

## Companies Act 2006 – Directors' Duties

A significant number of charities and social enterprises are constituted as companies limited by guarantee or community interest companies and the implementation of the Companies Act 2006 will have a significant impact on these organisations. This article highlights one major change introduced by the Act.

The Companies Act 2006 is being implemented in stages from November 2006, and it is expected that all sections will be in force by 1st October 2009. Some of the key provisions affecting director's duties came into force on 1st October 2007 and these provide a statutory statement of the principal duties of a director (though please note that it is not an exhaustive statement). In a charitable company limited by guarantee the directors are usually referred to as trustees, but in company law are directors and therefore these duties apply equally to them.

*The general duties are:*

- to act within powers (s.171);
- to promote the success of the Company (s.172);
- to exercise independent judgement (s.173);
- to exercise reasonable care, skill and diligence (s.174);
- to avoid conflicts of interest (s.175);
- not to accept benefits from third parties (s.176); and
- to declare any interest in proposed transactions or arrangements with the Company (s.177).

The final three of the seven general duties are not yet in force and until then the existing regime shall apply.

The Act states that the duties are based upon current common law rules and equitable principles and as such are not new issues to which directors must have regard.

### Duties now in force

The duty to act within powers means to act in accordance with the company's Memorandum and Articles of Association and to only exercise powers for the purposes for which they were conferred.

The duty to exercise independent judgment does not prevent the board from taking third party advice.

The duty to exercise reasonable care, skill and diligence is expressed as a two stage test. A director must exercise

the care, skill and diligence reasonably expected of someone carrying out the functions of a director, and of someone who has the general knowledge, skill and experience of the director.

Perhaps the most significant general duty is to promote the success of the company for the benefit of its members. For a charitable company limited by guarantee or a community interest company, promoting the success of the company means fulfilling the charitable objectives or social purposes of the company. This is also likely to apply to a company limited by guarantee with a non-charitable social purpose.

The legislation makes it clear that in order to fulfil this duty, when making a decision directors must have regard to the likely consequences of the decision in the long term, the interests of the company's employees, the need to foster the company's business relationships with suppliers, customers and others, the impact of the company's operations on the community and the environment, the desirability of the company to maintain a reputation for high standards of business conduct, and the need to act fairly as between members of the company. This is what the Company Law Review, that ultimately led to the Companies Act 2006, referred to as "enlightened shareholder value" and is intended to recognise that directors will be more likely to achieve long term sustainable success for the company's members (or the social purpose) through the building of long term relationships dependent on trust, and the interests of members (or the social purpose) will be better served if viewed more broadly. The requirement to consider these factors does go beyond the scope of the original common law duty to act in the best interests of the company.

### Procedure and practice

These provisions reinforce the need for boards to ensure that their corporate governance policies and procedures are updated.

The directors must be made aware of the nature their duties. Staff and directors preparing papers for board meetings should bear in mind that the directors must comply with all the duties, as well as considering all the factors listed as necessary to consider in fulfilment of the duty to promote the success of the company.

Relevant issues should be highlighted in board papers, with reference to the duties, and in particular it would be useful for any papers presented to the board to address each of the "success" factors discussed above. It would be

advisable to retain board papers for key decisions as a matter of policy, as evidence of "success" factors considered. Board minutes should also evidence that the board is acting in accordance with its duties, and make it clear that the "success" factors were considered, although the general view is that the minutes do not need to evidence all the board's thoughts on each "success" factor.

If there are any issues that you would like to discuss then please do not hesitate to contact: **Louise Platt** on 0151 600 3362 or **David Maples** on 0151 600 3108.

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# Estates and Charities

Estates are growing bigger and bigger, so too is the investment by charities in securing legacies. It is important therefore for charities to protect their interests. Increasingly, this can mean defending Probate Litigation or even bringing it.

Probate Litigation can vary from claims brought by overlooked family members alleging a Will is unfair, to the need to rectify a document to refer properly to the charity's correct name.

Charities are also finding that their legacies are vulnerable to attack on the basis of undue influence and lack of capacity. The Conservative Party (an unincorporated association) recently lost out to a £8million legacy on this basis.

It is important in such cases for the charity concerned to be fair but firm and to have at its disposal the right technical expertise to resolve such disputes favourably and costs effectively.

The Probate Litigation department at Brabners Chaffe Street LLP is led by Alison Miller Varey and Leanne Wheeler. Alison is a former Chancery Barrister practicing at the Independent Bar and Leanne is an Associate Solicitor with

significant litigation experience. Both specialise in Probate Litigation and have acted for charities, understanding the need always to consider the "public face" of the charity.

*Their expertise includes:*

- Rectification claims.
- Applications under the Inheritance (Provision for family and Dependants) Act 1975.
- Probate claims for setting aside Wills and Trusts on the basis of lack of mental capacity and/or undue influence.
- Construction points in wills and trust deeds eg where the charity is not properly described by name.
- Claims against trustees who act in breach of trust (both dishonest and negligent).
- Home Made Wills – Claims made against claims made by creditors and third parties against assets otherwise comprised in legacy.

In the current climate charities should not be afraid to take on such litigation and uphold legacies which they have worked hard to secure. Costs can be a disincentive. Our rates are amongst the most competitive for this specialist area of law.

If you feel the Probate Litigation section may be able to assist your Charity then please do not hesitate to get in contact with Alison Miller Varey for a free consultation.

## Public Benefit Update

The Charity Commission will be publishing its general public benefit guidance for all charities in January 2008. Shortly afterwards it will commence a three months consultation on draft supplemental guidance on public benefit for charities for the prevention and relief of poverty, charities for the advancement of education, charities for the advancement of religion, and fee-charging charities.

For further information and to sign up to be notified of the commencement of the consultations go to:

[www.charity-commission.gov.uk/news/pbnewsindex.asp](http://www.charity-commission.gov.uk/news/pbnewsindex.asp)



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For further information about Brabners Chaffe Street please go to [www.brabnerschaffestreet.com](http://www.brabnerschaffestreet.com). Contact David Maples or Louise Platt in Liverpool on 0151 600 3000.

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