The Company Director: Powers, Duties and Liabilities

Twelfth Edition

Peter Loose MA(Oxon)
Solicitor
Consultant, Edwin Coe, London

Michael Griffiths LLB, LLM
Formerly Deputy Head of the School of Legal Studies
at the University of Wolverhampton

David Impey MA(Oxon)
Solicitor
## CONTENTS

Preface \( v \)

Table of Statutes \( xxi \)

Table of Statutory Instruments \( xxxvii \)

Table of Cases \( xliii \)

### Chapter 1
The Origin and Nature of Companies 1

Corporations 1

The history of the modern company 1

Going behind the corporate veil 4

- Piercing under the Companies Act 4
- Piercing under the insolvency legislation 5
- The use of a company structure to limit exposure to risk 7
- Judicial ingenuity to get around the corporate veil 8
- Holland v HMRC 10

### Chapter 2
The Company and its Legal Framework 13

The Companies Act 2006 13

Background 13

- Companies Act 1985 14
- Associated Acts 15
- Table A 15
- Further developments prior to the Companies Act 1989 16
- Companies Act 1989 and later changes 16
- Statutory instruments 17
- Other developments 19
- The future 20
- The Companies Act 2006 20

Types of company 20

- The Companies Act 2006 21

Public and private companies 21

- The Companies Act 2006 23

The machinery of the company 24

- The Companies Act 2006 25

Same day registration 26

Choice of name 26

Public companies 27
<table>
<thead>
<tr>
<th>Chapter 3</th>
<th>Appointment of Directors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Identifying a company’s directors</td>
<td>67</td>
</tr>
<tr>
<td>Appointment of first directors on incorporation</td>
<td>68</td>
</tr>
<tr>
<td>Articles may repeat the provisions of the Companies Acts</td>
<td>70</td>
</tr>
<tr>
<td>Articles may name the first directors</td>
<td>70</td>
</tr>
<tr>
<td>Articles may specify appointor</td>
<td>71</td>
</tr>
<tr>
<td>Appointment of subsequent directors</td>
<td>71</td>
</tr>
<tr>
<td>Appointment by ordinary resolution of members in general meeting</td>
<td>71</td>
</tr>
<tr>
<td>Nomination by specified parties</td>
<td>73</td>
</tr>
<tr>
<td>Nomination pursuant to agreement for sale of shares</td>
<td>74</td>
</tr>
<tr>
<td>Appointment by the directors</td>
<td>75</td>
</tr>
<tr>
<td>Retirement of directors by rotation at the annual general meeting</td>
<td>75</td>
</tr>
<tr>
<td>Appointment of alternate directors</td>
<td>77</td>
</tr>
<tr>
<td>Number of directors</td>
<td>77</td>
</tr>
</tbody>
</table>
### Contents

Who can be a director? 78  
Directors of listed companies subject to the UK Corporate Governance Code 80  
- Disqualification by law 82  
- Disqualification orders 82  
- Bankrupts 98  
- Other disqualifications 98  
- Foreign disqualifications 99  
- Disqualified by the articles 102  
- Qualification shares 102  
- Vacation of office under the articles 102  
- Aliens 104  
- Defects in appointment 104  
Publicity 106  

### Chapter 4  
**Powers of Directors** 113  
Articles define powers 113  
- Company objects 117  
Limitations on the articles 119  
- Changes to a company's share capital 124  
- Conversion of stock into shares 125  
- Redenomination of shares 125  
- Reduction of capital 126  
- Changes to the memorandum of association 128  
- Allotment of shares 130  
Powers in the articles: the model form and Tables A 130  
- Table A: ‘1948 version’ 138  
- Table A: ‘pre-1948 versions’ 140  
Private company variations of the 2006 Act ‘model form’ articles 141  
Private company variations of Table A 148  
Other common private company variations of the model form or Table A 151  
Listed company variations of Table A 153  
- Variations arising from regulatory requirements 153  
- Optional variations 155  
Effect of articles – dominance of the board 156  
- Exceptions 157  
Powers exercised collectively 158  
- Delegation of powers 159  
- Directors exceeding powers 160  
- Ultra vires the company 160  
- Ultra vires the board 163  
Validity of directors’ acts 165  

### Chapter 5  
**Accounts** 171  
Introduction 171
Background

Accounting records
Entitlement of directors to examine company’s books
Annual accounts
Signature
Penalties
Accounting requirements
Small companies
Medium-sized companies
‘Dormant’ and ‘audit exempt’ companies
Audit exempt companies
Groups of companies
Publication of company accounts
Directors’ report
Auditor’s report
Changes effected by the Companies (Audit, Investigations and Community Enterprise) Act 2004
Chapter 1: Auditors
Overseas auditors
Disclosure of services provided by auditors and related remuneration
Auditors’ rights to information
Chapter 2: Accounts and reports
Statement in directors’ report as to disclosure of information to auditors
Defective accounts – introduction
Defective accounts
Disclosure of tax information
Power of authorised person to require documents, information and explanations
Supervision of periodic accounts and reports of issuers of listed securities
Dividends
Profits available for distribution
Restrictions on public companies
Relevant accounts: CA 2006, s 836
Successive distributions: CA 2006, s 274
General
Takeovers and mergers

Chapter 6
Duties of Directors
Key Duties of Directors
Sources of duties
The Companies Act 2006
Duties to whom
‘The company’
The Companies Act 2006
Contents

Creditors 237
  The Companies Act 2006 240
Employees 240
  The Companies Act 2006 241
Nominees 241
  Non-executive directors 242
Duty of good faith 242
Trustees 243
  Of powers 244
    The Companies Act 2006 247
  Of assets 247
    The Companies Act 2006 248
Assets: fiduciary duties under the Companies Act 2006 249
  The Companies Act 2006 252
Liability for ultra vires transactions 253
  The Companies Act 2006 254
Trustees of their positions 255
  Personal profit 255
Examples of personal profits 257
  Conflict of interest 257
Ratification insufficient 257
  Fees from subsidiaries 258
Post-retirement profits 258
  Bribes 259
Measure of damages 261
Interest in contracts: principles 262
Interest in contracts: features 266
  Ratification 266
Listed companies 266
  Failure to comply 266
Additional disclosure 267
  Extent of disclosure 268
Procedure 269
  The Companies Act 2006 270
Contracts with the company: other restrictions 270
  The Companies Act 2006 271
Competition 272
  Can a breach ever be justified? 273
The Companies Act 2006 274
Confidentiality 275
Duty of skill and care 277
  Principles 277
    A subjective test of skill 278
Periodic attendance 278
Delegation to executives 278
  The Companies Act 2006 281
Examples 281
  Cheque signing 281
Investments 283
Professional advice 284
Diligence 285
Negligence 286
Reliance on others 287
The Companies Act 2006 288
Directors’ duties 288
To whom are duties owed? 289
General duty to act within powers 289
Duty to promote success of company 289
Duty to exercise independent judgment 290
Duty to exercise reasonable care, skill and diligence 290
Duty to avoid conflicts of interest 291
Duty not to accept benefits from third parties 291
Duty to declare interest in proposed transaction 292
Enforcement of duties 292
Declaration of interest 292
Directors’ service agreements 293
Substantial property transactions 293
Loans to directors 293
Introduction 293
The basic rule 295
Public and associated companies 296
Further restrictions regarding public companies making quasi-loans to directors 296
Connected persons 297
Credit transactions by public companies 297
Related transactions 298
Loans for business expenditure 298
Loans to defend legal proceedings 299
Loans in connection with regulatory proceedings 300
Permitted transactions 300
Loans by money-lending companies 301
How credit is valued 301
Consequences of contravention 302
How the law has been changed 303
Payments for loss of office 303
Directors’ service contracts 304
Sole members 304

Chapter 7
Liabilities of Directors 307
Changes brought about by the Companies Act 2006 307
Consequences of breach of duty 307
Company to sue 307
Insolvency 307
Measure of recovery 308
Defendant 309
Contents

Directors, de facto directors and shadow directors and their duties 309
What is a director? 309
De facto directors 310
Shadow directors 310
Are de facto and shadow directors mutually exclusive? 311
Holland v HMRC, Re Paycheck Services Ltd 312
The facts 312
The decision 313
Vivendi SA v Richards & Bloch 314
The facts 314
Mr Richards’ duties as a shadow director 317
The duty of good faith 318
Limitation problems 319
Limitation of actions 319
Disqualification and wrongful trading 319
Disqualification 320
Unfit directors of insolvent companies 320
Safeguarding the public 321
Misfortune, misjudgment and mismanagement 321
Reliance on others 323
Periods of disqualification 323
Procedure 324
Procedure for disqualification 326
Summary procedure 327
Voluntary undertakings not to act as a director 328
The effect of disqualification by the Company Directors 330
Disqualification Act 1986, s 1 330
Partial disqualification 332
Wrongful trading: introduction 333
Wrongful trading: the ‘functions’ of directors 335
Wrongful trading: avoiding trouble 337
Wrongful trading: the ‘defence’ 339
Wrongful trading: the court’s order 341
Shadow directors 342
Administration 343
Fraudulent trading 346
Other personal liabilities of directors 347
Contract 348
Personal liability 348
Breach of warranty of authority 348
Torts 350
Liability under the Statute of Frauds (Amendment) Act 1828 352
Company crimes 353
Relief from liability 355
Ratification by general meeting 355
By majority vote 355
By special majority 357
Ratification by the articles: CA 1985, s 310 357
Indemnities for directors
  Background
Directors’ and officers’ insurance
Model articles under the CA 2006
The DTI consultation exercise on director liability
Prohibition on provisions protecting directors from liability
Transitional provisions
The CA 2006 and trustees
  QTPIPs
  QPSIPs
  Loans to enable directors to defend proceedings
Relief granted by the courts
Criminal liabilities

Chapter 8
Relations with Shareholders
  Separation of Powers
Transfer of shares
  Pre-emption rights: valuing the shares
  Paper-based and paperless share dealings
Compulsory acquisition of shares
  Lien
  Compulsory transfer under the articles
  Deprivation of pre-emptive rights
Statutory pre-emption rights on allotment of shares
Share capital rules
Financial assistance for acquisition of shares
  The general rules
  Exceptions
Issue of redeemable shares
Purchase of a company’s own shares
  Off-market purchases
  Market purchases
Capital rules and taxation
Insider dealing: common law and statutory control
  Information
    Rule 20.1
    Rule 23.2
    Rule 25.1
    Rule 27.1
  Secrecy and confidentiality
  Restrictions on dealings
    Rule 4
  Disclosure requirements
  Special deals
    Rule 16
Disclosure
  Directors’ disclosure of their interests in shares and debentures
## Contents

Automatic disclosure of substantial shareholdings 428  
Disclosure following investigation by a public company of interests 428  
in its voting shares 431  
The company’s powers 432  
The information to be given 432  
Interests in shares 433  
The register of interests disclosed 434  
Members’ requisitioning the company to exercise its powers 434  
Orders imposing restrictions on shares 435  
Supplementary articles 436  
Contents of registers 436  
Register of members 436  
Register of directors 437  
Register of directors’ residential addresses 438  
Disclosure by Companies House 439  
Disclosure by the company 441  
Inspection of registers and other documents 442  
Inspection of the register of members 443  
Inspection of the register of interests disclosed 445  
The Small Business, Enterprise and Employment Act 2015 446  

Unfair prejudice 463  
The rule in *Foss v Harbottle* 464  
Derivative actions (1) 465  
Members’ remedies 469  
Derivative actions (2) 469  
Actions commenced by a member 469  
Action commenced by the company 469  
Considerations applicable to derivative actions generally 470  
Action commenced by another member 471  
Derivative proceedings in Scotland 472  
Winding up 472  
Relief under CA 2006, s 994 474  
Remedies for unfair prejudice 478  
BIS investigation 480  

Chapter 9  
Relations of Directors with One Another 485  
Summary of changes in the Companies Act 2006 485  
Disagreement on the board: majority decides 485  
Responsibilities of dissentients: First Re-investment Trust Ltd 486  
The Companies Act 2006 490  
Remedies 490  
Action in board meeting 490  
Action in general meeting 491  
The Companies Act 2006 492  
Resignation 493  
Inspection by BIS 494
Changes occasioned by the Companies (Audit, Investigations and Community Enterprise) Act 2004 496
  Background 496
  Power to require documents and other information 497
  Information provided: evidence 498
  Provision for security of information obtained 498
  Protection in relation to disclosures 504
  Power to enter and remain on premises 505
  Power to enter and remain on premises: the procedural aspects 506
  The Companies Act 2006 507
  Application to the courts 507
  The Companies Act 2006 510
  Winding up 510

Chapter 10
Meetings 513
  Shareholders’ (general) and directors’ meetings 513
    Resolutions at general meetings 513
    Types of general meeting 513
      General meetings other than annual general meetings 513
      Annual general meetings – private companies 514
      Annual general meetings – public and traded companies 515
    Class rights and class meetings 519
    Calling and conduct of general meetings 524
      Calling a general meeting 524
      Members’ power to require circulation of statements under s 314 528
      Notices of general meetings 530
      Special notice 544
      Appointment of proxies 545
      Persons nominated by members 547
      Information rights in ‘traded companies’ 548
      Quorum 550
      Chairman 552
    Resolutions at general meetings 554
      Voting 560
    Right to demand a poll 565
    Adjournment 567
  Special rules for quoted companies 568
    Requirement for quoted company to publish results of polls 568
    Power of members of quoted company to require an independent assessment of a poll 569
    Members’ written resolutions in lieu of meetings 572
      Written resolutions proposed by the directors 573
      Written resolutions proposed by the members 575
  Informal members’ resolutions 576
  Directors’ meetings 578
    Notice 578
    Quorum 579
Contents

Procedure 581
Minutes 582
Minutes as evidence 582
Signature of board minutes 584
Signature of minutes of general meetings 585
Contents of minutes 585
Irregularities at meetings 586

Chapter 11
Terms of Service for Directors 587
Changes brought about by the Companies Act 2006 587
  Directors’ service agreements 587
  Payments for loss of office 587
  Directors’ service contracts 588
Remuneration – determined by articles 589
  Penalty clauses generally 593
  Service agreements 594
  Murray v Leisureplay plc 595
  The Companies Act 2006 596
Taxation 596
Share incentive schemes 597
  Approved profit-sharing schemes – ICTA 1988, ss 186–187 598
  Approved savings-related share option schemes – ICTA 1988, s 185 598
  Registered profit-related pay schemes (RPRP) – ICTA 1988, ss 169–184 598
  Executive share option schemes – ICTA 1985, s 185 598
  Employee share-ownership plans (ESOPS) – FA 1987, ss 67–74; FA 1992, s 36 599
Remuneration may be sued for 599
Disclosure in accounts 601
Expenses 602
National Insurance 604
Service contracts 605
  The Employment Rights Act 1996 605
  Disclosure 606
  Notice to terminate 607
  Duties 608
  Patents and inventions 608
  Restrictive covenants 609
  Pensions 610
  Enforcement 610
  Special directors 610
  Directors as employees 613

Chapter 12
Resignation, Removal and Retirement 617
Summary of changes in the Companies Act 2006 617
Vacation of office 617
Chapter 13

Bribery Act 2010

The new offences in outline

Paying bribes

Receiving bribes

 Meaning of relevant functions

 Meaning of improper performance

 Bribery of foreign officials

 Failure of commercial organisation to prevent bribery

 Prosecutions

 Extra-territoriality

 Conclusion

Chapter 14

Corporate Manslaughter and Corporate Homicide Act 2007

The offence of corporate manslaughter

Organisations to which the offence applies

 Corporation

 Departments and bodies listed in Schedule 1

 The police

 The armed forces

 Partnerships

 Senior manager

 The relevant duty of care

 The role of the judge in litigation

 Employees etc

 Specific exclusions from the Act

 Public authorities making decisions of public policy

 Military activities

 Policing and law enforcement

 Emergencies

 Child protection and probation functions

 Corporate manslaughter at common law

 Has statutory corporate manslaughter worked?
Chapter 15
Corporate Governance 655
Introduction 655
The development of company law 656
Articles of association 656
The objects clause 658
Third parties and companies 658
Types of company 659
The dynamics of a company 660
The collapse of Penn Central 661
The golden threads of great corporate collapses 661
The Report of the Select Committee on Joint Stock Companies 662
Well-meaning but perhaps misguided thoughts on the nature of governance 663
First example 663
Second example 664
Maxwell – are there any lessons? 665
DTI investigation into Queens Moat Houses plc 667
Corporate collapse 667
What approach should be adopted to corporate governance? 668
Payments to directors under the Companies Act 2006 669
Directors’ service agreements 669
Payments for loss of office 669
Directors’ service contracts 670
A brief history of corporate governance 671
Cadbury’s views on a workable code 672
The role of the chairman 673
The functions of the board 673
A checklist for board effectiveness 674
The UK Corporate Governance Code 674
Checklist – matters reserved to board 679
The Turnbull guidance 680
The roles of chairman and CEO 680
Should a Chief Executive become a Non-Executive Chairman? 680
The Nomination Committee for Board Appointments 681
The training of directors 681
Two-tier boards 681
Non-executive directors 681
Independence 681
The Myners Report and non-executive directors 682
Voting by institutional shareholders 682
Recommendations of the Institutional Shareholders Committee 683
The senior independent director 683
Board committees 683
The Smith Report on Audit Committees 684
Corporate social responsibility 684