Royal Court declared that if, for example, a transaction was gratuitous and the directors could not show sufficient

"cause" (which in the context of a company may be fairly paraphrased as "commercial reason") for exercising their powers in good faith and in the best interests of the company, the transaction might be set aside by the court.

If a director acts in a way which he bona fide considers is in the best interests of the company, he will not be in breach of Article 74 of the companies Law. Al Airports International Limited v Pirrwitz 2013 JCA 177 at para 82. The duty is to act in what the director believes not what the Court believes is in the best interests of the company Regentcrest plc v Cohen [2001] 2 BCLC 80.

Directors must not use their powers under the articles for a purpose for which they were not intended. An example is directors using powers to issue shares, not to raise capital needed by their company, but to forestall a takeover bid. Such an action was held to be an improper use of the directors' powers to issue shares and therefore a breach of duty. See Bamford v Bamford [1970] Ch 212.

When directors exercise their discretion to accept a proposed share transfer they must exercise it bona fide in the interests of the company. If no reasons for the refusal are given, the court cannot go beyond the directors' decision. If reasons are given they can be examined by the court to test whether there was a collateral purpose. See Baker v Falle 1991 JLR 284.

The UK Supreme Court had to consider the issue of proper purpose in the case of Eclairs Group Ltd -v- JKX Oil and Gas Plc and Others [2015] UKSC71. The board sought to issue additional shares and dis-apply pre-emption rights. As a result of the board deciding that certain information provided by shareholders relating to beneficial interests was inaccurate, the board suspended the rights of certain shareholders to vote at general meetings and to transfer their shares. These shareholders were also potential corporate raiders. The Supreme Court held that the proper purpose rule is concerned with the abuse of power by doing acts which are within the scope of the power but for an improper reason or purpose. Applying this rule the court decided that the reason for the suspensions included concurrent purposes: both a desire to enforce the company's rights to information but also a desire to thwart the actions of corporate raiders. The former might be regarded as proper and the latter improper. The Court held that the better test in such circumstances is not what is the principal or primary purpose but whether the improper purpose was ''causative'' in the sense that without it the action would not have been taken.

A company and therefore the directors are not allowed to manipulate the affairs of the company to defeat creditors' claims in an insolvency.

Directors are, to some extent, in a position akin to that of trustees as regards property of the company that is in their hands or under their control. They must ensure that it is not misapplied. The definition of property is a wide one, including not only tangible assets, such as cash at the bank, but also such items as trade secrets and "know-how". A misapplication would include any disposition of the company's property that ought not to have been made. The restriction could arise from the disposition being forbidden by statute, by the memorandum or articles of the company, by a resolution of the directors, or from the disposition being in breach of the directors' duty to act bona fide in the best interests of the company and for a proper purpose. The Royal Court and the Jersey Court of Appeal

have referred to these duties in various cases including Woodman and Arthurs v The Viscount 1975 JJ 263 and in Al Airports International Limited v Pirrwitz 2013 JCA 177 at para 84.

In general, as soon as it is demonstrated that a company's asset has been applied by the directors for an improper purpose, the directors become personally liable for its re-instatement unless the act has been ratified by the shareholders in accordance with Article 74 of the Companies Law.

4.1.4 Secret profits

If a director makes a personal profit through the use of the company's property without such use or profit being disclosed to the company, that profit is due to the company and the director is under a duty to account for it to the company. This principle has been extended by the English courts to profits arising from the directors making use of a corporate opportunity. It makes no difference that the profit is one that the company could not itself have made if the director had not deployed his own resources to making it, nor that he acted in good faith. The required elements are simply that what was done resulted in a profit to the director concerned, was not disclosed to the company and related to the company's affairs in such a way that it could be said to have been done in the course of the director's management or by virtue of his opportunities or special knowledge as a director.

Full disclosure to the board, followed by a resolution of shareholders ratifying the director's actions, may help the situation. However, in the event that the company subsequently becomes insolvent or if any minority shareholder objects, liability may well be imposed upon the director to account for any secret profit. Directors should therefore consider taking legal advice before acting upon any opportunity that arises as a result of their position as directors.

4.1.5 Confidentiality

This is part of the duty of good faith so as to prevent what belongs to the company being used by a director or another for their own purposes. This relates to commercial and technical secrets and, if the company is acting in a fiduciary relationship with its customers, there is a corresponding duty of confidentiality as regards their affairs.

Directors must use their knowledge, experience and abilities and properly consider all relevant material and ignore irrelevant material when reaching a decision. They should not simply abdicate their position to other directors or fail to participate. It is of course appropriate for directors to delegate some of their functions and to trust and rely upon employees and management unless there is reason to question the information or advice. A director should however reasonably probe the information. All delegation requires some kind of supervision.

In addition there may be additional grounds for confidentiality as for example between directors of banks and their customers' affairs.

4.1.6 To act within his powers

This is self evident. The Companies Law or the articles or resolutions of the board may provide certain authority. As management is vested in the board of directors as a whole, a director will only have actual authority to the extent it is delegated to him. See Re Level One Holding (Jersey) Limited [2007] JRC 106, 2007 JLR Note 39. His authority should not be exceeded. The articles or resolutions of the board

may impose certain limitations such as, for example, cheque signing or entering transactions of a particular type or size. There is a duty not to make an unlawful distribution of capital to shareholders or a distribution to third parties.

4.1.7 Conflicts and declaration of interest

Directors are agents of a company and must use their discretion, but whatever decisions they take must be in the interests of the company and not for any collateral purpose, nor for a personal motive. To aid in "policing" this duty, Article 75 of the Companies Law requires disclosure by a director to the company of the nature and extent of any interest he may have in a transaction entered into or proposed to be entered into by the company that to a material extent conflicts or may conflict with the interests of the company and of which such director is aware. Like other fiduciaries, directors are required to ensure that they do not find themselves in a position in relation to a transaction where there is a conflict (actual or potential) between their personal interests and their duties to the company. Where there is a sole shareholder who is also a director Article 74A requires special care to be taken to record the transaction.

Some conflicting interests may be permitted if, and only if, they are disclosed to the company. It is also key that the articles are reviewed as it is not uncommon to find specific requirements and conditions dealing with whether directors who have an interest can or cannot be counted in the quorum. Thus (assuming the articles authorise the same) a non-executive director may be interested in a business that competes with a company of which he is a director, provided that he does not thereby breach the director's fiduciary duty by, for instance, misappropriating the trade secrets or trade opportunities of the company. However, the connection with such a business must be made known to the company, fellow board members and, if thought appropriate, to the shareholders. The articles would also need to be reviewed to see if such a director could count in the quorum for the transaction of business having made such disclosure.

Where a director fails to disclose an interest or a conflict, Article 76 of the Companies Law permits the company or a member to apply to the court to set aside the transaction. Whether the court decides to do so will be within its discretion. The director may also have to account for any profits made, though not if the transaction is approved by special resolution of the shareholders (providing they are given sufficient information in regard to the transaction).

Despite the shareholders' nominal control over an individual's appointment and removal as director, executive directors may be protected by long-term employment contracts as employees of the company. There are no specific restrictions under Jersey company law upon the terms of such contracts (save in relation to the indemnities that may be given by the company in favour of directors, which is covered in the next chapter of this guide) but they should be demonstrably in the best interests of the company.

The recent case of GHLM Trading Ltd v Maroo [2012] EWHC 61 (Ch), [2012] 2 BCLC 369 considered the issue of whether a director was required by a duty of good faith to disclose misconduct on his part and, if so, whether this duty to disclose extended not only to the company but also to the shareholders. The court concluded that when a company sought to establish that a director was required by a duty of good faith to disclose misconduct on his part, it had to show that the director would have subjectively

concluded that disclosure was in his company's interests if he had been acting in good faith. The court concluded the director's duty of disclosure was not limited to wrongdoing, since the duty to act in good faith required him subjectively to consider whether it was in the company's interests for matters apart from misconduct to be disclosed. The issue was what the relevant director in fact believed to be in the company's interests for matters apart from misconduct to be disclosed. However, because his duty of good faith was owed to the company, not to the shareholders, the fact that disclosure would be in the shareholders' interests was not sufficient to put the director under a duty to make disclosure. Whilst an English law judgment, it is likely to be highly persuasive in the Royal Court of Jersey should the same issues need to be decided.

4.1.8 Diligence

Subject to the constitutional documents of the company, the directors will be responsible for the conduct of the business of the company. Breach of a director's duty of care owed to the company may cause the director to be liable in damages to the company for any loss suffered as a result of such breach. Directors may also have contractual duties to a company if employed under a service contract and breach of the same may give rise to similar liability to the company.

As part of their general duty of care, it is essential that directors be kept fully informed as to the financial position of the company by the accountants or other appropriately appointed agents upon whose statements the directors can reasonably rely. It may well be that a finance director is specifically appointed to ensure that the financial information upon which the board relies is accurate and comprehensive. A sound knowledge of the company's financial position will also help the directors to avoid a number of the risks outlined in the following chapter.

The standards of skill and care that directors must bring to their duties and the manner in which these duties are to be performed were considered in Re City Equitable Fire Insurance Company Ltd [1925] Ch. 407, an English judgment likely to be of persuasive authority to the Royal Court and which may be summarised as follows:

(a) a director must exercise such a degree of skill and diligence as would amount to the reasonable care that an ordinary man might be expected to take, in the same circumstances on his own behalf, but he need not exhibit in the performance of his duties, a greater degree of skill than may reasonably be expected from a person of his knowledge and experience;

(b) his duties are of an intermittent nature to be performed at periodical board meetings, which he ought to attend when reasonably able to do so and in respect of duties that may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly.

Under Article 74 of the Companies Law, the degree of skill and diligence test is thought to be more objective and stringent than the test set out above. Directors should endeavour to attend all board meetings and to diligently participate in the conduct of the company's affairs rather than leaving this to their colleagues.

Certain cases involving disqualification of directors illuminate the standards expected. For example in Re Barings plc (No. 5), Secretary of State for Trade and Industry v Baker [1999] 1 BCLC 433 it was said: "Directors have, both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors". There is therefore a positive duty to act and this may be affected by such matters as the nature of the activities, the size of the company, the management structure, the role of particular directors and the experience and skills of a particular director. There is clearly a minimum need to be informed and to act in the best interests of the company. Failure to manage can amount to bad management.

4.1.9 The English reforms

As a matter of English law, the Companies Act 2006 has now codified the English law common law duties and some additional duties and whilst the Act has no force in Jersey it reflects modern principles incorporating appropriate high standards, and as such is likely to have some influence in the future on the practice of what is considered a good corporate standard to follow in Jersey.

That Act provides that:

(a) the duties are owed to the company (not shareholders as such) and can be enforced by the company;

(b) directors should consider the interests of employees, suppliers, customers, the environment and the community;

(c) directors must act in good faith and promote the company;

(d) directors must know the constitution of the company and act within their powers;

(e) directors must show the care, skill and diligence to be expected of them having regard to their subjective skill or experience or what can be objectively expected of them, if higher;

(e) directors must not allow a conflict of interest to arise between them and the company; and

(f) directors must not receive benefit from a third party by being a director.

The Combined Code also includes a new duty to "promote the success of the company".

4.2 Certain administrative duties

The Companies Law and subordinate legislation regulates the affairs of companies by prescribing the criteria for their formation and the formalities of registration and regulates the consequences of incorporation and limited liability for shareholders of limited companies, creditors and other third parties with which a company deals.

The duties and corresponding liabilities imposed by the Companies Law may be borne by the company, the directors, or both. In all cases, it is the responsibility of the directors to ensure that the company meets its statutory obligations. In practice, the company secretary will often be appointed to ensure that certain requirements are met: however, the directors must ensure that the performance of the company secretary is monitored, as they may be liable for any default, and one of their duties is to ensure the company secretary is adequately instructed. A Jersey company must have a registered office in Jersey and the occupier must have given his authorisation to such use. The registrar must be notified of the address on incorporation or of any subsequent change of address.

4.2.1 Disclosure of information

Companies are required to disclose information in a number of ways:

(a) by including specified information on certain printed material;

(b) by filing annual returns to the Registrar of Companies that are available for public inspection;

(c) by making available registers and documents for inspection at the company's registered office or elsewhere; and

(d) by circulating reports and accounts to shareholders and prospectuses to prospective investors.

In all cases these documents should be prepared and processed in detail by individuals with the requisite qualifications but the ultimate responsibility for meeting disclosure requirements falls on the board, whose members may face financial liability or even penal sanction for any incorrect or misleading statement or default (and are also at risk of being disqualified from acting as a director).

4.2.2 Letterheads and stationery

Companies must include the following information on documents:

(a) on all business letters, statements of account, invoices and other forms - the company's name;

(b) on all business letters and order forms - the address of the company's registered office; and

(c) if a company's stationery includes a reference to the amount of its share capital, the reference must be to its paid-up share capital.

The name of the company must be displayed conspicuously outside its registered office in a place accessible to the public in normal office hours and in letters that are easily legible. If the company has a seal (which is no longer a requirement) the name of the company must be engraved legibly on that seal.

4.2.3 Returns to the registrar of companies

For a company to be incorporated in Jersey, the following documents must be filed with the Registrar of Companies on incorporation;

(a) the memorandum and articles;

(b) a statement of particulars including the address of the company's registered office; and

(c) a completed control of borrowing (COBO) application form (pursuant to which consent to issue the company's authorised share capital is granted). Further, as a result of legislative amendments which

came into force in 2017, any changes in beneficial ownership need to be notified to the Registrar within 21 days.

And in addition, on an ongoing basis, the following must also be filed with the registrar:

(a) all annual returns;
(b) special resolutions of shareholders;

(c) agreements between shareholders having the same effect as special resolutions;

(d) resolutions and agreements that bind all members of a class of shareholders; and

(e) notification of any change to the company's registered office.

4.2.4 Documents that must be made available for inspection

(a) A register of members must be kept at the registered office or at the place where the register is made up in Jersey and must be available for inspection during business hours by the public, and if requested copies must be provided (subject, in the case of public companies, to the submission of a declaration containing an undertaking under oath that the information will only be made available for the purpose permitted by Article 46 of the Companies Law). The court has power to rectify a share register where there has been an error. See In Re Thayer Group Limited [2006] JRC 125B, 2006 JLR Note 24.

(b) A register of directors and secretaries must be kept at the registered office. If the company is apublic company that register must be available for inspection by the public. If the company is not a public company it may be inspected only by the Registrar of Companies (who must not disclose its contents save to enforce the law) and the members and the directors of the company concerned but not the public.

(c) The minutes of the meetings of members and directors must be kept at the registered office and are available for inspection by members (but not the general public) who may require a copy of minutes of any shareholders' meetings.

In Shirley v Channel Islands Knitwear Co. Limited and Sangan 1985-86 JLR 404, the Royal Court stated that a director had the right to inspect the company's books of account, minutes and correspondence but this right ceased upon termination of the directorship. Such a right is only exercisable for the benefit of the company and not for personal advantage.

4.3 Accounting duties

Whilst not every director is required to be a technical expert in accounting, the responsibility for compliance with the law's requirements on accounts rests with the directors and every director should therefore be aware of them, at least in broad outline.
Regulations may also be made from time to time by the States of Jersey as to the content requirements for accounts of Jersey companies.

4.3.1 Accounting records
Each company is required to keep accounting records that are sufficient to show and explain its transactions, disclose with reasonable accuracy the company's financial position at any time and enable the directors to ensure that any accounts prepared by the company (typically comprising a profit and loss account and a balance sheet) comply with the requirements of the Companies Law. Alongside this specific duty, the directors should also, as part of their general duty of care, always have a reasonably accurate idea of the financial position of the company, particularly in circumstances where the company may be in difficulties. It is an offence for a company to fail to keep adequate accounting records.

In addition to company law requirements there are also tax requirements under the Income Tax (Jersey) Law 1961 and the Taxation (Implementation) (Jersey) Law 2004 and particularly under the Taxation (Accounting Records) (Jersey) Regulations 2013.

These apply to every person in receipt or possession of income or profits of a business or rental and whether or not an income tax return is required to be made. The Regulations provide for the adequacy and preservation of accounting records, a duty to produce them and, if they are outside the Island, to retain control over them. There are offences for fraudulently or negligently submitting false or incorrect accounts. The Financial Services (Jersey) Law 1998 and regulations and orders also require regulated companies to keep and maintain full and proper accounting records.

4.3.2 Retaining accounting records
Under Article 104 of the Companies Law, the directors are responsible in relation to the accounting records for:

(a) keeping them at such place as the directors think fit;

(b) ensuring they are open at all times to inspection by the company's officers and its secretary;

(c) ensuring they disclose with reasonable accuracy the financial position of the business in question at intervals of not more than six months; and

(d) generally preserving them for at least ten years from the date on which they are made.

4.3.3 Preparation of annual accounts
The statutory accounts must adhere to the following by virtue of Article 105 of the Companies Law, for a period of not more than eighteen months from incorporation, or the most recent accounts:

(a) be in accordance with generally accepted accounting principles or, in the case of a market traded company, as prescribed. These are prescribed in the Companies (GAAP) (Jersey) Order 2010;

(b) specify the generally accepted accounting principles that have been adopted in their preparation;

(c) where there is a requirement to appoint an auditor, give a true and fair view of, or be presented fairly in all material respects so as to show the company's profit or loss for the period covered by the accounts and the state of its affairs at the end of the period;

(d) be approved by the directors and signed on their behalf by one of them;

(e) if required, be examined and reported upon by an auditor and be laid, together with a copy of any auditor's report on the accounts, before a general meeting of the company. (There are provisions if the need for an AGM has been dispensed with.)

In conformity with best international standards and the recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes, the Taxation (Accounting Records) (Jersey) Regulations 2013 came into force on 11 June 2013. These Regulations apply to every person in receipt or possession of any income or of any profits arising from the carrying on of a business or from the letting of property whether or not liable to make a statement or file a return under the Income Tax (Jersey) Law 1961.

The Regulations set out the standard of adequacy of such accounting records and supporting material. The Regulations provide that these can be required to be produced to the Comptroller of Tax on pain of penalty.

These requirements apply not just to a company but also to a foundation, anstalt, partnership, trust, collective investment fund and a fiduciary.

4.3.4 Publication of accounts and reports

All members are entitled to inspect accounts and ask for a copy of the accounts and the auditor's report that must be provided within seven days.

4.3.5 Presenting and filing accounts and reports

The directors must present the annual accounts for each financial year (together with the auditors' report where auditors are required) to the company in general meeting, within the period prescribed by the Companies Law. If a private company has dispensed with the requirement to hold an AGM, then the directors should lay the accounts before the next general meeting (if any) called in the next year. The periods prescribed by the Companies Law are:

(a) for private companies - ten months after the end of the relevant financial period; and

(b) for public companies - seven months after the end of the relevant financial period.

There is no requirement to deliver the accounts and reports to the Registrar of Companies unless the company is a public company.

4.3.6 Criminal liability arising from directors' failure to comply with accounting requirements
If the directors fail to comply with the Companies Law requirements they may be guilty of a criminal offence for which a fine, or in certain cases imprisonment, may be imposed. In addition failure to keep and preserve proper accounting records is also an offence under the Désastre Law. See Appendix 1 and 2 and under the Taxation Laws and Regulations.

Companies listed or applying for a full listing on any stock exchange must also satisfy the basic conditions for listing and comply with the relevant listing rules with which directors should make themselves familiar.

4.3.7 Cell companies
When a cell company is involved Article 127 YDA of the Companies Law provides that a director of a cell has duties or liabilities for the cell itself but not generally for the company connected to that cell or to any other cell of the cell company. Such a director cannot obtain information in relation to the cell company nor any other cell of the cell company.

4.4 Duties in relation to auditors

4.4.1 Appointment and removal
The statutory provisions relating to the appointment, removal, duties, powers and qualifications of auditors of companies are found in Part 16 of the Companies Law. The Minister is required to make an order requiring the Jersey Financial Services Commission to keep a Register of Recognised Auditors and the Law and the Companies Audit (Jersey) Order 2010 provides for the procedure and integrity of that Register.

Auditors must be appointed where the company is a public company or its articles so require, where a general meeting has so resolved and/or where the company is contractually obliged to have its accounts audited, and they must be appointed at each general meeting before which accounts are laid to act until the next such meeting when they can either be reappointed or replaced. If the company is a market traded company it must be audited by a recognised auditor. A market traded company is one whose transferable securities have been admitted to trading on a regulated market or a company in respect of which transferable securities have been admitted to trading on a regulated market. Where a private company has dispensed with the need to hold an AGM, the auditors remain in office until the company in general meeting resolves to bring their appointment to an end. If the auditors retire between AGMs then the directors of the company or the shareholders may appoint new auditors to hold office until the next AGM. A company may, by ordinary resolution, remove the auditors before the expiration of their term of office, notwithstanding anything in any agreement with them but without prejudice to any claim for compensation or damages an auditor so removed may have.

A notice of resignation must contain either a statement that there are no circumstances connected with their resignation that the auditors consider should be brought to the attention of members or creditors

of the company or, where there are such circumstances, a statement of them. In the latter case, a copy of the notice of resignation must be sent by the company to all members and other persons entitled to receive copies of its audited accounts. Certain qualifications are stipulated in the Companies Law in order to qualify as an auditor.

4.4.2 Powers and duties of auditors affecting directors
Auditors have the right to receive notice of, attend and be heard at all meetings of the company's members - but not meetings of the board or management. They have a right of access at all times to the company's records and the right to require the officers of the company to give them such information and explanations as they consider necessary for the execution of their duties. It is an offence for a director or secretary knowingly or recklessly to make a written or oral statement to auditors that conveys or purports to convey information that the auditors require and which is misleading, false or deceptive in a material particular.
In summary under the Companies Law, an auditor's principal duty is to make a report to members on the company's accounts stating whether they have been properly prepared in accordance with the law and whether they give "a true and fair view" or, alternatively are presented fairly in all material respects. When presented fairly they must show the company's profit or loss account for the period and the state of affairs at the end of the period. In preparing their report they must carry out whatever investigations are necessary to enable them to form an opinion as to whether proper accounting records have been kept and whether the accounts agree with them. A failure on either count must be reported, as must any failure to obtain all the information and explanations they think necessary.

4.5 Duties to comply with the general law

Directors have a duty to ensure the company obeys the laws of the land. This includes Jersey law, the laws of other jurisdictions where the company undertakes activities or holds assets and where those connected to the company reside or are otherwise connected. These may provide sanctions of a civil, administrative or criminal nature and certain statutes specifically impose penalties on directors as well as the company, for example Article 23 of the Health and Safety at Work (Jersey) Law 1989.

There are Jersey requirements under laws of general application (including the Companies Law itself), or those affecting certain activities. As a non-exhaustive list and by way of example, here are some of the main ones to consider.

4.5.1 For general business:
(a) Competition (Jersey) Law 2005;
(b) Consumer (Safety) (Jersey) Law 2006;
(c) Control of Housing and Work (Jersey) Law 2012, as from 1 July 2013;
(d) Data Protection (Jersey) Law 2005;
(e) Distance Selling (Jersey) Law 2007;
(f) Employers' Liability (Compulsory Insurance) (Jersey) Law 1973;
(g) Employment (Jersey) Law 2003;
(h) Employment Relations (Jersey) Law 2007;
(i) Health and Safety at Work (Jersey) Law 1989;

(j) Intellectual Property (Unregistered Rights) (Jersey) Law 2011;
(k) Jersey Advisory and Conciliation (Jersey) Law 2003;
(l) Patents (Jersey) Law 1957;
(m) Registered Designs (Jersey) Law 1957;
(n) Social Security (Jersey) Law 1974;
(o) Supply of Goods and Services (Jersey) Law 2009;
(p) Trade Marks (Jersey) Law 2000; and
(q) Weights and Measures (Jersey) Law 1967.

4.5.2 Of general financial anti-abuse application:
(a) Drug Trafficking Offences (Jersey) Law 1988;
(b) Investigation of Fraud (Jersey) Law 1991;
(c) Proceeds of Crime (Jersey) Law 1999;
(d) Terrorism (Jersey) Law 2002.

Many of these statutes have been updated by later amending laws, and there may also be subordinate regulations and orders in force.

4.5.3 Common law duties
The laws governing the capacity of the parties may differ as may the validity and execution requirements. The law of Jersey in matters of both property and contract is different from other countries. In relation to contract, Jersey law has been influenced by Norman customary law and subsequent French customary law (which existed prior to Napoleonic codification). In the absence of Jersey authorities on issues relating to, amongst others, company law, trust law, civil procedure, criminal procedure and matters of public or international law, it is useful to seek guidance from English common law. Therefore, there is much commonality but with differences in certain areas.

Companies also need to ensure an understanding of the nature and extent of their obligations and liabilities as well as their rights and rewards under the common law. The position of criminal law is covered in paragraph 5.5 and tort in paragraph 5.6. There are aspects of property, contract and administrative law as well as specialist laws of direct relevance to the activities of the company. On property law, the position generally is that this will be governed by the law of the place where the property is situated (the lex situs). Contracts may be made subject to the laws and courts of specific jurisdictions and clearly appropriate legal advice should be taken to understand how such agreement would be recognised, interpreted and enforced. It may in turn be affected by statutes in other countries.

There are four requirements to form a contract:

(a) the consent of the obligor;
(b) the legal capacity to enter the contract;
(c) the “objet” or subject matter of the contract; and
(d) a “cause” or reason for the obligation to be performed for each party.

See Selby v Romeril 1996 JLR 210.

The English requirement of consideration is not required in Jersey, which in practice presents no problem as, if there is consideration, there will be cause in any event.

A number of cases deal with “erreur” or innocent misrepresentation or undue influence

See:
Marett v Marett and O’Brien 2008 JLR 384
Incat Equatorial Guinea Ltd v Luba Freeport Ltd 2010 JLR 287 Toothill v HSBC Bank PLC 2008 JLR 77

There have been suggestions that there is a general duty of good faith in all Jersey contracts.
The time in which civil proceedings must be brought differ. There are many time limits, but generally for contract there is a ten year limitation period and in tort and for claims for breach of trust a three year limitation period from knowing of the breach of duty.

4.6 Duties for regulated financial services businesses

In particular directors of companies undertaking regulated activities such as banking, investment, insurance and trust company business need to be particularly aware of the regulatory legislation, orders and guidelines as well as good and accepted international, legal and accounting standards.

4.6.1 Of particular application to the finance industry are:
(a) Banking Business (Jersey) Law 1991;
(b) Collective Investment Funds (Jersey) Law 1988;
(c) Control of Borrowing (Jersey) Law 1947 (see principally Control of Borrowing (Jersey) Order 1958);
(d) Investors (Prevention of Fraud) (Jersey) Law 1967;
(e) Financial Services Commission (Jersey) Law 1998; and
(f) Financial Services (Jersey) Law 1998;

There are specific duties arising for directors of companies or those engaging in regulated financial services activities.

4.6.2 The Financial Services Law
Under Article 2 of the Financial Services Law “A person carries on financial service business if by way of business the person carries on investment business, trust company business, general insurance mediation business, money service business, fund services business or alternative investment fund services business.” All those terms are further defined. Generally and with some exceptions a person is prohibited from carrying on a financial service business in or from within Jersey, and a Jersey incorporated company in Jersey shall not carry on such business in any part of the world unless the person is registered under the Financial Services Law and acting in accordance with the terms of that person’s registration. It is a criminal offence to hold oneself out as carrying on a financial service business in or from Jersey, and any Jersey incorporated company that holds itself out as carrying on such business shall be treated as carrying on such business. The sanction is up to seven years imprisonment or a fine.

Directors must therefore ensure they act entirely within the requirements of this Law and the regulations and orders made under it. Appendix 3 contains the offences and sanctions.

There are additional requirements in respect of principal persons, key persons and shareholders. Principal persons include, in relation to:

(a) a sole trader - the proprietor;

(b) a company - a person, with or without others, who:
- directly or indirectly holds over ten percent of the company shares;
- is entitled to control not less than ten percent of the votes;
- has a holding company with significant influence over management of the company;
- is a director;
- is a person on whose directions (whether given directly or indirectly) a director is accustomed to act; and

(c) a partnership - a partner or, if a corporate partner, as in (b).

A key person is a compliance officer, money laundering compliance officer or money laundering reporting officer.

Under Article 14 no one may become a principal person or a key person until the Jersey Financial Services Commission has sent confirmation of non objection. A shareholder controller cannot transfer shares so as to reach, exceed or fall below certain percentages without receiving a non objection. On ceasing to hold such a position reasons must be given. Any breach is capable of being a criminal offence with the sanction of up to two years imprisonment and a fine.

In addition, the Jersey Financial Services Commission has wide powers both in respect of directors and others engaged in financial services businesses and to make orders in relation to:

(a) accounts and auditors;

(b) codes of practice for good governance;

(c) segregation and identification of client assets and trust assets;

(d) giving directions for any breach of requirements, or if it is in the interests of various persons or to protect the reputation and integrity of Jersey in financial and commercial matters, or if it is in the best economic interests of Jersey;

(e) seeking injunctions;

(f) making public statements;

(g) seeking an order of the Royal Court to intervene;

(h) making compensation schemes; and

(i) obtaining information and documents and concluding examinations.

There are also offences relating to market manipulation, providing misleading information and insider dealing.

4.6.3 The Jersey Financial Services Commission

The Jersey Financial Services Commission is named as the supervisory body for all business carrying on a regulated activity and other activities under the Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008. The Jersey Financial Services Commission has extensive powers to oversee and enforce the anti-abuse regime relating to proceeds from crime and terrorism financing. There is an extensive Anti-Money Laundering/Countering Financial Terrorism Handbook or Codes of Practice with which directors of regulated bodies should be familiar. Under the Companies Law, the Jersey Financial Services
Commission has powers to:

(a) issue directions;

(b) seek injunctions;

(c) intervene;

(d) make public statements;

(e) obtain information and documents;

(f) investigate; and

(g) co-operate with relevant overseas authorities.

Board meetings of regulated business should receive regular reports on these matters.

4.6.4 The Codes of Practice of the Jersey Financial Services Commission

Under Article 19 of the Financial Services Law the Jersey Financial Services Commission has issued Codes of Practice for each of the regulated activities of deposit-taking business, fund business, trust company business and investment business.

The boards of directors of such regulated businesses must comply with these Codes. They are designed to establish sound high-level principles for operation of the businesses.

These Codes broadly follow a similar pattern, which is of course helpful as a company may operate one or more such businesses, but each business line has certain distinct differences.

The introduction to the Codes for each business type is broadly similar with appropriate adaptations and can be summarised as follows:

(a) Corporate governance

Corporate governance is the system by which an organisation is monitored, directed and controlled. A corporate governance framework specifies the allocation of management responsibilities and authorities across an organisation and sets out the rules and procedures for making decisions and taking actions. Risk management is an integral part of a corporate governance framework.

(b) Fundamental principles

The Codes are arranged under seven numbered sections. Each section is captioned by a fundamental principle, which is then further described and explained. Those fundamental principles are:

- A registered person must conduct its business with integrity;
- A registered person must have due regard for the interests of its customers, or in the case of funds, for the fund itself and in the case of trust companies, the word customer is defined;
- A registered person must organise and control its affairs effectively for the proper performance of its business activities and be able to demonstrate the existence of adequate risk management systems.;
- A registered person must be transparent in its business arrangements;
- A registered person must maintain, and be able to demonstrate the existence of, adequate capital resources in the case of a bank, and adequate funds for insurance, trust companies and investment businesses;
- A registered person must deal with the Jersey Financial Services Commission and other authorities in Jersey in an open and co-operative manner; and
- A registered person must not make statements that are misleading, false or deceptive.

Each section of the Codes is designed to be understood by reference to its full text, including any notes. The Codes should be read by registered persons in conjunction with the Financial Services Law and its subordinate legislation, together with any conditions attached to a registration held under the Law, and the relevant Handbook for the Prevention and Detection of Money Laundering and the Financing of Terrorism.

(c) Additional guidance specific to the relevant business

Additional guidance and requirements for the particular business line are given and of course each registered person can adopt additional principles and rules in its internal handbook.

(d) Failure to follow the Code

In the case of deposit-taking business:

Failure to follow these Codes shall not of itself render any person liable to legal proceedings of any kind or invalidate any transactions, but the Codes shall be admissible in evidence in any proceedings under the Banking Business (Jersey) Law 1991, if it appears to the Royal Court to be relevant to any question arising in those proceedings, and shall be taken into account in

determining any such question.

A breach of the Codes may also lead to the Jersey Financial Services Commission taking other regulatory action, such as enhanced supervision, the issue of a condition of registration, revocation of a registration or an increase in the registered person's minimum risk asset ratio requirement. In appropriate circumstances, the Jersey Financial Services Commission may issue a public statement concerning the registered person.

Further, the The Commission has the power to impose civil financial penalties for significant and material contraventions of the Codes of Practice and the AML/CFT Handbook. There are three bands of financial penalties, depending on the nature of the contravention, and the Commission will follow a published decision making process in determining the level of the penalty. The regime applies to any entity which is registered or has been issued a certificate or permit under the following laws and is therefore required to comply with the corresponding Codes of Practice relevant to their regulated activities:

- the Banking Business (Jersey) Law 1991 (the Codes of Practice for Deposit Taking Business);
- the Insurance Business (Jersey) Law 1996 (the Codes of Practice for Insurance Business);
- the Financial Services (Jersey) Law 1998 (the Codes of Practice for each of trust company business, investment business, money service business, fund services business and general insurance mediation business); and/or
- the Alternative Investment Funds (Jersey) Regulations 2012 (the Codes of Practice for alternative investment funds and AIF services business).

In addition, the civil penalty regime applies to any entity registered under the Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008 and is therefore required to comply with the AML/CFT Handbook. There are three levels of penalty depending on the seriousness and circumstances of the breach of the Codes of Practice. The first level is up to 4% of 'relevant income' up to a maximum of £10,000. The second level is up to 6% of 'relevant income' up to a maximum of £4,000,000. The third and highest level of financial penalty is up to 8% of 'relevant income' up to a maximum of £4,000,000. Broadly, 'relevant income' is income derived from licensed business activities.

The proceeds of penalties may be retained by the Commission and applied to reduce license fees. The Chief Minister can order that substantial penalties must be paid to the States of Jersey. The Commission will also be able to issue public statements when it imposes a penalty. There is a right of appeal to the Royal Court but only on the ground that the decision of the Commission was unreasonable having regard to all the circumstances of the case.

The Codes should be read by registered persons in conjunction with the Banking Law and its subordinate legislation, together with any conditions attached to a registration held under the Banking Law and the relevant Handbook for the Prevention and Detection of Money Laundering and the Financing of Terrorism. Where a registered person has multiple regulatory licences in Jersey, the requirements of the applicable Codes of Practice take precedence over these Codes in respect of those aspects of its business that relate to other licences.

In the case of fund, trust company and investment business:

Failure by a registered person to follow these Codes represents grounds for the Jersey Financial Services Commission to take enforcement action. Where the Jersey Financial Services Commission has reason to believe that at any time there has been a failure on the part of a registered person to follow these Codes, it may consider making use of its regulatory powers which, in serious cases, could include the revocation of their licence to conduct fund services business.

In addition, failure to comply with a Code may support a decision by the Jersey Financial Services Commission that, for example, continued non-compliance or other failure to remedy the circumstances giving rise to the breach may be addressed by the issue of a written direction under Article 23 of the Financial Services Law. Such a direction might impose requirements on the registered person to do or not to do things, remove persons or cease operations. In appropriate circumstances that direction can be made public.

Whilst failure to follow these Codes shall not of itself render any person liable to proceedings of any kind or invalidate any transaction, the Codes shall be admissible in evidence if it appears to the court conducting proceedings to be relevant to any question arising in the proceedings, and shall be taken into account in determining any such question.

Where it appears to the Jersey Financial Services Commission that a person has failed to comply with these Codes, it may issue a public statement under Article 25(b) of the Financial Services Law.

(e) Revision of the Codes
The Codes may be revised after consultation with such persons or bodies as appear to be representative of the interests concerned.

It is clearly important for each business type to comply also with the principal laws governing such activities to include the Banking Business (Jersey) Law 1991, the Trusts (Jersey) Law 1984 and the Foundations (Jersey) Law 2009 as well as international standards, for example, the requirement in the Basel Committee on Banking Supervision.

It is essential to ensure compliance with the Proceeds of Crime (Jersey) Law 1999, the Money Laundering (Jersey) Order 2008, the Terrorism (Jersey) Law 2002, the Drug Trafficking Offences (Jersey) Law 1988, United Nations and European Union sanctions orders applied in Jersey and the standards contained in the relevant Handbook for the Prevention and Detection of Money Laundering and the Financing of Terrorism.

It is clearly a duty of the board to be familiar with these requirements and to ensure that they and the appropriate compliance officers follow the procedures not only as a result of the stringent consequences for failure to do so for the company and individuals concerned but also for the good of the reputation and health of the business.

It has been held a single breach by a financial services provider contained in the Money Laundering

Order to maintain procedures may be an offence under the 1999 Law even though the failure was not systemic. The required procedures must be established and kept in good working order. See Attorney General v Bell [2005] JRC 143, 2005 JLR Note 42 and 2006 JLR 61.

As indicated in Appendix 4, it is a criminal offence to breach any of the requirements set out in the Money Laundering (Jersey) Order 2008. A regulated business could also be at risk of losing its licence, its reputation and possibly more if the requirements are breached.

The Codes are detailed and need careful review and enforcement by those engaged in the operations of the company, by compliance personnel and internal and external audit functions.
There are detailed sections on:

(a) the prevention and detection of money laundering, including policies, procedures and training;

(b) customer due diligence measures, including at the start and end of a relationship, enhancedand simplified customer due diligence and reliance on introducers, intermediaries and regulated persons;

(c) record-keeping requirements, including what needs to be kept and for how long; and

(d) reporting procedures and disclosure requirements and, in particular, the duty to report money laundering.

Everyone involved in a financial services business needs to understand and follow these requirements. Others would do well to ensure companies and individuals do not become involved in money laundering and recognise the risk and consequences.

Directors need to ask themselves do I understand all I need to know, does it make sense, what are the risks controls and who am I dealing with and what type of activity is involved? It is important to be alert and alive and conscious of the circumstances. Boards should receive sufficient reports from those in operations compliance and involved in the audit process.

In addition, importantly, to the Codes of Practice, the Jersey Financial Services Commission has issued a “Handbook for the Prevention and Detection of Money Laundering and the Financing of Terrorism for Regulated Financial Services Business”.

Part 1 sets out the statutory and regulatory requirements and guidance notes under the Proceeds of Crime (Jersey) Law 1999, the Money Laundering (Jersey) Order 2008, the Drug Trafficking Offences (Jersey) Law 1988 and the Terrorism (Jersey) Law 2002.

This part of the Handbook is divided into sections covering:

(a) Introduction;
(b) Corporate governance;
(c) Customer due diligence requirements;
(d) Identification and verification of identity;

(e) Monitoring activity and transactions;
(f) Reporting money laundering and financing terrorism activity and transactions;
(g) Vetting awareness and training of employees;
(h) Record keeping; and
(i) The position of existing customers.

There are certain specific sections and a range of appendices.

Part 2 deals with information resources.

Part 3 deals with supervision of compliance with the Handbook.

Part 4 contains a log of amendments to the Handbook.

Directors should also be aware of the Financial Services Ombudsman (Jersey) Law 2014 which provides for an Ombudsman to ensure complaints about financial services are resolved independently, effectively and appropriately by the Office of the Financial Services Ombudsman.

4.7 Specific duties arising for directors of trust companies

4.7.1 Trusteeships
Companies may act as trustees and where they do so they will have activities in their own right as companies and operationally in acting as a trustee of a particular trust.

Directors of such companies need to be conscious of this distinction and will need to act in relation to the affairs of the company as a company. They will also act as directors in relation to the affairs of the company in its capacity as a trustee. Both must be borne in mind. The duties to act for the trust i.e. the beneficiaries will, where there is conflict, override the duty of a company to act for itself. Corporate trustees will have minutes of the company and also keep minutes of each separate trusteeship

This is an important area for directors of companies performing the duties of a trustee. Jersey is a strong and popular trust law and administration jurisdiction. Most professional trustees are Jersey incorporated companies that must be licensed to carry on trust company business by the Jersey Financial Services Commission. The directors of such companies will, of course, have the usual duties arising from company law but in addition will need to ensure they act so that the corporate trustee performs its duties as a trustee and does not commit a breach of trust.

4.7.2 The duties
The duties of a trustee in relation to beneficiaries arise from the Trusts Law and case law. The duties of a corporate trustee are owed to the beneficiaries. The general rule is that beneficiaries cannot sue under company law.

If the company acts as a trustee, directors of the company will be making decisions in relation to the trusts. The directors of the company have a duty to ensure that the trust and fiduciary duties of the

company are followed. Any breach of trust may result in the company being liable to the beneficiaries. It is not possible to list all duties but the principal duties are as follows:

Article 21 of the Trusts Law states that a trustee shall:

(a) act with due diligence;
(b) act as would a prudent person;
(c) act to the best of its ability and skill;
(d) observe the utmost good faith;
(e) carry out and administer the trust in accordance with the terms of the trust;
(f) subject to the terms of the trust, so far as is reasonable, preserve and enhance the value of the trust property;
(g generally, not profit from its trusteeship or cause others to do so nor contract with the trust;
(h) keep accurate accounts of the trust; and
(i) keep the company's own property separate from the trust property.

There are various other trustee duties such as to act with any co-trustees, be impartial, not allow conflicts of interest to arise, only charge remuneration if authorised by the trust to do so and generally act as a responsible fiduciary.

It is impossible to list all the circumstances for the purposes of these guidelines. There are many different forms of trusts and ways in which trustees can be liable.

4.7.3 Breaches of trust
Examples of breaches of trust include:

(a) benefiting a non-beneficiary or an excluded person;
(b) not considering the interests of all beneficiaries as a whole when the trust instrument does not authorise the trustees to prefer one beneficiary over another;
(c) making decisions that are prohibited or not authorised;
(d) making decisions that while authorised are exercised improperly e.g. are unreasonable or ignore relevant matters and take account of irrelevant matters or where a power is exercised for an improper purpose or motive;
(e) acting as a nominee rather than a trustee and not making considered decisions;
(f) not having sufficient control over assets of the trust;
(g) being responsible for poor investment performance or choice of investments;
(h) becoming embroiled in beneficiary or third-party disputes and making wrong decisions;
(i) failing to keep proper trust records; and
(j) lack of or wrongful delegation.

There will however only be an actionable breach of trust if loss is suffered by the trust or a wrongful gain is made by the trustee. On the other hand Article 51 of the Trusts Law allows the trustees and others an ability to apply for directions to the court that may then protect a trustee. Similarly, trustee companies are not guarantors and the courts do not lightly impose liability - especially, for example, in relation to investment performance.

Under Article 45 of the Trusts Law the court may relieve a trustee from personal liability where, although there has been a breach of trust, the trustee has acted honestly and reasonably and he ought fairly to be excused for the breach or for failing to obtain directions from the courts.

Article 56 of the Trusts Law was repealed in 2006. It had provided that where a breach of trust had been committed by a corporate trustee of a Jersey trust or the trustee was resident or carrying on business in Jersey, the director of the corporate trustee would be a guarantor of the corporate trustee company for any loss arising from the breach unless the court relieved the director of liability.

4.7.4 Liability

Exclusion from liability can be contained in the terms of the trust but the extent will be limited by the Trusts Law. See also Midland Bank Trust Company (Jersey) Limited v Federated Pension Services 1994 JLR 276 and 1995 JLR 352 and West v Lazard Bros and Co (Jersey) Limited 1993 JLR 165.

Trustees have also indirectly avoided liability by successfully making a “Hastings Bass” application. In certain circumstances, where trustees made a decision by exercising a discretion and they took account of considerations they should not have considered or they failed to take account of considerations they should have taken into account and had they acted properly they would not have so decided, the Royal Court has set aside the transaction. However, more recently the English Supreme Court in Pitt v Holt and Futter v Futter [2013] UKSC 26, [2013] 2 WLR 1200 has held that the correct test for a Hastings Bass application now requires the trustees to have acted in breach of fiduciary duty. The Royal Court has indicated, obiter, that it would in future apply the new test. See In the matter of the B Life Interest Settlement [2012] JRC 229. In any event, a new statutory test in the Trusts (Amendment No. 6) (Jersey) Law 2013 came into force on 25th October 2013. It is thought that this statutory remedy is in addition to the common law remedy.

The Royal Court has decided that beneficiaries have no “dog leg” claim against directors where they caused a breach of trust by a corporate trustee as the loss to the trust company was not an asset of the trust. However, such an action might be in the interests of justice where in exceptional circumstances the trust had suffered large losses and the corporate trustee was uninsured or insolvent and there was no other means of recovery or there was one trust company with no assets. See Alhamrani v Alhamrani 2007 JLR 44. If such an action could lie the court would still have power to relieve a director of liability under Article 212 of the Companies Law where the director has acted honestly and in all the circumstances ought fairly to be excused for such matter.

4.8 Duties for council members of foundations

Trust companies may also act in relation to a foundation created under the Foundations Law. The trust company may provide council members. A foundation must have one or more council members, one of whom must be a qualified person (that is a person registered under the Financial Services Law). Under Article 22 of the Foundations Law, the duty of council members is to:

(a) act honestly and in good faith with a view to the best interests of the foundation; and

(b) exercise the care, diligence and skill that reasonably prudent persons would exercise in comparable circumstances.

They reflect the same statutory duties as set out in Article 74 of the Companies Law.

Like companies (and unlike trusts) foundations are legal entities. Time will tell whether the common law duties of directors will be engrafted on to the duties of council members. Trustees have more extensive fiduciary duties than council members. Article 24 of the Foundations Law prevents a council member or any representative from being relieved, released or excused from liability for that person's fraud, wilful misconduct or gross negligence whether by the terms of the charter or the regulations or by contract with the foundation. In addition, any insurance taken out by the foundation must not cover liability arising from fraud, wilful misconduct or gross negligence of such a council member or representative to the foundation. In addition, any insurance policy must not cover payment of a fine or for the costs of defending criminal proceedings where the council member is convicted or for the costs of civil proceedings commenced by the foundation where these are successfully brought against the person concerned.

Like Article 51 of the Trusts Law, persons with standing (which would include a council member) have power to apply to the Royal Court for directions under Article 43 of the Foundations Law for a wide variety of orders under Article 45 and 46 of the Foundations Law See A Limited v B 2013 JRC 75. However, the Foundations Law does not provide for the court to excuse a council member from liability for a breach of duty as is the case under Article 45 of the Trusts Law and Article 212 of the Companies Law. These articles give the court power, in proceedings for negligence, default, breach of duty or breach of trust against an officer of the company, to relieve that person wholly or in part from his liability on such terms as the court thinks fit where that person has acted honestly and in all the circumstances ought fairly to be excused for such a matter.

4.9 Duties in relation to pension funds

Pensions have become of great importance in recent years, partly as a result of the move away from defined benefit schemes or final salary schemes to money purchase or defined contribution schemes. The underfunding by employers of the first two types has also created problems. There are tax benefits for employees within certain restrictions prescribed by the Income Tax (Jersey) Law 1961. A company may well act as a trustee of a pension plan and in this context the employer company generally has a duty to hold the assets, invest the assets in accordance with the trust, collect the contributions and pay the benefits in accordance with the trust.

The trustee will be indemnified so long as it follows the terms of the trust and is not culpable of fraud, wilful misconduct or gross negligence. Pension trust instruments usually include exoneration clauses so far as permitted by law and it is usual practice for trustees to take out insurance cover. The trustee may be a company other than the employer and it is common practice for the investment policy to be delegated to investment managers. The day-to-day operational functions may be delegated to committees.

Difficult conflicts of interest can arise for directors and these need careful management and advice. Giving advice to employees also needs careful handling, fairness and accuracy. Where a pension fund is underfunded the laws of certain countries may require full funding and impose penalties. There is no such requirement in Jersey at the present time. Underfunding may create problems on a sale or merger.

4.10 Duties in relation to taxation

There are requirements, for example, for companies to keep and maintain accounting records. Directors have a duty to ensure the company complies with tax laws. Companies need to pay the correct level of taxes in the country of its incorporation, where it has activities and where it has assets. Equally directors have a duty not to pay more tax than is required to be paid and to mitigate it like any other expense. Tax avoidance is and has always been legal. Tax evasion has always been illegal and that has been reinforced by anti abuse provisions. Tax avoidance and unacceptable or aggressive tax avoidance and the effect on reputation and commerciality has added an additional factor to be considered as to the right policy to adopt, and has increased the need to ensure full and correct tax advice is obtained and, as a result, the right course is adopted.

In the English tax tribunal case of Developments Securities (No.9) Limited v HMRC [2017] UK FTT565 (TC), Jersey companies were subjected to detailed scrutiny of their tax status as the result of HMRC's concerns over a tax scheme. The tribunal looked at the reality of the companies' operations and decision making processes and concluded that ''central management and control'' for tax residency purposes was in England (not Jersey), which resulted in the scheme not achieving its aim of reducing capital gains tax.

Tax has become more complex and the number of different tax systems that may need to be considered has increased with globalisation and cross border trade. In addition to payment of the tax itself, the cost and expense of ensuring compliance and proper reporting increases. Transfer pricing policy may also apply where group companies are located in different jurisdictions or where there are branches in different jurisdictions. Transfer pricing issues are complex and specialist advice will invariably need to be taken.

Jersey Financial institutions also need to be aware of the obligations created by the Common Reporting Standard (''CRS''), which is implemented in Jersey through the Taxation (Implementation) (International Tax Compliance) (Common Reporting Standard) (Jersey) Regulations 2015, which came into force on 1 January 2016, as amended by the Taxation (Implementation) (International Tax Compliance)(Common Reporting Standard)(Amendment) (Jersey) Regulations 2017 which came into force on 17 October 2017. Jersey Financial institutions were required to file their first CRS return by 30 June 2017.

Chapter 5: The risks faced by Directors (and how to minimise them)

Rights and duties, obligations and risks are all associated. A breach of duty can give rise to different risks and ultimately compensation or sanctions. Accordingly, this chapter and the chapter on directors' duties need to be considered together.

Generally directors, as the agents of the company, will not be liable but they may become liable if they breach their duties to the company or they exceed their authority under the memorandum or articles, board resolutions or their contractual arrangements with the company. They may also be liable if they act recklessly, fraudulently or negligently in breach of statutory obligations.

The company may claim against a director for the loss suffered as a result. If the directors act honestly and reasonably and they ought fairly to be excused from liability then the court has power to excuse them in whole or in part. Similarly, if directors act honestly and reasonably, losses suffered by third parties by the actions of the directors will normally only be claimable (if at all) from the company itself.

5.1 Insolvency and financial difficulty

In normal solvent circumstances, and as stated above, an individual director will not be personally liable to the creditors of the company provided that he does not contract on his own account. However, in an insolvent scenario or a potentially insolvent scenario, directors must be particularly careful and vigilant. As a matter of practice, individual directors face very real prospects of personal liability should they fail to perform their duties in the context of an insolvent or potentially insolvent company. Under Jersey law, a company is insolvent if it is unable to pay its debts as they fall due or there are insufficient assets to meet all debts and liabilities.

The two main risks in an insolvency context are wrongful trading and fraudulent trading. Directors could in either case, and subject to any order of the court, become personally liable for the debts of the company, and may, in the latter case, commit a criminal offence, for which a fine or imprisonment may be applicable. Both aspects can only apply where there is a creditors' winding up or a désastre. If a company was insolvent and then became solvent these aspects should not apply as obviously the creditors would be paid. Directors may also be sued personally for misfeasance.

There are also powers vested in the liquidator and the Viscount of Jersey (the executive officer of the Royal Court charged with the administration of a désastre, the Jersey equivalent of UK bankruptcies) to challenge transactions entered into by a particular company at an undervalue. This is designed to combat the situation where a company gifts assets or sells assets for significantly less than their market value in the lead up to an insolvency scenario. There are specific time periods set out in the Companies Law and the Désastre Law with regard to transactions at an undervalue.

There are also powers vested in the liquidator and the Viscount to challenge a transaction that amounts to a preference. A preference is any act done by a company that has the effect of putting one of the

company's creditors into a better position than that creditor would otherwise have occupied in the event of the company's insolvency. Again there are specific time periods that apply. By way of example, a preference would arise in granting an unsecured creditor security or repaying one particular unsecured creditor in advance of other unsecured creditors.

The Royal Court is vested with wide powers to unwind transactions at an undervalue and transactions that amount to a preference or to make third parties pay a fair value for a particular benefit they might have received from a particular transaction.

5.2 Wrongful trading

The provisions on wrongful trading are set out in Article 177 of the Companies Law and Article 44 of the Désastre Law. In essence, a director may be held personally liable for the debts of the company (without any limitation on liability) if at some time before the date of the commencement of the winding up that director knew there was no reasonable prospect that the company would avoid a creditors' winding up (as provided for in the Companies Law) or would avoid being declared en désastre (as provided for in the Désastre Law) or on the facts known to him was reckless as to whether the company would avoid such a winding up.

A director can greatly limit the risks he faces by ensuring that those persons with whom he deals are aware that he is acting as an agent for the company, rather than in his own personal capacity. When signing it is prudent to signify the signature is given as a "director". He will potentially face unlimited personal liability if he fails to make this clear or if he personally guarantees the company's obligations under a contract or similar arrangement. He will not be guilty of a breach of his statutory duties if all of the members of the company subsequently ratify his actions, provided the company satisfies certain solvency tests and he has used his powers for the company's benefit, rather than for any "collateral purpose".

In view of the importance of Article 177 of the Companies Law to all directors, the relevant provisions are quoted here:

"Responsibility of persons for wrongful trading

(1) Subject to paragraph (3), if in the course of a creditors' winding up it appears that paragraph (2) applies in relation to a person who is or has been a director of the company, the court on the application of the liquidator may, if it thinks it proper to do so, order that that person be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company arising after the time referred to in paragraph (2).

(2) This paragraph applies in relation to a person if at a time before the date of the commencement of the creditors' winding up of the company that person as a director of the company -

(a) knew that there was no reasonable prospect that the company would avoid a creditors' winding up or the making of a declaration under the Désastre Law; or

(b) on the facts known to him or her was reckless as to whether the company would avoid such a winding-up or the making of such a declaration.

(3) The court shall not make an order under paragraph (1) with respect to a person if it is satisfied that after either condition specified in paragraph (2) was first satisfied in relation to him or her the person took reasonable steps with a view to minimising the potential loss to the company's creditors."

A similar provision is contained in Article 44 of the Désastre Law, where there is reference to a bankruptcy and a creditors' winding up. References to a liquidator in Article 177 of the Companies Law are replaced by references to the Viscount in Article 44 of the Désastre Law.

The motivation for these statutory provisions is based on a view that directors should be fixed with civil liability in cases where criminal fraud could not be proved but where the directors' conduct was unreasonable and caused loss to the company and/or its creditors. In particular, where a company was unable to pay its debts and incurred liabilities in circumstances where there was no reasonable possibility of the company paying them, then directors who were party to this "wrongful trading" should be held personally liable for the debts of the company. In fact, the Companies Law deliberately extends the potential liability of directors beyond this type of situation. The only reference to "wrongful trading" is in the heading to Article 177. To avoid liability under these articles a director is compelled to take positive action to minimise the potential loss to the company's creditors, from the time when he knows that there was no reasonable prospect of the company avoiding insolvent liquidation.

The crucial question, therefore, is whether or not the director took reasonable action as required by these articles to minimise the potential loss to the creditors of the company. The critical issue in determining whether or not he took such action is to decide the time from which such action should have been taken. This in turn depends upon the time when the director knew that there was no reasonable prospect of the company avoiding an insolvent liquidation or désastre or was reckless as to that possibility. This means that to minimise the risk of incurring liability under these articles, every director should take reasonable steps to ensure that he:

(a) is kept informed of the current financial situation of the company by somebody upon whose statements he is reasonably entitled to rely;

(b) is aware of the key factors which could, if they changed, trigger the insolvent liquidation of the company;

(c) is aware at the earliest possible time of any changes that may have occurred or may be about to occur in these key factors; and

(d) takes appropriate action as soon as he is aware that there is no reasonable prospect of avoiding insolvent liquidation. In many instances this may mean immediately ceasing to trade although this is not necessarily the case as, for instance, where a valuable contract could be completed and this can be done without incurring any increased credit.

A director of a company in financial difficulties who suspects it may be, or may become, insolvent or that a particular decision may cast doubt on a company's prospects of solvency in the future, should immediately call a board meeting to acquaint all the directors with his suspicions. The board should seek professional advice, starting with the company's accountants, who are likely to be the advisers most conversant with the company's accounting records and affairs.

The liability can only arise after a determination by the court but the amount of that liability can equal the amount of the debts and liabilities.

5.3 Fraudulent trading

Article 178 of the Companies Law and Article 45 of the Désastre Law provides that "fraudulent trading" may render a person (which could include a director) personally liable for the debts of the company and subject to criminal sanction. Any person (not necessarily a director) knowingly a party to carrying on the business of a company with intent to defraud creditors of the company or creditors of another person, or for a fraudulent purpose may be so liable. If such person is also a creditor of the company, any debt owed to that creditor by the company may be subordinated to the debts owed to other creditors of the company. It must be proved that the business was carried on with intent to defraud creditors of the company or of another person. This requires a high standard of proof.

Where a director has accepted an executive function, his obligations in this regard are in addition to any duties he may have as a director. A service contract for an executive director can, and often does, include specific and express obligations imposing a degree of skill that is higher than that which would otherwise be implied at law.

5.4 Market manipulation, misleading information and insider dealing

Market manipulation, providing misleading information and insider dealing, are not only a breach of a director's duty, but are prohibited by the Financial Services Law which makes a number of activities based on the use of inside information criminal offences. Briefly, a person commits an offence whether as a director or not if he has information as an insider and if he deals in securities that are price-affected securities in relation to the information. There are certain additional requirements and defences stated. It is also an offence to encourage anyone to do the above or to disclose relevant confidential information improperly.

It is an offence for a person to make a statement, promise or forecast that the person knows is misleading, false or deceptive or if he dishonestly conceals material facts or recklessly makes a statement, promise or forecast that is misleading, false or deceptive and if he does so in connection with an agreement for a financial services business or insurance. Both carry penalties of a fine and/or ten years imprisonment.

Directors and those coming into contact with or even being close to others with sensitive information and in a position of trust generally need to be aware of the risks if only so as not to be caught up in an

investigation, as it is always difficult to prove a negative. The reputational damage that may arise from any investigation or proceedings in connection with the above may be incalculable.

5.5 Criminal acts

As the company's officers are its "mind and will", the directors must ensure that the company complies with its legal obligations. These are wide-ranging and complex; they are also the subject of considerable public attention, not least in the context of the health and safety of employees.

A company, as a corporate entity, can commit an unlawful act only through the agency of natural persons - e.g. directors or employees. The liability of both these parties and the degree to which the company may be involved differs depending on whether the unlawful act concerned is a tort or a criminal offence or on how it is treated if, as can often happen, the same act is both. It also differs according to the degree of criminal intention that is required to be proved to establish whether an offence has been committed. These unlawful acts will be governed by the law of the place where they are committed and so it may be necessary to comply with laws outside Jersey as well as those that exist in Jersey. Directors of companies with overseas directors or employees or which hold assets such as aeroplanes or boats should be particularly aware of the potential risks posed in this regard.
There are of course many crimes, both common law and statute, and regulatory and administrative infractions. Fraud is both a criminal and civil offence under the ancient customary and common law of Jersey. Complete categorisation and definition of the common law offence of fraud has not been fully developed, partly as the facts giving rise to it can be so numerous and complex. In Foster v Att. Gen. 1992 JLR 6 at p.26 the Court of Appeal found that in order to establish criminal fraud:

> *"it is necessary to show that the defendant deliberately made a false representation with the intention of causing thereby - and with the result in fact of causing thereby - actual prejudice to someone and actual benefit to himself or somebody else."*

It has been established under English common law (which would influence Jersey law) that a company can commit a crime requiring proof of criminal intention if its "controlling officers", including senior managers as well as directors, participate in the commission of an offence. The state of mind of such officers, who may also be guilty of the offence, is imputed to the company. The circumstances in which a company and its directors may be criminally liable for failing to take action are still not entirely clear: there have been a number of high-profile corporate manslaughter cases in the United Kingdom (and equally publicised decisions not to bring such cases) in recent years arising out of, for example, shipping and train disasters, but these have not yet formed a body of law from which it is possible to draw fully coherent guidelines. English statute law has now sought to clarify this difficult area of law.

Many statutes besides the Companies Law and the legislation associated with it may impact upon a director's liability. Many enactments impose a parallel liability for offences committed by a company on a director who consents to or connives in an offence or, where the offence is one of omission not commission or does not require proof of criminal intention (and most do not), on a director to whose neglect it is attributable.

A Jersey director should be particularly vigilant to ensure that he checks the credentials of any potential client thoroughly, as recent money laundering legislation imposes liability not only upon those who actually deal with the proceeds of crime, but also upon those who provide services that assist the money launderer, whether or not the monies actually pass through their hands. (See the Proceeds of Crime (Jersey) Law 1999 and subordinate legislation thereto). The best safeguard is to remember at all times that a director's duty is to the company, not to any specific shareholders. Where relevant, directors should also take care not to fall into the trap of following client instructions without giving independent thought to each transaction and to the purpose behind each transaction. Signs of dealings that should rouse a director's suspicions include the unnecessary use of intermediaries and unusual business patterns such as buying and selling a security with no discernible purpose.

Directors of financial services businesses in particular need to be familiar with and comply with the requirements.

Other criminal legislation affecting company activities that directors need to be aware of include:

- the Corruption (Jersey) Law 2006;
- the Crime (Transnational Organised Crime) (Jersey) Law 2008;
- the Money Laundering and Weapons Development (Directions) (Jersey) Law 2012; and
- Various United Nations Sanctions and Arms Embargoes Orders relating to the Channel Islands.

Certain foreign criminal legislation may have extra territorial effect such as the UK Bribery Act 2010.

In Chapter 4 examples of key laws were listed, many of which contain criminal sanctions that could affect directors.

Appendix 1 lists the criminal offences created by the Companies Law;
Appendix 2 lists the criminal offences created by the Désastre Law;
Appendix 3 lists the criminal offences created by the Financial Services Law; and
Appendix 4 lists the criminal offences created by the Proceeds of Crime (Jersey) Law 1999.

5.6 Tortious acts

A tort is a wrong done that entitles a person suffering loss or damage to sue. Most motor accident claims, for instance, are based on the tort of negligence. In the context of a limited liability company it is likely that three parties may be involved in the commission of a tort: the company itself, the directors who authorised the tortious action and the employee who physically committed it. Under the doctrine of vicarious liability, a company will normally be liable for employees' torts committed in the course of their employment.

For a director to be liable for a corporate tort arising from a positive action, some measure of participation in physically committing the tort or directing or procuring it is required. The bare fact that an individual is a director is not of itself sufficient. At the same time, a director cannot escape liability

on the ground that he had no tortious intention unless the tort concerned requires proof of such intention. The position of directors involved in a corporate tort based on omission (e.g. negligence) is less clear but it is safest to assume that directors who fail to ensure that the company acts with due diligence towards third parties may thereby expose themselves to an action from a third party injured through a corporate default. In these circumstances, a director may also be liable to the company by way of indemnity because his negligence may be a breach of that director's duties of skill and care (amongst others) owed to the company. A director could also face contractual liability to the company if such omission is also a breach of his service contract.

In this connection the main torts are likely to include:

(a) Conversion: This is a positive wrongful dealing with goods or money inconsistent with the owner's rights and with an intention in so doing to deny the owner's rights or to assert rights inconsistent with them. See Re Guidon Investments Ltd 1978 JJ 29.

(b) Fraud: Fraud may be a tort or a crime. In the absence of a Jersey definition of civil fraud, the following English common law definition may assist:

> *"The tort involves a perfectly general principle: where a defendant makes a false representation, knowing it to be untrue, or being reckless as whether it is true, and intends that the claimant should act in reliance on it, then in so far as the latter does so and suffers loss the defendant is liable."*

(Clerk & Lindsell on Torts 20th Edition, paragraph 18-01, citing Pasley v Freeman (1789) 3 Term Rep 51, 100 ER 450 (Ct of KB) and Smith v Chadwick [1884] 9 App Cas 187 (HL) at 190.)

(c) Interference with contractual relations: This is where, without justification, a person knowingly and intentionally interferes with a contract between other persons. See Corby and Lewis v Le Main 1982 JJ 157.

(d) Negligence: Negligence is the omission to do something that a reasonable person, guided by those considerations that ordinarily regulate the conduct of human affairs, would do, or the commission of an act that a prudent and reasonable person would not do. See Hacquoil v George Troy & Sons Ltd and Harbours & Airport Committee 1970 JJ 1305.

(e) Passing off: This is where:

(i) the plaintiff's goods or services have acquired a goodwill or reputation in the market and are known by some distinguishing feature; and

(ii) there is misrepresentation by the defendant (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by the defendant are goods or services of the plaintiff; and

(iii) the plaintiff has suffered, or is likely to suffer, damage as a result of the erroneous belief engendered by the defendant's misrepresentation. See Veka A.G. v T.A. Picot (CI) Ltd 1998 JLR 417.

(f) Trespass to land: "Every unlawful entry by one person on land in the possession of another is a trespass for which an action lies, although no actual damage is done. A person trespasses upon land if he wrongfully sets foot on … or places or fixes anything on it …". See St Helier (Parish) v Manning 1982 JJ 183

(g) Wrongfully declaring a person "en désastre": This was discussed in detail in Minories Finance v Arya Holdings Ltd 1994 JLR 149 and also Arya Holdings Ltd v Minories Finance 1997 JLR 176. See d'Allain v de Gruchy (1890) 214 Ex 196.

5.7 Personal representations

Where a company deals with third parties, the directors may owe a duty of care or contractual obligation to such third parties; a breach of that kind may leave the directors susceptible to claims from these third parties in the event of breach. For example, in a contract by a company to pay an outstanding debt there may be an implied representation by the director that amounts to a fraudulent representation where the director knew the company had no means to pay it. In the case of Contex Drouzhba Limited v Wiseman [2007] EWCA Civ 1201, [2008] 1 BCLC 631 the director was held personally liable on those facts.

5.8 Breach of warranty of authority and holding out

Where a director purports to make a contract that fails to bind the company and which the company repudiates, he may be liable to the third party on the ground of breach of warranty of authority. As the name suggests, this liability is based on the assumption that the director has impliedly warranted to the third party that he has authority to enter into the contract. If it then turns out that such authority is beyond the powers of either himself or of his board he has broken that warranty and may be personally liable. Directors need to understand that they should not individually bind the company unless the board has authorised the director to bind the company or where the articles authorise the director to bind the company.

The implied warranty was recognised by the English courts in a series of nineteenth-century company law cases. In one case a director who negotiated a loan with a third party that put the company's borrowing beyond the company's limits was held to be personally liable. See Chapleo v Brunswick Permanent Building Society (1881) 6 QBD 696. In another case the individual directors who induced a bank to pass cheques in the absence of a company mandate were also found to be personally liable. See Cherry and M'Dougall v Colonial Bank of Australasia (1869) LR 3 PC 24.

Despite the strict legal position, as a matter of practice in business, third parties do deal with a single director whether or not he is the managing director and whether or not he has any delegated powers. They treat him as they would a partner in a partnership. The courts have to some extent assisted with this commercial reality and as a matter of practice, it is now unlikely that third parties will have to rely on the breach of warranty remedy against individual directors as a result of the development of the holding out principle.

The actual authority of an individual director derives from when the board is entitled to delegate its powers and validly does so. The articles normally provide that the power to manage the business of the company is vested in the board. See Re Level One Holding (Jersey) Limited [2007] JRC 106, 2007 JLR Note 39.

However, what about the situation where the board is entitled to delegate its powers but omits to do so, and say the finance director then purports to bind the company by instructing the company's brokers or where the finance director binds the company believing the board will ratify the act? So far as the third party is concerned, finance directors are normally held out as having authority to bind the company in these matters regardless of the actual extent of their delegated powers and even in some instances where they have never been formally appointed. This authority is called ostensible authority. In some instances a director may be so completely in control of a company that he will be regarded as having actual and ostensible authority. The holding out principle has now been extended to company secretaries to bind the company on administrative matters such as the ordering of office equipment and hire cars.

Accordingly the concept of breach of warranty of authority has been eroded by the courts over the twentieth century and the beginning of the twenty-first century. However, this is not to say that directors need to ignore the possible consequences. While third parties will, assuming they can rely on the holding out principle, invariably enforce against the company, rather than the individual director, if the company becomes insolvent, proceedings could be commenced by a third party against an individual director for breach of his warranty of authority.

Alternatively in a family company, the individual director who has breached his warranty of authority may also be the beneficial owner of the company and have more assets than the company itself. Furthermore, if a director's actions are blatantly outside his authority the third party may not be able to rely on the holding out principle and in these circumstances the company may be able to declare the contract void leaving the director susceptible to a claim from the third party for any liability.

If a director makes a representation with ostensible authority, and the other party is unaware that it has been made without actual authority an estoppel may arise. See Izodia plc v Royal Bank of Scotland International Limited 2006 JLR 346.

5.9 Constructive trust claims

There are two different classes of constructive trust. The first is where a person assumes fiduciary obligations in respect of trust property thereby becoming a constructive trustee (i.e. a real trustee in the traditional sense).

The second is where a person who is a stranger to a trust becomes liable as a trustee in equity by dishonest acts of interference. The latter class falls into two categories. The breach may comprise dishonest assistance or knowing receipt.

Chapter 5

The following table sets out the constituent elements of "dishonest assistance" and "knowing receipt" respectively:

	For Dishonest Assistance	For Knowing Receipt
Requirements	A primary wrongdoer (other than the defendant) acts in breach of trust or fiduciary duty to the knowledge of the defendant; and The defendant assists the primary wrongdoer so to act; and The defendant must act dishonestly i.e. the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised by those standards his conduct was dishonest; and There must be loss.	The defendant is the primary wrongdoer who disposes of assets in breach of trust or a fiduciary duty; and The defendant must have beneficially received assets that are traceable as assets of the plaintiff; and Knowledge by the defendant which renders receipt of the property unconscionable; and There must be loss.
Comments	The primary wrongdoer need not be dishonest (but usually has been). The defendant need not have received assets. The defendant's liability is to compensate for the wrongdoer's actions. Dishonesty is an objective test - no closing the eyes, not asking the right questions. He knows what he is doing would be regarded as dishonest by honest people. Assistance need not have caused or contributed to the loss. There will need to be a determination on the facts whether there was assistance	An agent will not have beneficial receipt. A causal connection is necessary. The defendant need not act dishonestly. Liability may still attach if the funds are gone.

See:
- Re Esteem Settlement 2002 JLR 53 at 93
- Bagus Investments Limited v Kastening 2010 JLR 355
- Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378 (PC)
- Twinsectra Ltd v Yardley [2002] UKHL 12, [2002] 2 AC 164
- Barlow Clowes International Limited (in liquidation) v. Eurotrust International Limited [2005] UKPC 37 and [2005] WTLR 1453
- Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) v Akindele [2001] Ch 437 (CA), [2003] 3 WLR 1423
- Madoff Securities International Limited (in liquidation) v Raven & Others 2013 EWHC 3147
- Fraud Fault and Fiduciary Liability by Lord Justice Walker - Jersey Law Review June 2006

Anyone, including a director, may incur personal liability pursuant to a constructive trust claim if he suspects or ought to suspect that the property acquired by his company has been wrongfully acquired. Liability in such instances greatly depends on the director's state of mind: thus a director who genuinely believes that no wrongdoing is taking place is unlikely to be held personally responsible for any resulting loss, while another who renders assistance and is suspicious yet closes his eyes to the possibility in order to avoid liability will be treated by the courts as though he had actual knowledge. In the case of knowing receipt, the defendant need not have acted dishonestly, but it must be unconscionable for the recipient to retain the benefit.

Templeton Insurance Ltd and another company v Brunswick and others [2012] EWHC 1522 (Ch) is a good illustration of how a director's conduct can lead to a constructive trust claim and usefully summarises the law in this complex area. There were three defendants. A director was sued for breach of trust and breach of duty by his former company as a director and as an employee for having wrongly appropriated sums to pay himself a bonus. The aggregate sums had been transferred to an account in the joint names of him and his wife. These sums were then paid to the wife's sole account. She was sued originally for dishonest assistance, but later solely on the grounds of knowing receipt. The trustee in bankruptcy of the director was sued as the current recipient of the sum. He took a neutral stance. The director was found to have been dishonest in the civil sense and the constructive trust claim succeeded against him but failed against his wife who, while a recipient, lacked the necessary knowledge at relevant times. The director's conduct was described as clandestine or surreptitious. He failed in his duties to act in good faith, not to profit from his trust, not to place himself in a position of conflict of interest and not to act for his own benefit without the informed consent of his principal (i.e. another director who was the mind of his employer). For a case where "dishonesty was not proven" see Goldspan Limited v Patel [2012] EWHC 1447 (Ch).

5.10 Indemnification, insurance, ratification and relief

The Companies Law does not make it easy for directors to be indemnified by their companies if they have failed in any duty owed to them. Although a company's capacity to ratify directors' ultra vires acts retrospectively has now been clarified, subject to certain exceptions, the company (or any subsidiary of the company) cannot make an arrangement with directors to indemnify them against or exempt them from any liability that would otherwise attach to him by reason of the fact that he is or was an officer of the company. Any provision purporting to have this effect, whether in the articles, in any contract with the company or otherwise, is void (Article 77 of the Companies Law).

A company may, however, make a prior agreement to indemnify a director for the costs of a civil or criminal defence or if he acted in good faith with a view to the best interests of the company or where the company normally insures for persons other than directors. Article 77 of the Companies Law does not prevent a company from purchasing and maintaining insurance for an officer for negligence, default, breach of duty or breach of trust in relation to the company. It should be noted that it is also possible for a director or the company to insure against liability to his company and to third parties, including shareholders.

An unauthorised act on the company's behalf, if the act is within the powers of directors and if it is exercised bona fide in the best interests of the company, can only be ratified by the directors; but acts or omissions by a director in breach of duty can only be ratified by the shareholders. See Izodia plc v Royal Bank of Scotland International Limited 2006 JLR 346. Article 74(2) of the Companies Law specifically provides that no act or omission of a director shall be a breach of duty if such act or omission is authorised or ratified by all the members and after the act or omission the company can discharge its liabilities as they fall due and the realisable value of the company's assets is not less than its liabilities.

A case illustrating problems involving transfers of shares is Re Level One Holding (Jersey) Limited [2007] JRC 106, 2007 JLR Note 39. Directors there acted without being appointed, without authority and without calling a valid meeting so that the transfers were null and void and of no effect. The court rectified the share register to put the position back to reflect the correct position.

As a last resort, if proceedings are taken against a director for negligence or breach of duty, the court may, in reliance upon Article 212 of the Companies Law, grant relief either wholly or partly on such terms as it thinks fit. Relief can be granted only if the court finds that:

(a) the director has acted honestly; and,

(b) having regard to all the circumstances, including those connected with his appointment, he ought fairly to be excused.

5.11 Directors' involvement in their company's litigation

There have been two examples of directors becoming embroiled in their company's litigation. One case related to seeking information and the other related to costs against directors as a non-party. Where a plaintiff wishes to sue a company and seeks a Norwich Pharmacal order (pre-trial discovery) Royal Court has held that it is undesirable to single out this class of person and such orders should be confined to the proposed parties to the litigation. See Viken Securities Limited v New World Trustees (Jersey) Limited [2011] JRC 28, 2011 JLR Note 3. The court has power in exceptional cases to order costs against a non-party to proceedings. A director was found liable for costs in proceedings in which the company was a party. See Leeds United Association Football Club Limited v The Phone-In Trading Post Limited (Trading as Admatch) [2011] JCA 110, 2011 JLR Note 22.

5.12 Regulatory sanction notices

Where a director has been prohibited by the Jersey Financial Services Commission from taking employment in a financial services business, the Royal Court has held that a public notice issued to that effect is reasonable and is not designed as a punishment. It is designed to protect the public and the Island's reputation as a place where high regulatory standards are enforced and also to inhibit financial crime. See Homer v Jersey Financial Services Commission [2010] JRC 115A, 2010 JLR Note 33.

5.13 Overseas trading and other overseas connections

All directors should be aware that any acts or omissions committed by a Jersey company outside the Island may be subject to the laws of the jurisdiction where such act or omission took place. It is therefore vital that directors ensure that they have full confidence in any representatives of the company acting outside Jersey, and that they or the company take appropriate legal advice from foreign lawyers where it is necessary or advisable to do so. Clearly directors will need to rely upon others abroad to provide sufficient and accurate information.

If a Jersey company is formed with the express intention of trading overseas, or being the registered owner of a boat or aeroplane that will operate internationally, any prospective director should seek specific legal advice in order to better evaluate the potential risks that acting as a director may bring.

Similarly laws outside Jersey may impact on the company or officers or representatives residing abroad or otherwise connected with other countries. For example, internet access can create jurisdiction for certain purposes especially in the USA and bring US laws into play. This could potentially involve extradition in an extreme case. See Extradition (Jersey) Law 2004 and de Figueiredo v Commonwealth of Australia 2010 JLR 376.

Chapter 6: Practical management tips to reduce risk of personal liability

6.1 Introduction

Some of the key risks arising from duties and liabilities are dealt with below. This does not cover all major risks and it does not provide an exhaustive list of practical tips. Many will in any event depend on the type of company and its activities and the circumstances generally. Accordingly a measure of judgement is always needed.

6.2 Before accepting office of director and thereafter periodically

6.2.1 General due diligence
Before accepting the office of director, it is fundamental that an individual director carries out a thorough due diligence exercise on the company itself. This is particularly the case for non-executive directors who may have had no involvement at all in the company prior to accepting office. The potential liabilities of a non-executive director are just as onerous as those of executive directors, but the non-executive is unlikely to have the same ability to influence, manage or direct the company's activities and performance as his executive colleagues. A prospective director needs to be vigilant before accepting an appointment to a board.

By way of background, before accepting a position, many questions need to be considered in connection with the company, its shareholders, the current board and the director in waiting. Some of the following matters are likely to be relevant considerations before accepting office and ought to be considered periodically throughout the duration of the appointment.

6.2.2 Specific due diligence
It is appropriate for a director to:

(a) review the memorandum and articles and any restrictions imposed by the Jersey Financial Services Commission on incorporation and to review the statutory books generally;

(b) ensure he has been properly appointed and will have sufficient authority to act;

(c) have agreed the form of a service contract including remuneration and what is expected of him in terms of his key duties;

(d) ensure the board meets at appropriate intervals, its business is undertaken appropriately and has been duly monitored;

(e) understand who the shareholders are individually or collectively and the beneficial owners, if different;

(f) review the statutory required annual accounts and ensure that they have been produced and approved in a timely way and to review the management and bookkeeping arrangements to ensure that they are properly maintained; and

(g) understand the commitments or at least the major commitments, review a snapshot asset and liability position and ensure that current cash flow is adequate (i.e. to ensure that the company is solvent).

Before accepting office, a director in waiting may wish to consider the following general questions:

(a) Activities/reputation
- What are the company's principal activities?
- Where is the company in the market place in the eyes of the board?
- What is the company's reputation in a particular market sector? (enquiries of professional advisers, customers, bankers, etc).

(b) What are the shareholders' strategic objectives?
- Where do they expect the company to be in three years?
- Where do they want the company to be in three years?
- Are those expectations realistic?
- Are shareholders' expectations consistent with those of management?

(c) Of the company: what is the structure of the board?
- Is it dominated by any specific individuals (e.g. a particular family member or entrepreneur)?
- Are there any non-executive directors to add balance? If not, should there be?
- How regularly does the board meet in the light of the proposed activities of the company? Is this sufficient bearing in mind these activities?
- Ask to see copy minutes to give an indication of recent issues.

(d) How is your role as a director perceived by the board?
- Why is your appointment being made?
- What expertise is the board anticipating that you will bring to the table? What are you specifically contributing? Are you actually able to provide this?
- What is the time commitment expected of you? Is this reasonable, in light of any other commitments, to enable you to discharge your duties?

(e) How reliable is the company's management information?
- When and how is information produced to directors? Is this good enough?
- Compare most recent management accounts with audited accounts.
- Are business plans/forecasts/budgets available for review?
- Does the company has satisfactory internal controls in place?
- What issues were raised by the auditors in their risk management letters? Have these been acted on?

(f) Of the non-executive
- Is my role clearly defined and agreed by the board as a whole?
- Will I be able to get on with the other members of the board?
- How important is industry-specific knowledge? Do I have this knowledge?
- Will I receive sufficient information to be able to perform any role properly?
- What do the recent copy minutes tell me? Are there any issues of immediate concern that ought to be raised?
- Is the remuneration appropriate for the role but at a level where I could afford to resign if necessary?

6.3 To avoid exceeding powers and personal liability

Having clarified the potentially serious consequences, if a director acts outside the scope of his authority, can a director take practical steps to mitigate this risk so as to ensure he acts within his designated authority?

(a) A director should review periodically the matters referred to in paragraph 6.2 above.

(b) If a director is delegated certain functions the director should check to ensure this delegation has been formally approved, resolved and minuted by the board.

(c) As a general rule, individual directors should not act alone unless it is clear that they have the authority to do so. It is of fundamental importance that individual directors appreciate that the board has collective responsibility for taking major decisions and collectively directing the company's affairs. Standard company articles usually permit any director to call a board meeting and the flexible provisions in most articles on quorum requirements (alternates, notice, attendance by telephone, etc.) make holding a board meeting relatively quick and easy.

(d) Minutes should be drawn up for the company summarising the rationale for the board proceeding in a particular way or entering into a specific transaction; directors' board minutes should be entered on the company's statutory books; the minutes should include confirmation of those directors present and should summarise the major decisions in relation to the directors' conduct of the company's affairs; the reasons for decisions should be justified and properly recorded.

(e) Minutes are key as they can demonstrate subsequently that directors collectively exercised therequisite degree of diligence and skill in accordance with their duty of care; compare proceeding on this basis with an individual director who goes off on a limb to bind the company without board approval and no formal minutes.

(f) A director should not sign any cheques that do not bear the company's proper registered name.

(g) A director should not enter into any contracts or other negotiable instruments unless it is clear that he is acting for and on behalf of the company; if there is any doubt in this regard he should seek formal board approval.

(h) Within a group of companies, the responsibilities of an individual company board and board members need to be adequately defined; the directors of each company should ensure that they have executive authority over their specific company's affairs that is consistent with their own responsibilities.

6.4 To avoid breach of warranty of authority

In light of the risks for individual directors dealing direct with third parties, the directors must make the capacity in which they are acting absolutely clear (i.e. whether he is acting in his capacity as a director of that particular company rather than in a personal capacity). With a view to mitigating the risk for breach of warranty of authority, individual directors should:

(a) obtain board approval prior to taking a particular course of action rather than acting in isolation;

(b) use the company letterhead in correspondence and the company logo in e-mails;

(c) ensure the sign off in correspondence is clear (i.e. that the individual is acting as a director for and on behalf of the company); and

(d) make it clear in telephone calls that he is acting as a director of the company rather than in any personal capacity and draft an attendance note of the call to this effect; follow up calls with communications on the company letterhead preferably with board approval.

If an individual director has acted outside the scope of his authority or has concerns that he may have acted outside the scope of his authority the individual director should immediately consider his options in terms of mitigating any risks or claims. These might include:

(a) taking legal advice;

(b) obtaining ratification from the board if an individual director has acted beyond his individual authority;

(c) obtaining shareholder approval pursuant to Article 74(2) of the Companies Law; Article 74(2) provides that no act or omission of a director shall be a breach of his duty if such act or omission is authorised or ratified by all the members, in the form of a resolution or (if the articles so require) special resolution, and after the act or omission the company will be able to discharge its liabilities as they fall due. While Article 74(2) expressly provides for ratification after the event, directors should note that if there is any doubt, ideally shareholder approval should be sought prior to entering into a particular transaction or course of action;

(d) considering the terms of any directors' and officers' insurance ("D & O Insurance") and considering whether a notification to the insurers is applicable; policies may cover directors and officers for liability arising from negligence, default, breach of duties and breach of trust;

(e) considering the terms of any indemnity entered into between the company and the individual director; any indemnity seeking to absolve a director from his general duties of office is likely to be void pursuant to Article 77 of the Companies Law (i.e. of no effect); however an indemnity protecting a director if he has acted in good faith in the best interests of the company or for legal costs incurred may be enforceable; and

(f) as a last resort considering a defence to any claim pursuant to Article 212 of the Companies Law; Article 212 provides it is a defence for a director facing a personal claim for negligence or breach of duty if he can show that he has acted honestly and having regard to all the circumstances, including those connected with his appointment, he ought to be fairly excused.

6.5 Delegation and monitoring

What can directors learn from the Barings, Vass and Weavering cases referred to in Chapter 3 on delegating functions and responsibilities? They may need to ask themselves questions.

(a) Despite the delegation the board must maintain “control” of the business.

(b) Are the terms of the delegation sufficiently clear?

(c) Do you as a director of the board understand the role and duties of the delegate?

(d) Make sure the delegation is properly authorised by the board.

(e) Is the delegate sufficiently qualified and experienced to perform his functions?

(f) Will the delegated function conflict with any other function of the delegate?

(g) Delegating functions does not absolve directors of responsibility.

(h) Overall responsibility cannot be delegated.

(i) Is there adequate report back in both directions?

(j) Bear in mind the Combined Code - the board has responsibility for internal controls.

(k) Identify any significant risks.

(l) How are these risks evaluated?

(m) How are these risks managed?

(n) Who has responsibility for the proper risk management and is it recorded and understood by them that they bear the responsibility?

(o) Act on warning signs.

(p) Annually review and test the effectiveness of controls.

6.6 Avoiding personal liability for wrongful trading

To minimise risks of incurring personal liability for wrongful trading, every director should take reasonable steps to ensure he:

(a) is notified of the current financial situation of the company on a regular basis by somebody upon whose statements he is reasonably entitled to rely;

(b) is aware of the key factors that could, if they changed, trigger the insolvent liquidation of the company;

(c) is aware at the earliest possible time of any changes that may have occurred or may be about to occur in these key factors; and

(d) takes appropriate action as soon as he is aware that there is no reasonable prospect of avoiding insolvency. For a trading company this may mean immediately ceasing to trade although this is not always necessarily the case; by way of example, where a valuable contract could be completed and this can be done without incurring any increased credit.

6.7 General insolvency concerns

If any individual director knows there are financial difficulties, or suspects that there might be, or that a particular decision could lead to the company becoming insolvent, he should immediately:

(a) call a board meeting to inform his co-directors of his concerns or findings;

(b) ensure the board understand that in a winding up or désastre the interests of the creditors prevail over the members of the company;

(c) inform the members of the company as appropriate;

(d) ensure that the board then takes appropriate professional advice, commencing with the company's accountants, who will hopefully be familiar with the company's accounting records and affairs; legal advice will also be required in conjunction with accounting advice to determine whether the company is insolvent; the board should be able to decide with the aid of professional advice whether any remedial options short of liquidation are possible; the decision as to whether to continue trading or cease trading is likely to be key;

(e) inform the members of the company - the members may inject funds; and

(f) if remedial measures are not an option, ensure that the company ceases to trade forthwith.

Failure to take these steps will severely reduce a director's capacity to mount a successful defence against a plaintiff seeking to make him personally liable for the debts of the company.

6.8 The dissenting director

If a non-executive director or executive director disagrees with a particular strategy adopted by the board or uncovers something untoward that is not acted upon, what should he do to protect himself if fellow board members will not recognise the issue or problem?

The following steps should be considered by the dissenting director to protect his position:

(a) the director's concern should be formally tabled at the next board meeting together with recommendations for action to be taken to rectify or correct the issue or problem;

(b) if appropriate, recommend that the board takes professional advice from the company's lawyers or accountants as appropriate;

(c) if the board is unwilling to do this, the dissenting director's opinion must be formally recorded in the minutes of the meeting; it may be prudent for the dissenting director to seek independent professional advice in respect of his actions (independent from the company's professional advice);

(d) if no progress is made, the dissenting director should convene a board meeting to specifically consider the issue or problem; legal advice should be taken and the costs should be paid by the company; and

(e) if no rectifying or correcting action is taken, the director will probably be forced to resign but he must take care not to damage the company further by the fact of that resignation.

If a director follows these practical guidelines he will mitigate the risks of any subsequent claims against him personally for failing to act should the issue or problem lead to material consequences.

6.9 Prescription

Directors should consider whether any claims made against them are prescribed (i.e. the right to bring an action is time barred by the passage of time). It will be necessary to consider when the facts giving rise to the claim arose and knowledge of the facts resulting in the claim may be required for time to start running. It is not possible to give a full list of prescription periods but, as a guide, generally ten years is the period for all personal actions and actions concerning moveables save to the extent they are subject to a different period or by analogy another period is more applicable. See Rockhampton Apartments Limited and Antler Property C.I. Limited v Gale and Clarke 2007 JLR 332. It was confirmed in O'Keefe & Ano'r v Caner and O'rs 2017 EWHC 1105 (Ch) that the appropriate prescription period for a claim against directors of a Jersey company for breach of their duties under Article 74 of the Companies

(Jersey) Law 1991 was the default period applicable to personal claims in Jersey, namely ten years from the date of breach. This case involved the English High Court applying Jersey law (with the assistance of Jersey Advocates providing expert evidence). As a result the judgment is not strictly binding in Jersey, but it will be highly persuasive nonetheless. The current state of the law in Jersey is therefore likely to be that claims in contract, quasi contract and breach of fiduciary duty all have a ten year prescription period. Claims in tort are prescribed after three years under the Law Reform Miscellaneous Provisions (Jersey) Law 1960. Claims for breach of trust are also prescribed after three years from the date of receiving final accounts or from knowledge of the breach but are unlimited where there is fraud involving the trustee or where the claim is to recover trust property. See Trusts (Jersey) Law 1984, Article 57.

Generally, time starts to run from the time a cause of action accrues. This is either the date of breach or the date of reasonable discoverability of the breach, although the point has not been conclusively determined (see Boyd -v- Pickersgill & Le Cornu [1999] JLR 284). Separate to the question of accrual (although of similar effect) the prescription period may be suspended for the time during which it was not possible for the plaintiff to exercise his, her or its rights. This reflects the ''practical impossibility'' (as opposed to the theoretical impossibility) of a plaintiff exercising its rights. Therefore ignorance may suspend the running of a prescription period where the ignorance is reasonable.

Chapter 7: Shares, shareholders and shareholders' rights

7.1 Issuing and transferring shares

The articles of a company usually give the directors the right to issue shares up to the value of the authorised capital of the company.

Directors should pay particular attention to any decision involving the company's shareholders or prospective shareholders. The law relating to directors' obligations to shareholders is both extensive and complex particularly in situations where directors may become responsible for the accuracy of contents of documents issued by the company such as prospectuses. Any failure in this area may expose both the company and the directors to civil and criminal liability.

A director may become personally liable as the agent of an individual shareholder if he undertakes to act on the shareholder's behalf - for instance, by offering to find a buyer for his shares. A director may also be liable for having made a negligent misstatement as to, for example, the financial strength of the company to anyone who might reasonably be expected to rely on the statement for business purposes.

The Companies Law contains provisions rendering a director liable both civilly and criminally for statements contained in a prospectus that are untrue and misleading or the omission from it of a material fact. Other laws dealing with investments such as the Investors (Prevention of Fraud) (Jersey) Law, 1967, the Collective Investment Funds (Jersey) Law, 1988 and the Financial Services Law contain provisions whereby a director, as well as the company, commit an offence if they make, knowingly or recklessly, a statement that is misleading, false or deceptive pursuant to which a person is induced to acquire or dispose of securities. Such offences are punishable by a fine and/or imprisonment of up to ten years.

There is additional subordinate legislation under the Collective Investment Funds (Jersey) Law, 1988, which extends the liabilities of directors in this area to permit both shareholders and investors to claim compensation. The legislation also provides for the imposition of criminal sanctions not only for statements or omissions in prospectuses but also for non-compliance with legislation.

These statutory provisions are in addition to possible criminal offences for fraud and a number of non-statutory civil liabilities (including deceit and negligent misstatement) that a director may incur for misleading, false or deceptive statements that induce persons to invest in or give credit to a company.

In view of these liabilities, directors should ensure that the accuracy of all statements and the reasonableness of opinions expressed in documents issued by the company are checked by means of a formal verification process. They should ensure that the persons to whom this task is delegated are competent to carry out the task and have all the necessary and relevant information to enable them to do so. Each director should read both the document and the verification notes and discuss any

concerns or doubts with the company's professional advisers. This is an area where specific legal advice should always be sought.

Once issued, the articles will govern the transfer of shares and any restrictions or rights attaching thereto, subject always to the provisions of the Companies Law. The transfer of shares will ordinarily need to be approved by the board of the company whose shares are being transferred. It is also necessary for boards of the transferor and also the transferee to authorise the transfer. A transfer where the transferee has not properly agreed to become a member of the company concerned is not valid. See Re Level One Holding (Jersey) Limited [2007] JRC 106, 2007 JLR Note 39.

7.2 Capital

The capital of a company is the amount that would be due to the shareholders on a winding up after the lawful claims of all the other parties associated with the company have been met. The doctrine of maintenance of capital is very important for limited companies that must neither return shareholders' own funds to them as if they were a distribution of profits nor arbitrarily diminish the fund from which creditors legitimately expect to be paid.

The Companies (Amendment No. 11) (Jersey) Law 2014 enables Jersey companies to carry out a reduction of capital without needing to obtain court approval where a reduction is supported by: (i) a solvency statement filed with the Companies Registry; (ii) a special resolution of shareholders; and (iii) a special form of minute confirming certain information in relation to the capital accounts of the company and the share capital of the company. The new procedure is open to all types of public and private limited companies in Jersey. Whilst the old mechanism for court approval of a share capital reduction remains in place, the new procedure allows for Jersey companies to more easily reduce their capital accounts and supplements the ability for Jersey companies to distribute from certain capital accounts.

Maintenance of capital requirements does not mean that a company is not permitted to make losses, but it does mean that accumulated losses must be taken into account in determining distributable profits. A company and its directors must make a clear distinction between what is distributable and what is not. This distinction underlies many of the legal provisions relating to a company's capital and to the ability of a company to make distributions.

It should be emphasised that the statutory provisions used to determine what is or is not distributable are complex, but were simplified by the Companies (Amendment No. 9) (Jersey) Law 2008 to allow distributions to be made from sources other than realisable profit provided the requisite solvency statement is given. If directors are not certain that the company is in a position to make a distribution, or give the requisite solvency statement, they should not hesitate to seek professional legal and/or accounting advice.

7.3 Purchase and redemption of a company's own shares

Subject to its articles, a company may purchase and/or redeem its own shares in accordance with the provisions of Articles 55 and 57 of the Companies Law.

All companies may, if so authorised by their articles, issue or convert ordinary shares to redeemable shares but they must always ensure that at all times the company has non-redeemable shares in issue. With the sanction of a special resolution a company may also purchase its own shares, provided that where the company is a wholly owned subsidiary this is not required. A company may also hold treasury shares following a repurchase or redemption if authorised by a special resolution. See Articles 57(7), 58A and 58B of the Companies Law.

A company may only redeem or purchase its own shares if such shares are fully paid and, in respect of the nominal amount of the shares to be redeemed or purchased, to the extent that it can do so essentially out of realised profits or the proceeds of a new issue of shares made specifically for that purpose. Any premium element payable on redemption or re-purchase may be paid out of the share premium account from realised profits, from the proceeds of a new issue of shares and, with the sanction of a special resolution, out of unrealised profits. However, this procedure is subject to a number of procedural requirements principally to safeguard creditors. The directors must reasonably believe that after payment the company will be solvent (i.e. able to discharge its liabilities as they fall due) and be satisfied that, having regard to the prospects of the company, the intentions of the directors and the financial resources of the company, the company will be able to carry on business and remain solvent for at least one year after the payment.

Only those directors who participate in the resolution of authorising a repurchase or redemption of shares have to sign the solvency statement. Secondly, the requirement that the directors may only make such a statement after having made a "full enquiry into the affairs and prospects of the company" was removed and replaced with the look-forward solvency statement referred to above.

At a practical level, this means that it is not necessary to seek signatures from all board members when preparing to file a solvency statement but, equally, it is only those board members who approve the repurchase or redemption who are liable to creditors in the event that the solvency statement is not correct.

It is also noteworthy that purchased or redeemed shares must be cancelled unless held as treasury shares.

7.4 Financial assistance for the acquisition of a company's own shares

In 2008 Article 58 of the Companies Law was amended so as to abolish the rule that a Jersey company may not give financial assistance, directly or indirectly, for the purpose of any acquisition of shares in the company or its holding company. Following the introduction of the Companies (Amendment No. 9) (Jersey) Law 2008 the old financial assistance restrictions relating to the maintenance of capital have been abolished in favour of provisions that provide much greater flexibility as to how a company may distribute assets to its shareholders. The old rules broadly provided that a company could only make a distribution out of its realised profits less its realised assets or out of its realised revenue profits less its revenue losses, whether realised or unrealised, if the directors who authorised the distribution reasonably believed that immediately after the distribution had been made the company would be able to discharge its liabilities as they fall due. This has been replaced with a new regime that allows

a distribution to be debited to a share premium account or a stated capital account of the company or any other account of the company other than the capital redemption reserve or the nominal capital account provided that the directors who are to authorise the distribution make a statement in accordance with Article 115(4) of the Companies Law (broadly a twelve-month look-forward cash flow solvency statement).

Furthermore, all criminal sanctions arising from the giving of “unapproved” financial assistance were abolished pursuant to the Companies (Amendment No. 9) (Jersey) Law 2008.

Thus, Article 115(7) of the Companies Law allows share capital to be used in the funding of distributions to shareholders (other than any capital redemptions reserve and any share capital account to whom the nominal value of shares is credited). This is a material relaxation of the general corporate law provisions relating to maintenance of capital and is to be welcomed.

7.5 Distributions and dividends

The rights of shareholders to receive dividends from a company will generally be found in the company’s articles. Distributions to shareholders including the payment of dividends are also governed by Articles 114 and 115 of the Companies Law as specified above. Article 115(4) provides that a mcompany may make a distribution at any time provided that the directors who make the distribution mmake a statement that they have formed the opinion that after the distribution, and having regard mto the prospects of the company and the intentions of the directors and the financial resources of the mcompany, it will be able to carry on business and discharge its liabilities as they fall due for at least one year after the distribution. That declaration should be referred to and kept with the accounts of the company.

Article 115(5) of the Companies Law specifies that a director who makes a statement under Article 115(4) of the Law without having reasonable grounds for the opinion expressed in the statement is guilty of an offence. The Companies Law gives no guidance on what constitutes reasonable grounds.

As a matter of practice, this will vary depending on the complexity of a company’s trading and accounting position. For trading companies, accounting advice may well need to be taken. However, the test is lower for an open-ended investment company that may make a distribution if the directors making it reasonably believe that after the distribution is made the company will be able to discharge its liabilities as they fall due.

New provisions in the Law (Article 115ZA) allow retrospective applications to court where a distribution has been made contrary to Article 115. The Court can effectively validate such a distribution if certain conditions are met in relation to the solvency of the company immediately after the distribution and at the time of the application (and also, prospectively, at a time 12 months after the distribution if the application is made within 12 months of the distribution). These provisions also set out the consequences of an unlawful distribution for the shareholder concerned. For an example of the Royal Court retrospectively validating distributions exceeding £2billion pursuant to Article 115ZA, see Representations of RBSI Limited and another [2017] JRC120A.

7.6 Members' rights, the rule in Foss v Harbottle and unfair prejudice istributions and dividends

A fundamental principal of company law is that shareholders own companies and appoint directors to run them. The company acts through its directors. A potential difficulty arises, however, in circumstances where shareholders may wish the company to bring an action to redress a wrong done to the company, but the directors do not wish to sue. The basic rule, set out in the English case of Foss v Harbottle (1843) 67 E.R. 189, is that a duty owed to the company can only be enforced and should be pursued by the company itself and not by individual shareholders. Under English case law, the shareholder wishing to bring proceedings will, in all likelihood, have to do so by means of a derivative action, and in so doing persuade the court that it is appropriate for him as shareholder (as opposed to the company itself) to bring the action and that the rule in Foss v Harbottle should not apply.

Directors owe duties to the company as a whole and therefore, prima facie, they fall to be enforced by the company as a whole. However, it is feasible, under Article 74(2) of the Companies Law, for all of the members of the company to authorise or ratify a breach of those director's duties specified in Article 74(1) provided that after the act or omission, the company will be able to discharge its liabilities as they fall due. As a general rule, proceedings on behalf of the company must be taken by the directors: this is why most of the cases relating to breach of directors' duties have been brought after control of the company has changed hands or by liquidators of insolvent companies after the directors' powers have lapsed.

Even under the unmodified Foss v Harbottle regime an individual shareholder could take proceedings against the persons who controlled the company where the act complained of:

(a) was ultra vires or illegal; or

(b) should have been sanctioned by extraordinary or special resolution, and was not; or

(c) infringed the rights of an individual shareholder in his capacity as member of the company; or

(d) was a fraud on the minority by those controlling the company - for instance, by the expropriation of company property; negligence could be treated as a fraud on the minority if the directors' negligent use of their powers resulted in their improperly receiving a benefit at the expense of the company.

These principles have been discussed and affirmed over the past decade in a number of Jersey cases, including Eves v St. Brelade's Bay Hotel Ltd UJ 1995/97, 1995 JLR Note 8a, Khan (née Osman) v Leisure Enterprises (Jersey) Ltd 1997 JLR 313 and Eves v Crills UJ 1998/30, 1998 JLR Note 6c. In Gamlestaden Fastigheter AB v Baltic Partners Limited [2007] UKPC 26, [2007] 4 All ER 164, the Privy Council refused to strike out an action by certain shareholders of an insolvent company in respect of their claim against directors for alleged mismanagement even though such a claim would not make the company solvent and so benefit the plaintiff as a member. The fact that the plaintiff was a creditor and if successful would be benefited in that capacity was sufficient.

The emphasis in the Foss v Harbottle rule on control through ownership was partially eroded by the English case of Prudential Assurance Co. Ltd. v Newman Industries Ltd (No. 2) [1982] Ch 204 in which the court was prepared to entertain an action brought by a minority shareholder against directors who did not hold a formal controlling interest and to accept that such an action might be both derivative (i.e. brought in the company's name) and representative (i.e. brought by one shareholder on behalf of all).

Articles 141 to 143 of the Companies Law offer the shareholders another remedy allowing any shareholder or the Minister for Economic Development or the Jersey Financial Services Commission to apply to the Royal Court if the company's affairs are or are about to be conducted so as unfairly to prejudice the shareholders or some of them. The Royal Court is given powers to award appropriate relief.

The distinction between seeking a derivative action under an exception to the Foss v Harbottle rule and an action commenced under Article 141 unfair prejudice was explained in Prestigic (Wisley) Nominees Limited Company v JTC Management Limited [2012] JRC 97. The case shows the principles to be followed in an Article 141 application, which is increasingly used in cases where there has been mismanagement of the company's affairs or to oppose relief for a particular director's misconduct.

The Jersey Financial Services Commission or the Minister for Economic Development may, on the application of a member, officer or creditor, appoint inspectors to investigate and report on the affairs of the company, but must first be satisfied that there is good reason to do so. Inspectors have wide powers of investigation and search including the power to require production of bank accounts maintained by directors.

Chapter 8: Takeovers, compromises, mergers and migration

8.1 Takeovers, compromises and mergers

Part 18 of the Companies Law deals with takeovers.

A company may become the subject of a takeover bid, and if this is a possibility the board should have a contingency plan for managing such an event (e.g. by assigning responsibility for different actions to different individuals). It is better to work out this sort of detail in advance in order to leave the board free to consider the issues of principle that a bid raises.

In particular shareholders of nine-tenths or more of a company's capital or a particular class of capital may acquire the remaining shares by following a procedure set out in the Companies Law. Whenever an offer is made that results in the offeror obtaining nine- tenths or more of the capital or a particular class of capital, the holder of any other shares may make the offeror purchase such shares.

The Companies (Takeovers and Mergers Panel) (Jersey) Law 2009 provides for the creation and appointment of a takeover panel and for the making of rules and procedures to govern its application. The panel appointed is the Panel on Takeovers and Mergers of the UK.

Part 18A of the Companies Law provides for compromises and arrangements with creditors as well as shareholders having facilities for schemes of reconstruction and/or amalgamation of companies.

Part 18B of the Companies Law permits two or more existing companies to merge and continue as a new single company, provided neither company has guarantor or unlimited members (these restrictions do not apply to mergers of wholly-owned subsidiaries). The Companies Law gives creditors of either existing company the right to object to proposed mergers. Clearly, in cases where companies merge or change their jurisdiction of residence/incorporation, the directors should consider whether it is prudent for them to remain in position.

Part 18BA of the Companies (Amendment No.11) (Jersey) Law 2014 provides for demergers. In the event of a demerger, the States may make provision for enabling the undertaking, property and liabilities of a company to be divided among two or more companies.

In the event of takeovers, mergers and demergers, directors should be careful where they have conflicts of interest (e.g. where they are also shareholders) not to join with the remainder of the board in expressing any views on the offer and professional advice should be sought as soon as possible particularly where the transaction is governed by the Channel Islands Stock Exchange or the UK Takeover Code or regulated by the London Stock Exchange or any other stock exchange.

8.2 Migration

Part 18C of the Companies Law provides that an overseas company, if permitted to do so under the law of its place of incorporation, may apply to the Jersey Financial Services Commission to continue its corporate existence as a company incorporated in Jersey. Similarly, a Jersey incorporated company will be permitted to repatriate to another jurisdiction, provided that the company resolves to do so by special resolution and the proposed new jurisdiction meets the criteria set out in these articles. A number of safeguards have been included that will allow creditors and minority members of a company to object if they believe that continuance overseas will unfairly prejudice their own position. Only when all objections have been satisfactorily resolved will the Jersey Financial Services Commission authorise a Jersey company to continue overseas.

Directors should be cautious in cases where a company changes its jurisdiction of residence/incorporation. In the case of companies moving to Jersey, directors will wish to carry out due diligence on the company in relation to its previous activities. In the case of companies leaving Jersey, the directors must take legal advice in relation to the laws of the new jurisdiction and, if they are not comfortable operating within what may be an unfamiliar framework, consider whether they wish to resign.

Chapter 9: Winding up and désastre

9.1 Various procedures

Part 21 of the Companies Law covers arrangements for the winding up of a company. This can be by way of summary (solvent) winding up, a creditors' (typically insolvent) winding up or a court winding up on public interest or just and equitable grounds. Winding up may occur at the end of a company's stated period of existence, upon the occurrence of an event specified in the company's memorandum or if the members pass a special resolution or the court makes an order on just and equitable grounds.

Despite its somewhat misleading name, a creditors' winding up is in fact initiated by the members of the company rather than on the application of creditors. A summary winding up may be conducted by the directors or a liquidator but a creditors' winding up must be conducted by a liquidator with appropriate qualifications such as a qualified chartered accountant. The precise qualifications are set out in the Companies (General Provisions) (Jersey) Order 2002. The creditors are able to overrule the members' choice of liquidator and in case of a dispute it may be proper for the directors to bring the matter to the court for determination. See Directors of UGDJ Limited v Laverty [2007] JRC 190.

Creditors or the company itself can apply to the court for a désastre if a company is insolvent but has realisable assets. A désastre is conducted by the Viscount although he may engage the services of a specialist liquidator firm. A creditors' winding up is conducted under the Companies Law and a désastre under the Désastre Law. In practice the provisions mirror each other so that in most respects the procedure is similar and the results the same. Finally, a company can be struck off the register for failing to pay its annual return fee due in January each year.

9.2 Summary or solvent winding up

As all creditors can and will be paid, a summary winding up is more internal to the company than other procedures that apply to an insolvent company. Once the summary winding up procedure is commenced, directors can only act for the purposes of the winding up itself.

A summary winding up will terminate:

(a) when a solvency statement is filed stating that there are no assets or liabilities; or

(b) when after meeting liabilities and distributing assets a notice is filed stating there are no assets or liabilities; or

(c) when it is superseded by a creditors' winding up (i.e. the directors consider liabilities cannot be paid off within six months or, if they fall due later, as they fall due); or

(d) if the members pass a special resolution to do so and fulfil certain requirements.

A summary winding up is commenced by all the directors signing a statement of solvency and within 28 days of the solvency statement the shareholders have passed a special resolution to wind up the company summarily. A statement of solvency must state that:

(a) the company has no assets or liabilities; or

(b) the company has assets and no liabilities; or

(c) the company will be able to discharge its liabilities in full within the six months after the commencement of the winding up; or

(d) the company has liabilities that will arise more than six months after the commencement of the winding up and which it will be able to discharge in full as the liabilities fall due; or

(e) both (c) and (d) apply to the company.

If afterwards it appears that the statement of solvency was not correct, the directors are under a duty to call a meeting of creditors and produce a statement of affairs verified by affidavit. On the appointment of a liquidator, or the Viscount in a désastre under the Désastre Law, the powers of the directors (subject to certain minor exceptions) cease and are vested in the liquidator or the Viscount respectively. Under Article 213 of the Companies Law the court has power within ten years of a dissolution to declare a dissolution void and give directions that the company and all interested persons are restored to the position they were in immediately prior to the dissolution. Article 213 vests in the court, following a summary winding up or where a dissolution has been declared, the power, on the application of a creditor, to make shareholders liable to contribute towards liabilities up to the amount of the value of assets they received on a distribution. Directors and liquidators who signed a solvency statement or a distribution statement may be jointly and severally liable with those shareholders to make up any deficiency for the benefit of creditors.

Where a Jersey company still owning movable property situated in Jersey is dissolved, Her Majesty's Receiver General will be entitled to claim those assets, passing them to the Crown. See re Salamanca Corp. Servs. (Jersey) Ltd 2016 (1) JLR N.

9.3 Creditors' winding up and désastre

9.3.1 Personal implications

In normal circumstances the directors will not be personally liable to the creditors of the company provided they are not contracting on their own account. A director should make it clear that he is contracting on behalf of the company and not on his own account in order to avoid doubt. This is particularly important when a director signs a document such as a cheque or any order for goods or money on behalf of the company. Failure to include the name of the company on such a document may result in the director being personally liable for the money or the price of the goods unless

duly paid by the company. The director should also indicate he signs as a “director”. However, when the company is insolvent, the director’s paramount duty is to the interests of creditors, which duty supersedes any duty owed to the company itself or its shareholders and, of course, the personal interests of the individual director.

Where an insolvency arises the conduct of directors will be scrutinised and creditors will be interested in the company pursuing and recovering from whosoever. Directors are more vulnerable to the risks set out in Chapter 5.

In reality, it may be very difficult to determine when a company is insolvent. Given the potential personal liability that may attach to the directors in the event that the court finds that directors have been responsible for allowing a company to trade wrongfully, directors must ensure that any suspicion they have that the company may be near to an insolvent position is thoroughly investigated. If the suspicions are confirmed, the company will need immediate advice from both accountants and lawyers with the necessary expertise as insolvency practitioners to determine whether any remedial measures short of liquidation are possible. In this connection, the directors should consider whether they should continue trading or seek an immediate liquidation.

Failure to take any of the steps outlined above will severely reduce a director’s capacity to mount a successful defence against a plaintiff seeking to make him personally liable for the debts of the company. If remedial measures short of winding up are not possible, the directors must ensure that the company ceases to trade. These issues are dealt with in greater detail in 5.1, 5.2 and 5.3 above.

If in the course of a creditors’ winding up it appears that any person has been guilty of an offence, the liquidator has a duty to report it to the Attorney General. The Viscount has a similar duty in a désastre. Past and present officers of a company and employees, amongst others, have a duty to co-operate with the liquidator in a liquidation and the Viscount in a désastre and failure to do so is an offence.

9.3.2 Setting aside transactions

The Companies Law and the Désastre Law contain a number of provisions aimed at reversing transactions whereby the assets of a company have been disposed when they ought to have been preserved for the company’s creditors in its insolvency.

(a) Transactions at an undervalue

Where there is a transaction at an undervalue Article 176 of the Companies Law allows the court on the application of a liquidator, in a liquidation, and Article 17 of the Désastre Law allows the court on the application of the Viscount, in a désastre, to make an appropriate order to restore the position to what it would have been had the transaction not been made. A transaction may constitute a “transaction at an undervalue” where the company makes a gift of its property or where there is no “cause” or the “cause” obtained by the debtor is significantly less than the value provided by the debtor.

However, the court cannot make such an order where the company entered into the transaction in good faith and in furtherance of its business and at the time of the transaction there were reasonable grounds to believe it would benefit the company. The transaction must have occurred

at a time within five years ending with the commencement of the winding up or désastre and at a time when it is established that the company was insolvent or became insolvent as a result of entering into the transaction. Where the transaction was with a connected or associated person (as defined) the evidential burden as to insolvency shifts and the transaction will be declared defective unless it can be proved that the company was solvent at the time of the transaction and remained so as a result of it. A transaction entered into more than five years prior to the insolvency cannot be set aside under these provisions. The court may not be able to make an order where third-party interests are affected.

Where an application is made to the court in respect of a transaction at an undervalue, the court has wide powers to unwind the transaction or make any person receiving a benefit under the transaction pay a fair value for it.

(b) Preferences.

Under Article 176A of the Companies Law and Article 17A of the Désastre Law, a debtor gives a preference where:

- that person is one of the company's creditors or a surety or guarantor surety for any of its debts or other liabilities; and
- the debtor does or suffers anything to be done that puts that person in a better position if there is a désastre or winding up than he would have been if that thing had not been done.

An example of a preference is granting an existing unsecured creditor security or repaying one creditor in advance of other creditors. For a preference to be vulnerable to challenge, the company must have been influenced in its decision to prefer the creditor. The company is presumed to be so influenced if the preference is given to a connected or associated person (as defined). The transaction at issue must have occurred at a time within twelve months ending with the commencement of the winding up or désastre and at a time when it is established that the company was insolvent or became insolvent as a result of giving the preference. Where the transaction was with a connected or associated person, then the evidential burden as to insolvency shifts in the same way as in relation to transactions at an undervalue. In other words a transaction constituting a preference made within twelve months of insolvency will be set aside unless it can be proved that the company was solvent at the time of the transaction and remained so as a result of it.

The court has wide powers to set aside a preference and to make anyone obtaining a benefit pay a fair value for it.

(c) Extortionate credit transactions

Under Article 179 of the Companies Law and Article 17C of the Désastre Law a liquidator or the Viscount may ask the court to declare that a credit transaction is extortionate i.e. grossly exorbitant or grossly contravening ordinary principles of fair dealing. The court has wide powers to set it aside, vary the terms, require reimbursement and call for an account.

9.4 Just and equitable winding up

Pursuant to Article 155 of the Companies Law, a company that has not been declared en désastre may be wound up if it is:

(a) just and equitable to do so: or

(b) it is expedient in the public interest to do so.

An application for (a) may be made by the company, a director or a member of the company, and an application for (a) or (b) may be made by the Minister for Economic Development or the Jersey Financial Services Commission.

The court has power to appoint a liquidator and direct the manner for conducting the winding up.

Directors should be aware that this is a useful provision where members have fallen out with each other or the substratum or the purpose of the company has ceased to exist. The Royal Court stated, in Jean v Murfitt UJ 1996/237, 1996 JLR Note 8b and Note 8c, that the term "just and equitable" was not exhaustively defined by the Companies Law, but ought to be determined with regard to all of the individual circumstances of the case.

It can also be used where a company is insolvent or heading to insolvency but the shareholders fail or refuse to wind up the company thus potentially exposing the directors to personal liability if they resign or continue to trade. It is also a remedy of last resort for the Jersey Financial Services Commission where there have been serious or consistent breaches of the Companies Law or Financial Services (Jersey) Law 1998. The public interest element will prevail over private rights in order to maintain the good reputation of the Island or to protect others. The Jersey Financial Services Commission may seek to recover insurance rights due to the company as in Jersey Financial Services Commission v Alternate Insurance Services Limited [2007] JRC 52 and Re Huelin-Renouf Shipping Limited 2013 JRC 164.

The court is vested with wide powers to make such orders as it sees fit to ensure that the winding up is dealt with in an orderly manner that can permit greater flexibility than the more rigid désastre and creditors' winding up procedures. The term "just and equitable" has been extended to different factual positions as shown in a number of cases including Re Horizon Investments (Jersey) Limited [2012] JRC 39 and Euro Value Investment Company I v Greater Europe Deep Value Fund II Limited [2012] JRC 146, Huelin Renouf Shipping Ltd [2013]JRC164, Re Collections Group [2013] JRC 096, Re Maltete Holdins Ltd [2012] JRC 172 and Re Anthony Investment (Esplanade) Ltd [2013] JRC 217A and to the cases to which they refer.

9.5 Changed powers and duties in a winding up

The authority for directors to exercise their powers will cease on:

(a) a summary winding up where a liquidator has been appointed (Article 149 of the Companies Law);

(b) a creditors' winding up when the liquidator is appointed or to the extent the liquidation committee sanctions their continuance (Article 163 of the Companies Law);

(c) a declaration en désastre by virtue of all assets becoming vested in the Viscount (Article 8 of the Désastre Law); and

(d) on a just and equitable winding up (by necessary implication) to the extent expressly or impliedly required by the terms of the court order (Article 155 of the Companies Law).

In a solvent winding up without a liquidator, the directors' powers will be exercisable only for the purpose of conducting the winding up. In an insolvent winding up, the directors will have statutory and common law duties to assist those responsible for the winding up and there are sanctions if they fail to do so.

9.6 Disqualification

A liquidator or the Viscount may make a report to the Attorney General pursuant to Article 184 of the Companies (Jersey) Law 1991 or Article 43 of the Bankruptcy (Désastre) (Jersey) Law 1990 where the liquidator or Viscount believes a criminal offence has been committed by the company or any person, or where the liquidator or Viscount believes a disqualification order should be sought against a director pursuant to Article 78 of the Companies (Jersey) Law 1991.

Under Article 78 of the Companies Law following an insolvent winding up or a désastre, the Jersey Financial Services Commission, the Minister for Economic Development, the Attorney General or the Viscount may apply for an order for disqualification of a person from holding office as a director. The court may grant the request if it is satisfied that the director's conduct in relation to the company makes him unfit to be concerned in the management of a company.

The order will disqualify the director from acting as a director of a body corporate. That expression is defined to include all companies. Accordingly as a matter of Jersey law a disqualification order will disqualify a person from acting as a director of any company wherever incorporated. A person who is disqualified will, if he performs the role of director or acts as a director by whatever name called or if he is involved in the management of a company, become personally liable for the liabilities of the company incurred at a time when that person acted in breach of a disqualification order. A person who acts in breach of a disqualification order also commits a criminal offence punishable by fine and/or imprisonment. A director may be disqualified under the Companies Law for up to fifteen years (in line with the applicable period under the Désastre Law).

There is no reason why disqualification should not apply to corporate directors and of course individuals who are directors of corporate director companies.

Where there has been fraud, rather than mere incompetence, three years has been held an appropriate period and a second fraud will make disqualification very likely. See In Re Dimsey 2000 JLR 401.

The Jersey courts have in the past decade ruled on a number of issues relating to company bankruptcy that are particularly relevant to directors. In Re Delaney UJ 1995/217, 1995 JLR Note 2b it was decided that the proper time for the Attorney General to make an application to disqualify a director who had committed a criminal offence relating to désastre (using his powers under Article 24(7) of the Désastre Law) is at the time of sentencing. However, a later application is not to be dismissed if the director deserves disqualification. In Re Hay UJ 1996/109, 1996 JLR Note 1b the Royal Court declared that the disqualification of a director under such circumstances should run from the date that the order was made, rather than the earlier date of sentence or declaration, as the purpose of protecting the public ought not to be frustrated by the expiry of the disqualification period before the director is released from prison. In Re Baltic Partners UJ 1996/75, 1996 JLR Note 1c the Royal Court found that company directors may challenge a declaration of désastre once made, even though the affairs of the company are already in the hands of the Viscount.

Appendix 1: Offences contained in the Companies (Jersey) Law 1991

see 5.5

Article of Law creating offence	General nature of offence	Punishment fine*/ imprisonment	Daily default fine* (where applicable)
12(2)	Company failing to send to one of its members a copy of its memorandum or articles, when so required by the member	Level 3	
14(4)	Company failing to deliver to Judicial Greffier copy of altered certificate of incorporation following change of name	Level 3	Level 2
15(5)	Company failing to change name on direction of registrar	Level 3	Level 2
16(5)	Company failing to comply with condition of direction, or to deliver to registrar copy of notice of direction of the Jersey Financial Services Commission, or of withdrawal or amendment of condition	Level 3	Level 2
17(5)	Private company failing to give written notice to registrar of increase of membership beyond 30	Level 3	Level 2
17(8)	Private company failing to deliver to registrar Act of the court relieving company from consequences of increasing the number of its members beyond 30	Level 3	Level 2
17(8)	Company failing to deliver to registrar copy of direction by the Jersey Financial Services Commission modifying Article 17(2) in its application to the company	Level 3	Level 2
22(1A)	Company failing to have its name engraved on company seal	Level 3	
22(2)	Officer of company etc. using company seal without name engraved on it in legible characters	Level 3	

Appendix 1

Article of Law creating offence	General nature of offence	Punishment fine*/ imprisonment	Daily default fine* (where applicable)
29(3)	Failure to comply with Order of Minister prohibiting the circulation of a prospectus in Jersey, the circulation of a prospectus outside Jersey by a company, or the procuring by a company (whether in or outside Jersey) of the circulation of a prospectus outside Jersey	2 years or a fine; or both	
33	Circulation of a prospectus with a material statement in it that is untrue or misleading or with the omission from it of the statement of a material fact	10 years or a fine; or both	
41(3)	Company failing to keep a register of members	Level 4	Level 2
42(1B)	Company registering transfer of shares to which Taxation (Land Transactions) (Jersey) Law 2009 applies, without production of LTT receipt	Level 3	
44(4)	Company failing to give notice to registrar as to place where register of members is kept	Level 3	Level 2
45(3)	Refusal of inspection of members' register; failure to send copy on requisition	Level 3	
46(3)	Misuse of information obtained from members' register	A fine	
47(4)	Company failing to deliver to registrar Act of court ordering rectification of register of members	Level 3	Level 2
49(10)	Company failing to comply with requirements in respect of overseas branch registers	Level 3	Level 2
50(5)	Company default in compliance with Article 50(1)	Level 3	Level 2
	(certificates to be made ready following allotment or transfer of shares)		
53(5)	Company failing to deliver to registrar Act of court when application made to cancel resolution varying members' rights	Level 3	Level 2
54(5)	Company failing to deliver to registrar statement or notice required by Article 54 (particulars of special rights of members)	Level 3	Level 2

Article of Law creating offence	General nature of offence	Punishment fine*/ imprisonment	Daily default fine* (where applicable)
55(10)	Director making statement without reasonable grounds for the opinion expressed	2 years or a fine; or both	
58B(4)	Company failing to dispose for treasury shares	Level 3	Level 2
61A(3)	Director making solvency statement without reasonable Grounds for the opinion expressed	2 years or a fine; or both	
66	Officer of company concealing name of creditor entitled to object to reduction of capital, or wilfully misrepresenting nature or amount of debt or claim, etc.	2 years or a fine; or both	
67(9)	Company failing to comply with requirements as to registered office	Level 3	
69(2)	Company failing to have name on business correspondence, invoices, etc.	Level 3	
70(3)	Company failing to comply with Article 70(1) or (2) (matters to be stated on business correspondence, etc.)	Level 3	
71(6)	Company failing to comply with requirements for annual returns	Level 3	Level 2
74A(2)	Company failing to record contracts with sole member who is a director	Level 3	
78(4)	Person acting in contravention of disqualification order	2 years or a fine; or both	
83(4)	Default in complying with Article 83 (keeping register of directors and secretaries; refusal of inspection)	Level 3	Level 2
87(8)	Company default in holding annual general meeting	Level 4	
88(3)	Company default in complying with the Jersey Financial Services Commission direction to hold company meeting	A fine	
88(5)	Company failing to register resolution that meeting held under Article 88 is to be its annual general meeting	Level 3	Level 2

Appendix 1

Article of Law creating offence	General nature of offence	Punishment fine*/ imprisonment	Daily default fine* (where applicable)
95A(2)	Sole member failing to provide company with written record of decision	Level 3	
95ZA(5)	Company and officer in default failing to comply with Article 95ZA(2) to (4) (circulation of written resolutions Proposed by directors etc)	Level 3	
95ZC(5)	Company and officer in default failing to comply With Article 95ZC(2) to (4) (circulation of written Resolutions required under Article 95ZB etc)	Level 3	
96(3)	Failure to give notice, to member entitled to vote at company meeting, that he or she may do so by proxy	Level 3	
96(5)	Officer of company authorising or permitting issue of irregular invitations to appoint proxies	A fine	Level 2
98(4)	Company failing to keep minutes of proceedings at company and board meetings, etc.	Level 3	Level 2
99(3)	Refusal of inspection of minutes of general meeting; failure to send copy of minutes on member's request	Level 3	
100(5)	Company failing to include copy of resolution to which Article 100 applies with memorandum or articles; failing to forward copy to member on request	Level 3	
109	Company failing to comply with Article 103 (keeping accounting records); 104 (retaining accounting records); 105 (preparing and laying accounts); Article 106; (publishing interim accounts); Article 107 (supplying copies of accounts to members) or 108 (delivering copy of accounts to registrar)	Level 3	For contravention of Article 107 or 108
109	Liquidator or other officer of public company failing to comply with Article 103, 104, 105, 106, 107 or 108		2 years or a fine; or both
110(5)(a)	Failure to comply with an obligation imposed by an order made under the Article	Level 3	Level 2

Article of Law creating offence	General nature of offence	Punishment fine*/ imprisonment	Daily default fine* (where applicable)
110(5)(b)	Knowingly or recklessly provides information that is false or misleading in a material particular	2 years or a fine; or both	
111(16)	Failure by recognised auditor or any officer in default to inform the Jersey Financial Services Commission of change in provided information	Level 3	Level 2
111(17)	Person providing false or misleading information	2 years or a fine; or both	
113(10)	Company failing to appoint auditor when required to do so	A fine	
113(10)	Officer failing to appoint auditor when company required to do so	2 years or a fine; or both	
113B(12)	Auditor ceasing to hold office failing to deposit statement as required by Article 113B(9)	A fine	
113B(12)	Failure by officer of auditor ceasing to hold office to deposit statement as required by Article 113B(9)	A fine	
113B(13)	Company failing to send notice of auditor's resignation to members and to other persons entitled to receive notice of general meetings	A fine	
113B(13)	Failure by officers of company to send notice of auditor's resignation to members and to other persons entitled to receive notice of general meetings	A fine	
113B(14)	Recognised auditor failing to keep working papers of audit of market traded company in the English language or failing to produce them on demand	A fine	
113B(14)	Officer of recognised auditor failing to keep working papers of audit of market traded company in the English language or failing to produce them on demand	A fine	
113C(2)	Company officer or secretary making false or misleading statement to auditors	5 years or a fine; or both	

Appendix 1

Article of Law creating offence	General nature of offence	Punishment fine*/ imprisonment	Daily default fine* (where applicable)
113D(4)	Person accepting an appointment to be, or acting as, an auditor of a market traded company or attempting to persuade others that the person is a recognised auditor, when not a recognised auditor	2 years or a fine; or both	
113D(4)	Person accepting an appointment to be, or acting as, an auditor of a company or attempting to persuade others that the person is an auditor, when not an auditor	2 years or a fine; or both	
113D(4)	Person failing to give company notice of ineligibility	2 years or a fine; or both	
113D(7)	Person providing false or misleading information	2 years or a fine; or both	
113F(2)	Auditor or officer in default if auditor acting when prohibited or failing to give notice	2 years or a fine; or both	
113L(4)(a)	Recognised auditor or officer in default failing to comply with a requirement of the Jersey Financial Services Commission to provide information	Level 3	
113L(4)(b)	Recognised auditor or officer in default providing false or misleading information to the Jersey Financial Services Commission	2 years or a fine; or both	
113P(9)	Unauthorised disclosure of information	2 years or a fine; or both	
113Q(4)	Company failing to comply with a direction to have its accounts re-audited or to restate them (and failing, if further directed to do so, to have those restated accounts audited)	A fine	
113Q(4)	Officer of company that fails to comply with a direction to have the company's accounts re-audited or to restate them (and failing, if further directed to do so, to have those restated accounts audited)	2 years or a fine; or both	

Article of Law creating offence	General nature of offence	Punishment fine*/ imprisonment	Daily default fine* (where applicable)
115(5)	Director making statement without having reasonable grounds for doing so	2 years or a fine, or both	
117(6)	Offeror failing to send to company whose shares are the subject of the offer notice and declaration required by Article 117(4); making false declaration for purposes of Article 117(4)	2 years or a fine; or both	
119(6)	Offeror failing to give minority shareholder notice of rights exercisable under Article 119(1) or (2)	A fine	
125(4)	Company failing to annex Act of court to memorandum	Level 3	
126(6)	Company failing to comply with requirements of Article 126 (information to members and creditors about compromise or arrangement)	Level 3	
126(7)	Director or trustee for debenture holders failing to give notice to company of such matters relating to himself or herself as are necessary for purposes of Article 126	A fine	
127(4)	Company failing to deliver to registrar Act of court sanctioning compromise or arrangement	Level 3	Level 2
127G(1)	Person providing false, misleading or deceptive information or document in connection with application under Part 18B	2 years or a fine; or both	
127G(2)	Person signing certificate without reasonable grounds for doing so directed to do so, to have those restated accounts audited)	2 years or a fine; or both	
127W(4)	Director, or future director, making statement without having reasonable grounds for doing so	2 years or a fine, or both	
127Y	Person giving false, misleading or deceptive information in respect of application under Part 18C	2 years or a fine, or both	
127YDA(4)	Company or cell failing to comply with requirements re directors	Level 3	Level 2

Article of Law creating offence	General nature of offence	Punishment fine*/ imprisonment	Daily default fine* (where applicable)
127YE(3)	Cell company failing to provide annual return for cell of the company	Level 3	Level 2
127YE(5)	Cell of cell company and officer failing to provide information to cell company	Level 3	Level 2
127YI(5)	Director making declaration without reasonable grounds to do so	2 years or a fine, or both	
127YI(7)	Cell company and officers failing to file document in respect of cell transfer	Level 3	Level 2
127YIA(5)	Director making declaration without having reasonable grounds to do so	2 years or a fine, or both	
127YIA(7)	Cell company and officer failing to file document in respect of cell transfer	Level 3	Level 2
127YR(3)	Director failing to keep assets of protected cell company separate or failing to make clear the position of company in respect of an agreement by it in respect of a cell	A fine	
127YT(8)	Director making statement without reasonable grounds for the opinion expressed	2 years or a fine; or both	
127YU(9)	Creditor failing to keep cell assets separate and identifiable	Level 3	Level 2
127YU(15)	Company failing to take action in respect of loss wrongly suffered by its cellular or non-cellular assets	Level 3	Level 2
130(3)	Person giving false, misleading or deceptive information etc. to an inspector	2 years or a fine; or both	
133	Obstruction of person acting in execution of search warrant issued under Article 132	2 years or a fine; or both	
143(5)	Company failing to deliver to registrar Act of court altering, or giving leave to alter, company's memorandum or articles following application by member, Minister or the Jersey Financial Services Commission	Level 3	Level 2

Article of Law creating offence	General nature of offence	Punishment fine*/ imprisonment	Daily default fine* (where applicable)
146(4)	Director giving statement of solvency for the purpose of a summary winding up	2 years or a fine or both	
150(7)	Director or liquidator giving statement that company has no liabilities	2 years or a fine or both	
151(12)	Director or liquidator of company in summary winding up failing to take any required action on forming opinion that company is unable to discharge its liabilities as they fall due	2 years or a fine; or both	
154(5)	Director signs certificate without having reasonable grounds for belief that the statements in it are true	2 years or a fine; or both	Level 2
155(6)	Company and officer in default failing to deliver to registrar Act of court ordering company to be wound up on just and equitable grounds	Level 3	Level 2
158(2)	Company and officer in default failing to advertise resolution for creditors' winding up	Level 3	Level 2
160(3)	Company or director failing to comply with Article 160 in respect of calling or giving notice of creditors' meeting; directors failing to attend and lay statement before creditors' meeting	A fine	
161(6)	Liquidator failing to give notice of appointment	Level 3	Level 2

Appendix 2: Offences contained in the Bankruptcy (Désastre) (Jersey) Law 1990

See 5.5

The offence	**The offender**	**The sanction**	**Article of the law**
The debtor failing (without reasonable excuse) to list property, creditors and debtors, to provide information, or fail to assign or deliver up possession or control of property	The debtor, the company and any attributable director, manager, secretary, officer or liquidator	6 months and a fine	18
The debtor or any director of the debtor failing to notify the Viscount of change of address, employment or name	The debtor, the company or a director	6 months and a fine	18
The debtor in business for over 2 years failing to keep proper accounting records or preserving all accounting records, unless the omission was honest and excusable	The debtor, the company or a director	Fine or 6 months; or both	19
Person failing (without reasonable excuse) to respond to summons from Viscount Making false or misleading statements to or attempting to mislead the Viscount	The offending person	6 months and a fine	20
Debtor holding a prohibited or private office	The debtor or the company	6 months and a fine and director disqualification	24
Debtor obtaining credit without consent	The debtor or the company	6 months and a fine	25

Appendix 3: Offences contained in the Financial Services (Jersey) Law 1998

See 5.5

The offence	The offender	The sanction	Article of the law
Carrying on or holding out as carrying on financial service business in or from Jersey	The person	7 years or a fine; or both	7
Breach of a Jersey Financial Services Commission notice to display or communicate registration certificate	The registered person	Level 2	11A(1)
Failing to notify a change in a principal person or key person	The person	6 months and a fine	15(1)
Failing to notify a change	The registered person	2 years and a fine	15(5)
Failing to comply with a notice relating to shares	The person	2 years or a fine; or both	16(9)
Failing to comply with an order for accounting and auditing of a registered person	The person	2 years or a fine; or both	17(3)
Failing to comply with an order concerning client assets	The person	6 months or a fine; or both	20(4)
Failing to comply with an order concerning trust company business assets	The person	6 months or a fine; or both	21
Failing to comply with a direction from the Jersey Financial Services Commission	The person	2 years and a fine	23(15)
Allowing an individual to perform a function, be employed or hold a position in contravention of a direction	The person	2 years and a fine	23(15A)
Knowingly or recklessly providing the Jersey Financial Services Commission, or an inspector appointed by the Jersey Financial Services Commission, with information that is fake or misleading in a material particular	The person	5 years or a fine; or both	28(4)

Appendix 3

The offence	The offender	The sanction	Article of the law
Failing to provide the Jersey Financial Services Commission with information in his possession, knowing or having reasonable cause to believe, or being reckless as to relevant information for the Jersey Financial Services Commission, or withholding information likely to lead to the Jersey Financial Services Commission being misled	The registered person or former registered person	2 years or a fine; or both	28(6)
Issuing a prohibited or non compliant financial service advertisement	The registered person	2 years or a fine; or both	31(3)
Failing to provide a document, to assist or attend	The person	6 months or a fine; or both	33
on or answer questions of an inspector appointed by the Jersey Financial Services Commission or obstructing such inspector			
Obstructing a person with a warrant to enter and search premises	The person	2 years or a fine; or both	34(6)
Obstructing investigations by falsifying, concealing, destroying, disposing of or permitting the same	The person	2 years or a fine; or both	35(2)
Disclosing restricted information (subject to permitted disclosures) by a person receiving information under or for the purposes of the law or from a person who has received it	The person	2 years or a fine; or both	37(1)

Appendix 4: Offences contained in the Proceeds of Crime (Jersey) Law 1999

See 5.5

The offence	The offender	The sanction	Article of the law
Acquiring, using or possessing criminal property	The person	Fine or 14 years; or both	30(4)
Conceal, disguise, convert, transfer or remove criminal property from Jersey	The person	Fine or 14 years; or both	31(3)
Failure to make disclosure to a police officer where person knows or suspects that another is engaged in money laundering where suspicion arises out of the person's trade, profession business or employment	The person	Fine or 5 years; or both	34A
Failure to make disclosure a police officer where a person who is engaged in a financial services business suspects that another is engaged in money laundering	The person	Fine or 5 years; or both	34D
Disclosing information to another knowing or suspecting:	The person	Fine or 5 years	Article 35
(a) the Attorney General or a police officer is carrying on an investigation; or (b) a disclosure has or will be made to a police officer or employer and is likely to prejudice any investigation; or (c) a disclosure has or will be made and it is likely to prejudice any investigation that might be conducted.			
A person carrying on a financial services business contravening or failing to comply with a requirement contained in any Order applying to that business, e.g. Money Laundering (Jersey) Order 2008 and other Orders made under anti-abuse legislation. N.B. relevance of Codes of Conduct	The person/an officer of a body corporate Body corporate	Fine or 2 years; or both Fine	37

Appendix 5: Companies: Current review summary

(This is a Non-Exhaustive List)

1. Certificate of Incorporation and Memorandum & Articles of Association
2. Objects
3. Registered Office
4. Share Capital
5. Type of Company
6. Company Concerns
7. Company Purpose
8. Company Documentation
9. Other Documentation
10. Beneficial Ownership
11. Directors and secretary
12. Company Seal
13. Documents in Safe Keeping
14. Taxation
15. Company Assets - General
16. Company Assets - Specific
17. Credit cards
18. External-Advisers
19. Bookkeeping and Accounts
20. Liabilities and Borrowings
21. Guarantees
22. Loans Made
23. Company Minute Book
24. Correspondence
25. Business Risk Assessment
26. SWOT Assessment
27. Distributions

Action points arising: **1. Certificate of incorporation and memorandum & articles of association**	
(a) Date of Incorporation.	
(b) Country of Incorporation.	
(c) If Jersey	
(i) Are the memorandum and articles based on a standard form	Yes/No
(ii) If yes, is there anything special to be noted?	
(iii) If no, is there anything special to be noted.	
(d) If non-Jersey:	
(i) Who prepared the memorandum & articles/articles of incorporation?	
(ii) Have bylaws been adopted?	
State date adopted by the board of directors/shareholders.	
(e) Have subsequent special resolutions (or foreign company equivalent) been passed to change the memorandum and/or articles of association/bylaws?	Yes/No
(f) If yes, has a conformed version been produced?	
Ensure a document has been produced to illustrate amendments and place this in the minute book.	
(g) Is the company a private or public company?	Yes/No
(h) Has the company issued a prospectus?	Yes/No
(i) Is it a listed company?	Yes/No

Appendix 5

5. Type of Company	
Property	
Investment	
Trading	
Consultancy	
Special Purpose	
Fund Administration	
Other, please specify	
6. Company concerns	
Check whether:	
(a) The company holds all necessary governmental licences and it is compliant with all conditions and requirements.	
(b) There has been any breaches or alleged breaches of duty.	
(c) There are any claims or litigation affecting the company or its officers or circumstances that could give rise to them?	
(d) There have been or there are any investigations or regulatory enquiries.	
(e) All relevant laws have been complied with including:	
(i) employment law and procedure	
(ii) environmental law	
(iii) public health law	

(iv) anti abuse legislation	
(v) data protection etc?	
(f) Does the company engage in regulated activity?	
7. Company purpose	
(a) Why was the company established?	
(b) Describe ownership, purpose, activities, and other matters.	
(c) Is this still current?	Yes/No
If not, update.	
8. Company Documentation	
Check the secretary holds:	
(a) Certificate of incorporation (or foreign equivalent).	Yes/No
(b) Any change of name certificate.	Yes/No/NA
(c) COBO or governmental consent (or foreign equivalent).	Yes/No
If shares have been issued at a premium, is this in compliance with COBO/other consent?	Yes/No
(d) Up-to-date share register.	Yes/No
Have all transfers been registered and approved by directors?	Yes/No/NA
Have all share certificates been issued, sealed and countersigned?	Yes/No

(e) Original share certificates.	Yes/No
If not, state who and where held.	
(f) All minutes exist to evidence the business conducted.	Yes/No
Are they signed? If not, obtain signature.	Yes/No
(g) Notices for all meetings have been duly given?	Yes/No/NA
If not, was there agreement to waive notice?	
If no notice given, rectify position by a directors' resolution/ meeting.	
(h) Copies of documents have been approved at meetings. If not, obtain copies where applicable.	Yes/No
(i) Waiver signed by all shareholders, thereby dispensing with the need for an AGM, where articles permit.	Yes/No/NA
If not, are there AGM Minutes for those AGMs held?	Yes/No
(j) Proxy forms for attendance at AGMs?	Yes/No
(k) An up-to-date directors' register (where applicable) including alternates.	Yes/No
Ensure all appointments/resignations are properly approved, recorded, entered and registered in relevant jurisdiction.	Yes/No
Ensure minimum/maximum number of directors complied with. If not, rectify by directors'/shareholders' meeting.	Yes/No
(l) Letters of acceptance/consent to act/disclosures/resignation of directors and letters appointing alternate directors.	Yes/No
(m) An up-to-date secretary's register.	Yes/No
Ensure all appointments/resignations properly recorded, entered and registered in relevant jurisdiction.	Yes/No

(n) Letter of acceptance/consent to act/resignations as secretary.	Yes/No
(o) (For foreign companies where applicable) up-to-date register of other officers such as president and treasurer.	Yes/No
Ensure all appointments/resignations properly approved, recorded, entered and registered in relevant jurisdiction.	Yes/No
9. Other documentation	
(a) Powers of attorney.	
(i) Have any been issued?	Yes/No
(ii) To whom?	
(iii) General or specific?	
(iv) Limited in time or unlimited?	
(v) Purpose?	
(vi) Has the power of attorney been duly executed and approved by the directors and recorded in the minutes of the meetings of the directors?	Yes/No
Are these still required?	Yes/No
N.B. Unlimited general powers of attorney to be revoked unless specific reason to the contrary.	Yes/No
(b) Are there employment agreements and are they adequate?	Yes/No
(c) Other agreements/contracts.	
(i) Have these been properly executed i.e. under seal, witnessed, signed?	Yes/No
(ii) Are copies held?	Yes/No

Appendix 5

Were references obtained on those providing funds?	Yes/No
Does the company hold copies of duly verified passports/equivalent photographic ID of the Beneficial Owners and customer due diligence generally	Yes/No
If not, obtain from Beneficial Owners and ensure copies are duly verified.	
If the Company is held in a Trust, are the Company's affairs in accordance with the objectives of that Trust?	Yes/No
11. Directors and Secretary	
(a) State names, addresses and contact details.	
(b) Is there a service contract?	Yes/No
(c) Are the directors entitled to adequate remuneration and reimbursement for expenses?	Yes/No
(d) Is there adequate directors' and officers' liability insurance?	Yes/No
(e) Are there any indemnities in favour of directors?	Yes/No
(f) Does or would the company benefit from non-executive directors?	Yes/No
(g) (i) Does beneficial owner or a third party retain any kind of power or authority in relation to the company?	
(ii) How?	
(iii) For what purpose(s)?	
(iv) How has his power/authority been verified?	

Appendix 5

Appendix 5

If there are gaps in the Company's records, specify.	
Are assets held through an intermediary/underlying company? Specify.	Yes/No
Does the company wholly own the intermediary/underlying company?	Yes/No
If not, supply details.	
Who administers the underlying company?	
Who are the Directors of the underlying company?	
Identify and give addresses and contact details	
How is the underlying company funded? Specify.	
Is there a loan account between the Companies?	Yes/No
Is the loan documented?	Yes/No
If not, arrange for Directors to formalise, approve and ratify loan terms and balance.	

16. Company Assets - Specific	
(1) Real Estate/Moveable Assets	
If the Company owns real estate and or movable assets (ships/ boats / cars / works of art / chattels / house contents / other movable assets) answer:	Yes/No
(a) Are these assets fully insured?	Yes/No
Specify details.	
(b) Has a managing agent been appointed?	Yes/No
If yes, specify details.	
If no, how are the assets looked after?	
(c) Where are assets held?	
(d) Who resides in or uses the assets?	
(e) Do they pay commercial rent or other fees for this?	
(f) Does the Company have good title to the assets?	Yes/No
(g) Where are title deeds held or are they registered? If so, which registry?	Yes/No
(h) How has the asset(s) been purchased?	
(i) If applicable, has income been properly accounted for?	Yes/No/NA
(j) If applicable, has income been properly accounted for? authorised to inspect?	Yes/No
(k) When were the assets last valued?	

(2) Portfolio of Securities/Life Assurance/Other Intangible Assets	
(a) Has an Investment Manager been appointed and on what basis? Specify.	Yes/No/NA
(b) Is the mandate agreed and clear?	Yes/No
(c) When was it last reviewed?	
(d) Does the Company receive regular reports?	Yes/No
(e) Has the performance been reviewed?	Yes/No
(f) Is performance considered satisfactory?	Yes/No
(g) Is title to the assets in the name of the Company or a nominee? Specify?	
(h) Is all income properly accounted for?	Yes/No
(i) Check proceeds of sale accounted for where investments sold.	
(j) Does the Company hold any life policies, annuities etc?	Yes/No
If yes, specify	
(3) Holding Company for Trading Companies	
Does the Company own shares in any private trading company?	Yes/No
If yes, is it a 100%, or majority or minority interest?	
Who are the Directors of the underlying company?	

Specify the nature of the trading activities of the underlying company.	
Do Directors receive a report and accounts or other financial information about the underlying company?	Yes/No
Does the underlying company pay any dividends?	Yes/No
Is there a shareholders' agreement in place, if parties other than the Company hold shares?	Yes/No
(4) Trading Companies	
Does the Company trade?	
If yes, specify the nature and activities of the Company.	
State the places and companies involved.	
Is there a business plan/strategy?	
Do the Directors receive the report and accounts or other financial information about the company?	Yes/No
What are the strengths, weaknesses, opportunities and threats?	Yes/No
Does the Company pay any dividends?	Yes/No
Who are the shareholders?	
(5) Bank Accounts	
Does the Company or any underlying company have any monies on deposit?	Yes/No

If yes, where are they held?	
In whose name are the accounts held?	
Who has signing power on the account?	
Have the accounts and their operation been approved by the Directors?	Yes/No
Who receives bank statements?	
17. Credit Cards	
Have any credit cards been issued to:	
(1) the principal?	Yes/No
(2) a director of the Company?	Yes/No
State the names of the director(s).	
(3) other individual?	Yes/No
State names, addresses, and relationship to the Company:	

18. External - Advisers	Yes/No
Are there any other advisers or consultants to the Company?	
Specify full details and function and how the relation is evidenced.	
Lawyers	
Accountants	
Auditors	
IT	
Valuers	
Property/Investment Managers	
Custodians	
19. Bookkeeping and Accounts	
Who keeps accounting records for the Company and/or any underlying Company?	
Are management accounts kept?	Yes/No
Is there a cash flow forecast?	Yes/No
Is the company clearly solvent?	Yes/No
Are the accounting records satisfactory?	Yes/No
Are there management accounts?	Yes/No
How often, and who reviews them?	

Do the Directors receive copies of accounts/have access to accounting records?	Yes/No
Are annual accounts produced and approved by the company?	Yes/No
Are such accounts up to date?	Yes/No
Is there any requirement to have the company accounts audited?	Yes/No
Specify arrangements.	
Is there a need for an audit committee?	Yes/No
Are copies of company accounts sent to the beneficial owner or to others entitled to see the accounts? Specify names of recipients.	
20. Liabilities and Borrowings	
Are there any liabilities? If so, how much and when payable?	Yes/No
Are there any conditional liabilities?	Yes/No
Have any monies been borrowed in the name of the Company?	Yes/No
If yes, provide full details (e.g. amount, lender, terms, rate of interest).	
Are there any options or calls that can be made?	Yes/No
If yes, provide full details	

Is the borrowing secured on a Company asset? Specify.	
How is the interest cost funded?	
Can the company meet its liabilities as they fall due?	
21. Guarantees	
Have any guarantees been given by the Company? If so, to whom and for how much?	Yes/No
State reasons why given.	
Are the Company's obligations under the guarantee limited to the value of the Company assets?	Yes/No
If not, specify.	
Is there a cap on the maximum amount guaranteed and is it limited by time?	Yes/No
What benefit is being obtained by giving the guarantee?	
Have the obligations of the company been guaranteed by a third party and what is the extent of the right of the guarantor to claim his loss if the guarantee is called?	Yes/No

22. Loans made	
Have the Directors made any loans out of the Company's funds?	Yes/No
If yes, provide full details (e.g. amount, borrower, terms, rate of interest)	
Is the loan secured/unsecured?	Yes/No
State purpose of the loan.	
Are there any concerns that this is not on arm's length commercial terms?	Yes/No
Is there a formal written Loan Agreement in place with borrower? If not, obtain one.	Yes/No
23. Company Minute Book	
Ensure Company minutes are up to date.	
Were Directors' Meetings quorate and did the appropriate majority take decisions?	Yes/No
Who holds copies of all documents referred to in the minutes?	
Specify.	

How frequently are Directors' Meetings for this Company held?	
Are the Directors fully informed of the Company's activities?	Yes/No
Is there a proper review of the past, consideration of the present and appropriate strategy for the future?	Yes/No
24. Correspondence	
Has the Company received letters needing a response but which have not yet been answered? Specify.	Yes/No
Are there any outstanding matters on which the Company awaits reply/further information? Specify.	Yes/No
Have reminders been sent?	Yes/No
Is there any correspondence with UK or other foreign Revenue? Specify.	Yes/No
Are there any claims or proceedings outstanding or threatened by or against the company? Specify.	Yes/No
Has the company filed its annual return? State date.	Yes/No Date:

Who is responsible for ensuring this?	
25. Business Risk Assessment Review and consider.	
26. Swot Assessment Strengths; Weaknesses; Opportunities; and Threats	
27. Distributions	
What are the distribution powers?	
Is the distribution to shareholders?	Yes/No
Is the distribution by dividend?	Yes/No
Should the powers be exercised?	Yes/No
How much should the dividend be?	
Has a statement of solvency been completed?	Yes/No
Is it by loan or by a repayment of a loan? If yes, what are the terms?	
Is the loan to a shareholder/director/ third party?	

Appendix 5

Action points arising:

1. ______________________

2. ______________________

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19. ______________________

20. ______________________

Appendix 6
Useful Points of Contact and Websites

Institute of Directors
Jersey Branch Headquarters
Meadowlands
Rue a la Dame
St Saviour
Jersey
JE2 7NQ
Channel Islands
T: +44 (0) 1534 610799
E: jedirector@localdial.com
W: www.iod.com

Bedell Cristin
26 New Street
St Helier
Jersey
JE2 3RA
Channel Islands
T: +44 (0) 1534 814814
E: robert.gardner@bedellcristin.com/edward.drummond@bedellcristin.com
W: www.bedellcristin.com

Jersey Finance Limited
4th Floor
Sir Walter Raleigh House
48-50 Esplanade
Jersey
JE2 3QB
Channel Islands
T: +44 (0) 1534 836000
E: jersey@jerseyfinance.je
W: www.jerseyfinance.je

Jersey Financial Services Commission
and Companies Registry
PO Box 267
14-18 Castle Street
St Helier
Jersey
JE4 8TP
Channel Islands
T: +44 (0) 1534 822000
E: info@jerseyfsc.org
W: www.jerseyfsc.org

Judicial Greffe
Judicial Greffier
Royal Court House, Royal Square
St Helier
Jersey, JE1 1JG
Channel Islands
T: +44 (0) 1534 441300
E: jgreffe@gov.je
W: www.gov.je/judicialgreffe

The Law Society of Jersey
The Administrator
PO Box 493
St Helier
Jersey
JE4 5SZ
Channel Islands
T: +44 (0) 1534 613920
E: admin@jerseylawsociety.je
W: www.jerseylawsociety.je

Viscount's Department
The Viscount
Morier House
Halkett Place
St Helier
Jersey
JE1 1DD
Channel Islands
T: +44 (0) 1534 441400
E: viscount@gov.je
W: www.gov.je/viscount

Jersey Law
W: www.jerseylaw.je

Financial Reporting Council
W: www.frc.org.uk

Appendix 6

Useful Publications

"Dunlop on Jersey Company Law"
by Advocate Mark Dunlop of Bedell Cristin
Published by Key Haven Publications plc
www.khpplc.com

"Jersey Insolvency and Asset Tracking"
5th Edition by Anthony Dessain and Michael Wilkins
Published by Key Haven Publications plc
www.khpplc.com

"International Commercial Fraud"
by Goldspink & Cole including a chapter on Jersey
Published by Sweet & Maxwell

Suggested Further Reading

Financial Aspects of Corporate Governance (The Cadbury Report)

Study Group on Directors' Remuneration: Final Report (The Greenbury Report) - 1995

Committee on Corporate Governance: Final Report (The Hampel Report) - 1998

The Combined Code: Principles of Good Governance and Code of Best Practice - 1998

Internal Control: Guidance for Directors on the Combined Code (Turnbull Report) - 1999

Review of the Role and Effectiveness of Non-Executive Directors (Higgs Report) - 2003

A Review of Corporate Governance in UK Banks and Other
Financial Industry Entities (Walker Report) - 2009

A Regulatory Response to the Global Banking Crisis (The Turner Report) - 2009

Guidance on Board Effectiveness - March 2011 - FRC

Gender Diversity on Boards - October 2011 - FRC The UK Stewardship Code - September 2012 - FRC

Guidance on Audit Committees - FRC

The Independent Commission on Banking (The Vickers Report) - 2012

The UK Corporate Governance Code - September 2012 - FRC

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