VOISIN LAW

Attorney General's Guidance – Director's Disqualification | 1

The Attorney General has released helpful guidance relating to applications for director disqualifications pursuant to Article 78 of the Companies (Jersey) Law 1991
(the "**Companies Law**").

Article 78 of the Companies Law allows the Attorney General, the Jersey Financial Services Commission or the Minister for External Relations and Financial Services to apply to the Royal Court to disqualify a person from being the director of a company where their conduct makes them unfit to be concerned in the management of a company. The Court may, on such an application being made, make an order restricting or disqualifying that person from acting as a director or manager for a period of up to 15 years.

Importantly, the guidance applies to every director of a company, including non-professional directors of charitable and other voluntary organisations. It also applies to shadow directors, being persons occupying (or deemed to occupy) the position of director even if not called by that name.

The guidance sets out a list of factors (which is not exhaustive) that may trigger an application for disqualification under the Companies Law, including:

1. criminal convictions arising out of or in the context of a person's directorial/corporate managerial activities, or which otherwise calls into question their suitability to be a director of a company, (for example, offences of dishonesty);

2. court orders in relation to wrongful trading in respect of the director (for example, in cases where a director knew there was no reasonable prospect that the company would avoid a creditors' winding up or on the facts known to him was reckless as to whether the company would avoid a creditors winding up and did not take reasonable steps with a view to minimising the potential loss to the company's creditors);

3. court orders in relation to fraudulent trading in respect of the director (for example where it appears that any business of the company has been carried on with intent to defraud creditors or for a fraudulent purpose);

4. transactions at an undervalue, the giving of a preference or extortionate credit transactions and the director was directly involved in such a transaction or reckless
as to his or her fellow directors being involved in the same;

5. corporate governance breaches including: (i) poor or non-existent statutory records, poor or non-existent records of board meetings and poor or non-existent financial records being kept by the company; (ii) the director failing to take professional advice when reasonably necessary or failing to encourage his or her fellow directors to do the same; (iii) a director acquiescing and/or failing to appropriately challenge other directors and/or company management; and (iv) a director delegating or acquiescing in the delegation of duties to persons who are incompetent and/or failure to ensure the board has appropriate skills;

6. failure by the director to co-operate with any liquidator or the Viscount (the executive officer of the Royal Court, whose department administers en désastre proceedings in cases of insolvency) where the company is subject to winding-up or bankruptcy proceedings or to account for company property or to

deliver the same to any liquidator or the Viscount where required to do so;

7. negligent completion by the director of a statement of solvency (for example in relation to distributions);

8. a director being personally culpable of a serious breach by the company of the JFSC Codes of Practice;

9. a director failing to declare or act appropriately as regards conflicts of interest; and

10. the Company committing an offence, under the Companies Law or the Bankruptcy (Désastre) (Jersey) Law 1990 with the acquiescence of the director,

Importantly, the guidance also sets out certain aggravating factors including:

1. where the director is professionally qualified and/or experienced;

2. where there is loss to investors or creditors, based on the effect of the loss in light of the injured party's circumstances;

3. where there is repeated offending; or

4. where there are wider public interest considerations.

It is no coincidence that this guidance has been issued in the run up to the MONEYVAL inspection of Jersey's financial services sector, which is due to commence later this year.

Directors of regulated trust company and funds services providers should in particular note the list of aggravating factors listed above.

That being said, the guidance does state that in cases where the Attorney General considers the issue to be minor, the Attorney General may resolve the matter informally with a written warning.

In relation to the corporate governance breaches listed above, particular note should be taken of the importance of ensuring that, where a director delegates duties to another person, that person must have appropriate skills and adequate scrutiny and oversight of that person must take place. Directors must also be prepared, where appropriate, to challenge the decisions of other directors – it is not sufficient to simply agree with the majority, if such consent is likely to result in a breach of director duties or indeed the criteria set out in these guidelines.

The majority of directors will undoubtedly view the guidance as "common sense" and should not have any concerns arising. However, the guidance is helpful in emphasising the importance of good record-keeping and decision-making, together with highlighting that directors should act in the best interests of the company at all times.