

tant suppliers will be the airline companies. Without the modes of they offer, a reliable document delivery service will not be having identified this stakeholder to the business, management will to approach the airline and bus on a mutually beneficial basis: reliably and expeditiously you can parcels and documents, the more e will obtain, the more business ve you, and hence a mutually arrangement will ensue.

ie all this, the strategic business plan can be developed, implemented by management and monitored by the board.

In order to practise good governance in the twenty-first century this inclusive approach has to be adopted. In this context, however, a director or a leader of any entity must remember that his ultimate responsibility is performance. Without business success, even the best processes will be hollow.

The Duties of Directors of Companies

A director's duties are good faith, care, skill and diligence.

By *good faith* is meant that a director must honestly apply his mind and act in the best interests of the company he is governing. He cannot filch any corporate opportunity for himself and he must ensure that there is no conflict between his interests and those of the company.

The duty of *care* involves acting with that degree of care which would be expected of a reasonable person caring for another's assets. The director

has to be a good steward of the company's assets. He should ensure that the company utilises its assets as if they were the assets of his own family, of which he is the head. Acting with care also involves the honest application of mind in making a decision in regard to the enterprise side of the business. When something goes wrong, the question that will be asked is whether the leader acted with care.

In regard to the duty of *skill*, it is expected of each director that whatever his practised ability is, he will apply that ability in the interests of the company he represents. In making a business judgement call, therefore, a director will use his practised ability to add to the debate around the table.

Diligence simply connotes that a director must do his homework. A director of a company, or indeed a leader of any entity, who comes to the decision-making table without being fully informed about the issues to be decided there, and who has not studied the information furnished to him in the document pack, is not fulfilling his duties. Diligence also requires that a director understands the issues and the information given to him.

These duties are not usually set out in a statute in terms of which a company is incorporated. They are, however, usually found in statutes dealing with trusteeships or curatorships. The jurisprudence

developing the common law duties of directors of companies is approximately 150 years old.

However, the jurisprudence dealing with the curatorship of incapacitated human beings is hundreds of years old.

If a relative or someone near or dear to you became incapacitated of mind as a result of a motor car accident and you were appointed to look after that unfortunate person for the rest of his life, you would not want your peers, relatives or friends, or the incapacitated person's peers, relatives or friends, to believe that as the individual looking after him, you were actually filching some benefit from his assets for yourself. In short, you would act with the duty of *good faith*; you would ensure that there was no conflict between your interests and the interests of the incapacitated person. You would certainly not seize for yourself any opportunity arising out of your administration of that person's assets.

Likewise, you would care for that person's assets with the same care you give to your own assets. You would want everyone to see you as a good steward of this unfortunate human being's assets. You would do this to fulfil your duty of *care*.

You would also want to be seen as a person who was actually enhancing and improving the lot of the incapacitated person by applying your practised abilities to improve the person's asset base and consequently his quality of life. In short, you would fulfil the duty of *skill*.

You would do your homework diligently so that you fully understood the incapacitated person's assets and liabilities. If necessary, you would seek advice in order to reach this understanding, but certainly you would ensure one way or another that you understood the person's affairs. In so doing you would fulfil the duty of *diligence*.

In looking after this unfortunate human being you would want to be seen to be a decent citizen. You would do the decent thing for him in every way possible.

A director's duties to a company are similar to those of a person looking after an incapacitated human being. But a company or entity is in fact more incapacitated than our unfortunate human being. It has no heart, mind or soul of its own. Our unfortunate human being still functions (the heart beats) and still has a soul (a reputation). A company once formed becomes a person in law but has no mind, functionality or reputation of

its own. It is only when directors are appointed that it acquires a mind, functions and develops a reputation.

Just as no person would want to be seen to be anything other than a decent citizen in administering the affairs of an incapacitated human being, a director should act likewise in fulfilling his duties of good faith, care, skill and diligence for a company. In doing so he also ensures that the company itself is seen as a decent corporate citizen in the community in which it carries on its business.

The Silent Questions

As already pointed out, a director's duties are those of good faith, care, skill and diligence.

The duty of good faith is usually tested in court by applying common sense principles. The question that is asked is whether the director has behaved as an honest man of business might be expected to behave in the circumstances of each case. As a court in England pointed out, directors are required to behave 'bona fide in what they consider – not what a court may consider – is in the interests of the company ...' Directors cannot, however, be supine and if the need for enquiry arises they must do so. Thus even if they are not dishonest it can be

concluded that they failed to carry out their duty of care. On the other hand, directors are not required to act 'in a vague mood of ideal abstraction from obvious facts which must be present in the mind of any honest and intelligent man when he exercises his powers as a director', per Latham, C.J. in an English case.

Courts have always referred to the heavier duty of good faith and the lighter duties of care, skill and diligence. In the locus classicus of the City Equitable Fire Insurance Company case, Romer, J. said in 1925 that 'a director 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'.

Courts in the twenty-first century are applying more objective tests to the duties of skill, care and diligence. For example, in regard to the executive who is elevated to the board, reference will be made to his service contract as an employee of the company. The court will also look as to whether an outside director has any specific mandate in regard to his appointment as a director. Courts have recently said that the statement of Romer, J. applies only to a director's exercise of his duty of skill, and not in regard to his duties of care and diligence. The courts have now expressed the view that the duties of care and diligence should both be looked at objectively. The modern test, therefore,

is what a reasonable director who acted honestly, diligently and with skill would have done in the circumstances of each case.

The average director cannot be expected to apply these legal tests in the heat of the boardroom. More particularly is this so when one considers the different aspects of these duties gleaned from American, English and Commonwealth judgments.

The duty of good faith connotes

- reliance,
- trust,
- integrity,
- not acting in conflict with the company,
- not seizing corporate opportunities,
- having one's remuneration as one's only advantage,
- acting in an unfettered manner, and
- acting only in the interests of the company.

The duty of care involves

- serious attention to the matters at hand,
- stewardship,
- transparent communication, and
- protection of the reputation of the company.

The duty of diligence involves

- industry,
- attention, and
- the company's relationships with stakeholders.

The duty of skill is

- a matter of how one evaluates the information furnished to one at the boardroom table, and
- the honest application of one's mind, having regard to one's practised ability, skill and experience, in making a decision on behalf of the company.

How does the average director make sure that he is complying with these duties, let alone understand the tests pertaining to them?

The answer lies in a director silently asking himself ten pertinent questions in regard to the issues before the board. These questions have been developed by the author during the course of his own personal experiences of advising companies and directors over a period of forty years, acting as a director of companies listed on main stock exchanges on three continents, and having regard to numerous judgments and the Business Judgment Rules formulated in America. The questions are designed to help a director to discharge his duties on a qualitative basis. As already pointed out, this is the true test of good governance rather than a mindless quantitative compliance with a code, be it voluntary or compulsory.

The first question: 'Do I as a director of this board have any conflict in regard to the issue before the board?' As remote as any conflict might be, disclose

it. This disclosure is not an end to the enquiry. The following question should then be asked: 'Should I excuse myself from the remainder of the board meeting or should I make my contribution, having regard to the fact that I was asked to be a member of the board either for my practised ability or because of my representativity?' If the answer to that question is to remain in the boardroom and to make your contribution to the decision-making process, the next question to ask yourself is whether to vote or not. Generally, the common law of every country stipulates that where there is a conflict of interest the director should not vote, but the modern approach, either by statute or by way of a provision in the articles or constitution of the company, is that notwithstanding the conflict on a disclosure of that conflict, a director can vote. This is probably the most difficult issue arising out of this first question. It will be appreciated that one needs to answer all these questions on an intellectually honest basis in order to discharge the duty of good faith.

The second question: 'Do I have all the facts to enable me to make a decision on the issue before the board?' Not projections or assumptions, but facts. How often are we dazzled by electronic presentations? In the nature of things, particularly in decisions involving capital expenditure, one is dealing with projections or assumptions. A director must separate out facts from projections

and assumptions. If he believes that all the facts are *not* before the board and, objectively speaking, there are more facts that can be ascertained, it is his duty to ask for those facts or to request that the meeting be adjourned. A positive answer to this question is absolutely necessary in order to discharge one's duties of care, skill and diligence.

The third question: 'Is the decision being made a rational business one based on all the facts available at the time of the board meeting?' Nothing more can be asked of a director. The wisdom of hindsight cannot replace a director's foresight. Notwithstanding this proposition, a court will objectively examine whether the decision was rational at the time. One needs to ask this question more particularly in the context of the best interests of the company. If the decision is not a rational business decision in the interests of the company, then obviously one is not discharging one's duties of good faith and care.

The fourth question: 'Is the decision in the best interests of the company?' This seems, on the face of it, an easy question to answer. It is, however, one of the most difficult ones to try to deal with in the boardroom. In the modern world one invariably has conflict which has to be managed. It is *how* it is managed that is important. For example, one might be a shareholder as well as a director and the issue in the boardroom is whether or not dividends

should be declared. This is an excellent example of realising that one is acting in the real world and not altruistically or in the abstract. One cannot, however, make a decision which one believes to be in the interests of the major shareholder. The major shareholder is not the company to which the director owes his allegiance. Further, shareholders' interests differ. For example, some shareholders might want capital appreciation, while others might want larger dividends. Also, a company's shareholder profile changes from time to time, more particularly if the company is one listed on an exchange. In the context of this question one has to divorce oneself from the person or organisation who nominated one as a director. It may well be that the decision in the best interests of the company is not in the best interests of the director's nominator. So be it, because to discharge one's duty of good faith one has to make that decision in the best interests of the company even though it might not be in the interests of one's nominator.

The fifth question: 'Is the communication of the decision to the stakeholders of the company transparent with substance over form and does it contain all the negative and positive features bound up in that decision?' Transparency is a pillar of good governance. It has a withering effect on misconduct and the more transparent one is in one's communication (without giving away

confidential information of the company), the less chance there is of any suggestion of misconduct. A bright light is the best policeman when it comes to governance. There should never be an attempt to create substance by the use of form.

The sixth question: 'Will the company be seen as a good corporate citizen as a result of this decision?' This question is necessary because, as already pointed out, a company does not operate in a vacuum. It operates in a community. Consequently a board must envisage how the company will be perceived, arising out of its decision, not only by the local but also by the national community. More often than not these days regard must also be had to the reaction to the decision of the international community. Sustainability is something of which everyone today is aware. The United Nations human rights declaration, social, health and environmental legislation and interest groups, ensure that directors can no longer focus only on the providers of capital and ignore the company's other stakeholders. Here a distinction must be drawn between the duty to account to the company, which is the director's duty, and the fact that the company might actually be called to account by stakeholders by way of tort or statute, for example, for polluting the environment. Development for short-term gain must not be undertaken if it compromises the long-term sustainability of the company and the ability of future generations to