CLASS NOTES – 2021/2022

Directors

Directors play a significant role in corporate governance.

The Companies Act define directors as persons who have been appointed to direct and administer the business of the Company. See Section 170.

Though there are certain similarities between the duties of a director and a trustee, a director is not a trustee of the company. In ***Regal Hastings v Gulliver***[1], the court described directors as follows:

"*Directors of a limited company are the creatures of statute and occupy a position peculiar to themselves. In some respects, they resemble trustees, in others they do not. In some respects, the resemble agents, in others they do not. In some respects, they resemble managing partners in others they do not.*" @387.

In the case of the ***Forest of Dean Coal Mining Co. (10 C.D. 450)*** a director was held not liable for omitting to recover promotion money which had been improperly paid on the formation of the company. He knew of the improper payment, but he was not appointed a director until a later date. It was held that although a trustee of settled property which included a debt would be liable for neglecting to sue for it, a director of a company was not a trustee of debts due to the company and was not liable. Sir George Jessel, M.R held as follow:

they are really commercial men managing a trading concern for the benefit of themselves and all the other shareholders in it."

A key difference between a trustee in equity and a director is that a trustee's main duty is to avoid risky undertakings and to be cautious in managing the assets or interest under his trust. In the case of a director, his duty is not to avoid risk but to take risk to promote the commercial interest of the company and its shareholders.

Directors may be classified as de jure, de facto and shadow[2].

De Facto and Shadow Directors: Section 170 (2)

---

[1] [1942] 1 All ER 378
[2] Section 170

Any person, not being a duly appointed director of a company:

(a) who holds out as a director or knowingly allows to be held out as a director of that company, or

(b) on whose directions or instructions, the duly appointed directors are accustomed to act, is subject to the same duties and liabilities as if that person were a duly appointed director of the company

The duly appointed directors of a company also have an overriding duty not to act on the directions or instructions of any other person. If any person, not being a duly appointed director of a company, holds himself out, or knowingly allows himself to be held out, as a director of the company, the person shall be liable to a fine.

Further, if a company holds out any person, or knowingly allows any person to hold himself out, as a director of the company, the company shall be liable to a fine. Under section 170 (5) a person who is described as director of a company, whether such description is qualified by the word "local", "special", "executive", or in any other way, is deemed to be held out as a director of that company.

De-facto Directors

Under section 170(2) (a), a person who holds himself out or allows himself to be held out as a director of the company is deemed to be a de facto director. **In *Re Hydrodam*[3],** the liquidator of a company brought disqualification proceedings against two of its directors on the ground that they were either de facto or shadow directors. The court held that the allegation that a person could be both a de facto and shadow director was embarrassing. In the court's view:

"a de facto director is a person who assumes to act as a director. He is held out as a director by the company and claims and purports to be a director although never actually or validly appointed as such. To establish that a person was a de facto director of a company it is necessary to plead and prove that he undertook functions in relation to the company, which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company's affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level." @ page 183.

[3] [1994] 2 BCLC 180 AT 183

In ***Commodore v. Fruit Supply***, it was held that a person who was not a duly appointed director of the company but whose name appeared on the company's letterhead as a director, conducted business on behalf of the company and sometimes shared in its profits was a de facto director and therefore his acts were binding on the company.

The question as to whether a person has been concerned in the management of the company on the same level as a director is not always easy to answer. In the ***Sec of State v Tjolle***[4], action was brought for the disqualification of a person who had on various occasions been described by the company as a "sales and marketing director" and as a "deputy managing director. Though she didn't have access to the company's accounts in reasonable detail, she was a signatory to the company's bank accounts and sometimes acted as a spokesperson for the company in media. As to what level participation in management will make a person a de facto director, the court held that it is difficult to postulate any one decisive test. In the courts view:

"*I think what is involved is very much a question of degree. The courts take into account all relevant factors. Those factors include at least whether or not there was a holding out by the Company by the company of the individual as a director. Whether the individual used the title, whether the individual had proper information (eg management accounts) on which to base decisions, and whether the individual had to make major decisions and so on.*

Taking all these factors into account, one asks 'was this individual part of the corporate governing structure?' "

In the view of the court, a person who only had knowledge of peripheral matters concerning the affairs of the company and has no right, legal or de facto senior management position should not in substance be considered as a director of the company, even if such a person had the title of a director in the company.

In ***Re Richborough Furniture Ltd***[5], Mr Lloyd QC decided that a business consultant providing computer and other management services to a furniture-making company was not a *de facto* director, despite having undertaken extensive negotiations with creditors and performed some of the functions of a finance director.

The court held that:

[4] [1998] BCLC 333 AT 343-4 Jacob J
[5] [1996] 1 BCLC 507

"*it seems to me that for someone to be made liable to disqualification as a de facto director, the court would have to have clear evidence that he had been either the sole person directing the affairs of the company (or acting with others all equally lacking in a valid appointment) or, if there were others who were true directors, that he was acting on an equal footing with the others in directing the affairs of the company. It also seems to me that, if it is unclear whether acts of the person in question are referable to an assumed directorship, or to some other capacity such as a shareholder or, as here, consultant, the person in question must be entitled to the benefit of the doubt.*" @ page524

Sect of State v Tjolle seems to be at odds with section 170 (5) of the Act which provides that:

"*For the purposes of subsections (2) and (3) of this section a person who is described as director of a company, whether such description is qualified by the word "local", "special", "executive", or in any other way, shall be deemed to be held out as a director of that company.*"

According to Prof. Gower, the purpose of subsection 5 is to prevent the:

"*growing practice for companies to give employees the prestige and status of directors, but without the latters' powers and responsibilities, by appointing them to posts described as that of "special director ", or the like, under Regulations which provide that they shall have none of the powers or duties of true directors. The fact that a disproportionate prestige attaches to the name "director" in comparison with names such as "manager" is perhaps regrettable. But it seems to me to be thoroughly objectionable to attempt to evade this by the device of having "adjectival" directors who appear to the outside world to be directors but who do not have the latters' powers or duties. These subsections are therefore designed to prevent the practice from spreading to Ghana. Anyone described by the company as a director by whatever adjective qualified will be deemed to be held out as a director.*"

Thus, under section 170(5) of the Companies Act, irrespective of the actual role a person plays in the governance structure of a company, if the person is described as a director, then he is deemed to have been held out as a director.

Shadow Directors

A shadow director is defined under section 170 (2) (b) as a person on whose directions or instructions the duly appointed directors are accustomed to act. In ***Re Hydrodam***, the court distinguishing between a shadow director and a de facto director held that.

"A shadow director, unlike a de facto director, does not claim or purport to be a director. On the contrary he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director by the company. To establish that a defendant is a shadow director it is necessary to allege and prove:

(i) *who are the directors of the company, whether de facto or de jure;*

(ii) *that the defendant directed those directors how to act in relation to the company or that he was one of the person who did so;*

(iii) *that those directors acted in accordance with such directions; and*

(iv) *that they were accustomed so to act.*

What is needed is first a board of directors claiming and purporting to act as such; and a pattern of behavior in which the board did board not exercise any discretion or judgment of its own but acted in accordance with the directions of others." @ page 183.

To determine that the directors were "accustomed to act "in accordance with the instructions of the alleged shadow director, it is not necessary to show that in all decisions of the board they followed the instructions and directions of the alleged shadow director. In ***Australian Securities Commission v. AS Nominees Ltd***, the court held that:

"*The reference in the section to a person in accordance with whose directions or instructions the directors are 'accustomed to act' does not in my opinion require that there be directions or instructions embracing all matters involving the board. Rather it only requires that, as and when the directors are directed or instructed, they are accustomed to act as the section requires. The idea of the section is … that the third party calls the tune and the directors dance in their capacity as directors."*

The fact that "accustomed to act" refers to a course of conduct but not necessarily a requirement that the directors followed the directions of the alleged shadow director in all matters was further emphasized in the ***Re Unisoft (No.3)***, where the court held as follows:

".. the shadow director must be, in effect, the puppet master controlling the actions of the board. The directors must be (to use a different phrase) the 'cat's paw' of the shadow director. They must be people who act on the directions or instructions of the shadow director as a matter of regular practice. The last requirement follows from the reference follows from the reference

in the subsection to the directors being 'accustomed to act'. That must refer to acts not one individual occasion but over a period of time and as a regular course of conduct." @ page 620

A further issue is whether, the alleged shadow director should be controlling all the directors or only some of them. The impression is created in Millet J's statements in ***Re Hydrodam*** that indeed the whole board should be under the thumb of the alleged shadow director. The issue was considered in ***Re Unisoft (No 3)***, and the court opined that:

"*In my view, there can be no way in which the acts of any one of several directors of a company in complying with the directions of an outsider could constitute that outsider a shadow director of that company. Of course, if the board of the company be one person only and that person is a 'cat's paw' for an outsider, the outsider may be shadow director of that company. But in such a case as this with a multi-member board, unless the whole of the board, or at the very least a governing majority of it-in my belief the whole, but I need not exclude a governing majority- are accustomed to act on the directions of an outsider, such an outsider cannot be a shadow director.*"

In ***Secretary of State v Deverell***, the court considered most of the major cases on shadow directorship and summarized the applicable principles as follows:

(i) The purpose of the legislation is to identify those, other than professional advisers, with real influence in the corporate affairs of the company. But it is not necessary that such influence should be exercised over the whole field of its corporate activities.

Whether any particular communication from the alleged shadow director, whether by words or conduct, is to be classified as a direction or instruction must be objectively ascertained by the court in the light of all the evidence. It is not necessary to prove the understanding or expectation of either the giver or receiver.

In many, if not most, cases it will suffice to prove the communication and its consequence.

(iii) Non-professional advice may come within that statutory description. The concepts of

'direction' and 'instruction' do not exclude the concept of 'advice' for all three share the common feature of 'guidance'.

(iv) It will be sufficient to show that in the face of 'directions or instructions' from the alleged shadow director the properly appointed directors or some of them cast themselves in a subservient role or surrendered their respective discretions. This is however not necessary

in all cases. Such a requirement would be to put a gloss on the statutory requirement that the board are 'accustomed to act in accordance with' such directions or instructions.

In *Deverell*, the court also expressed concern about use of graphic descriptive language to explain the role of a shadow director since in the view of the court; this may sometimes cloud clear analysis of the issues. In the view of Morrit LJ:

"*They may be very effective in graphically conveying the effect of the definition in the light of the facts of that case, as shown by their frequent use in the reported cases to which I have referred. But, it seems to me, they may be misleading when transposed to the facts of other cases. Thus to describe the board as the cat's paw, puppet or dancer to the tune of the shadow director implies a degree of control both of quality and extent over the corporate field in excess of what the statutory definition requires. What is needed is that the board is accustomed to act on the directions or instructions of the shadow director. As I have already indicated such directions and instructions do not have to extend over all or most of the corporate activities of the company; nor is it necessary to demonstrate a degree of compulsion in excess of that implicit in the fact that the board are accustomed to act in accordance with them. Further, in my view, it is not necessary to the recognition of a shadow director that he should lurk in the shadows, though frequently he may.*"

Number of directors: Section 171

A company is required to have not less than 2 directors and the actual number of directors shall be fixed by each company's constitution.

Liability for having less than 2 directors: Section 171(3).

Appointment of Directors

Before a person can be appointed as a director, he should have consented in writing to be appointed as such. Failing to obtain the consent in writing invalidates the appointment and if the person were to act as a director, he would be a de facto director. ***Politis v Plastic (No.2)*** See recent Supreme Court decision in ***Quarcoopome v Sanyo Electric Trading Company Ltd* [2009] SCGLR 213.**

First Directors

The first directors of the company are always named in an application for incorporation and their consent to the appointment is signified by the signing of the letter of consent.

Subsequent directors

The mode of appointment of subsequent directors may be determined by the Constitution or any shareholders agreement signed by the shareholders and the company.

The Constitution of a company may provide for the appointment of a director or directors by any class of shareholders, debenture holders, creditors, employees or any other person. Such rights may also be conferred under a shareholders' agreement. Where the Constitution or a shareholders' agreement confer such a right of appointment on a class of shareholders, it will be protected as a class right under section 50 of the Companies Act. Also see section 29(2).

Private Companies: section 300

Appointments are done by ordinary resolution of the company.

Public Companies: Section 325 and 326

In the absence of contrary provisions in the Regulations of a company, the appointment of directors of a public are subject to the rotation rules set out in section 325 of the Act. Under these rules:

(i) All the directors are supposed to retire at the first AGM of the company;

(ii) At every subsequent AGM, one-third of the directors, or if their number is not three or a multiple of three, then the number nearest one-third retire from office;

(iii) The directors who have been longest in office since their last election are those who retire in every year;

(iv) In the case of directors who were appointed on the same day, those to retire shall (unless they otherwise agree among themselves) be determined by lot;

(v) Managing directors are not subject to the rotation rules;

(vi) Retiring directors are eligible for re-election;

(vii) Where a director retires by rotation, the company can appoint another person at that meeting to fill the vacancy;

(viii) If a retiring director offers himself for re-election, he shall be deemed to have been re-elected unless the company resolves not to fill the vacancy or a resolution for his re-election is lost; and

(ix) With the exception of retiring directors, a person cannot be appointed as a director at a meeting unless not less than 3 nor more than 28 days before the meeting notice of intention to propose him as a director signed by a member entitled to and attend and vote at the meeting has been deposited at the registered office of the company. A consent letter from the proposed director should also be deposited.

<u>Casual Vacancy (Section 172(4) & (5))</u>

Notwithstanding any provision in the company's Constitution, any casual vacancy in the number of directors may be filled by:

(a) the continuing directors or director notwithstanding that their number may have been reduced below that fixed as the necessary quorum of directors; or

(b) by an ordinary resolution of the company in general meeting.

Where the directors are exercising their power to fill a casual vacancy, the directors are required to observe the rules laid down in sections 190 and 191 of the Companies Act and should not appoint any person to be a director unless they have taken reasonable steps to satisfy themselves that he is a person of integrity and suitable to be a director of the company.

If the casual vacancy relates to a vacancy which, under the terms of the company's Constitution, should be filled by an appointment by any class of shareholders, debenture holders, creditors, employees or other person, the director appointed by the continuing directors or by an ordinary resolution of the company in general meeting, as the case may be, shall cease to hold office so soon as any other director is duly appointed in accordance with the Regulations.

In ***Politis v Plastico (2),*** the court held that a casual vacancy is any vacancy other than one occurring by effluxion of time, or through the director retiring by rotation.

<u>Qualification of Directors: Section 173</u>

The following persons shall not be competent to be appointed or to act as a director of a company:

(a) an infant;

(b) anyone found by a competent court to be a lunatic or of unsound mind;

(c) a body corporate;

(d) anyone in respect of whom an order shall have been made under section 177 of this Act so long as such order remains in force unless leave to act as director has been given by the Court in accordance with that section;

(e) an undischarged bankrupt, unless he shall have been granted leave to act as director by the court by which he was adjudged bankrupt.

In ***Ex parte Ploetner***, the court held that the combined effect of sections 173 (1) (e) and 177 (1) (b) of Act 179 is to render a person who is adjudged bankrupt outside Ghana incompetent to act as director of a company in Ghana without leave.

The Constitution of a company may also contain additional classes of persons who may be incompetent to act as directors of the Company. Industry Specific Competence Requirements

Banking: Sections 38 and 40 of the Banking Act

A person cannot be appointed as a director of a bank if he:

(a) has been adjudged to be of unsound mind or is detained as a criminal lunatic under any law in force in Ghana;

(b) has been declared insolvent, has entered into terms with any person for payment of that person's debt or has suspended payment of the person's debt;

(c) is convicted of an offence involving fraud, dishonesty or moral turpitude;

(d) has been a director or manager or associated with the management of an institution which is being or has been wound up by a court of competent jurisdiction due to offences committed under a law or a bankruptcy;

(e) is a director, chief executive or employee of another bank;

(f) is under the age of eighteen years; or

(g) is not, in the opinion of the Bank of Ghana, a fit and proper person to be a director.

Share Qualification: Section 174

Ordinarily directors are not required to hold shares in a company. The Constitution of a company may however require that directors should hold a certain minimum number of shares in the company. If the Constitution of a company include such a requirement then every director of the Company is required to acquire the shares within 2 months after his appointment or such shorter period as may be imposed by the Constitution.

A person who fails to acquire the relevant number of shares shall be deemed to have vacated his post.

If a company amends its Constitution to include a share qualification, the existing directors have 2 months to obtain their qualification.

If a director vacates his post because of a failure to obtain a share qualification, then he cannot be reappointed unless he has obtained the qualification.

Vacation of office as a Director: Section 175

A director is deemed to have vacated his office:

(i) if he becomes incompetent to act as director under section 173 of the Act;

(ii) if he fails to meet a share qualification requirement under section 174;

(iii) if he resigns by notice to the company; or

(iv) By any other means provided for in the Constitution of the Company.

Removal of Directors

Section 176 of the Companies Act allows a company to remove any director by ordinary resolution notwithstanding any provision in the Company's Constitution or in any agreement with director.

Section 176 (1) vests shareholders with the absolute right to determine who manages their business. The court will hesitate to interfere in the exercise of the right, except in cases of procedural irregularities or oppressive and discriminatory behaviour. ***Okudjeto v Irani Brothers* [1974] 1 GLR 374.**

A director cannot be removed at any meeting unless not less than **35 days' notice** of the intention to remove him has been given to the company. The notice of intention to remove is required to be circulated to the members of the company in the same manner as notices of a meeting will be circulated.

When a company receives a notice of an intention to remove a director, it is required to send a copy of the notice to the relevant director immediately. The relevant director is entitled to:

(i) be heard at the meeting;

(ii) send a written statement to the company, which shall be circulated to all members.

If the removal of a director constitutes a breach of his service agreement, he may be entitled to compensation on the basis of the service agreement.

Is section 176 mandatory?

In ***Pinaman v Abrokwa,*** the Court of Appeal held as follows:

"… *Act 179 specifically provided for the procedure and the mode for the removal of a director of a limited liability company under section 185. Prima facie, to remove a director of a company from the office of a director, the procedure spelt out under section 185 of Act 179 must be followed by the company. It seems to me that the applicants must satisfy the court that resort to section 218 of Act 179 had become necessary as a final and last resort. In other words, the affidavits of the applicants must on the face of it show that the applicants resorted to section 185 without avail and without success. That as a last resort, the almighty power of the court must of necessity be called in aid of the applicants. There was no evidence to show that the applicants had unsuccessfully attempted to remove the named director chairman pursuant to section 185 of Act 179. It is only after this unsuccessful exercise pursuant to section 185 of Act 179 that resort to section 218 of Act 179 could be justified.* "@p 390

The Court of Appeal expressed a different view in ***Adams v Tandoh***. The court held that under section 216 of the Act a director could be summarily dismissed without resort to the procedure under section 185(now Section 176). At page 581, the court held as follows:

"*The appellant was an officer of the company. That is, he was the managing director of Solid Construction Co. Ltd. and a director of the other three sister companies; and his relationship with those companies continued to be governed by the common law rules of master and servant, irrespective of section 185 whose provisions are not in conflict with the common law rules. There was therefore no obligation whatsoever on the part of the company to resort to the procedure under section 185 of the Act before the appellant could be dismissed from his office as a director or as a managing director. The company may choose either to adopt the procedure under the said section 185 or may proceed in accordance with the principles of common law and equity as provided by section 216, depending on the circumstances of each case.*

In this particular case, the appellant, as found by the learned trial judge, had not only breached his fiduciary obligation towards the company as required by section 203(now Section 190) of the Act, but had also committed acts of serious fraud and criminal misconduct in his dealings with the company. It was disclosed by the evidence that the appellant had been guilty of immoral and untrustworthy conduct and it would have been highly prejudicial to the interests of the West Coast Group of Companies to keep him in his position. Prompt and swift action was therefore absolutely necessary to safeguard the interests of the Group. In the court's view, immediate summary dismissal was the right answer and that was justified under the common law.

It would seem from the views expressed by the court that the serious nature of the misconduct of the dismissed director and its potential impact on the interest of the company justified his summary dismissal.

In ***Montero v Redco [1984-86] 1 GLR 710***, the court upheld the dismissal of an MD by the board in spite of the fact that the dismissal did not comply with the Company's Regulations and the board acted without a quorum. In the view of the court, the conduct of the MD had put the interest of the company and its shareholders in jeopardy, so they had to act quickly. It is not clear from the case whether the plaintiff had been removed as a director because the case indicates that he had been suspended from his position as the MD.

An argument that compliance with section 176 is mandatory for the removal of directors may be awkward to defend when considered in the light of section 29 of the Companies Act, which empowers persons who may not be members to appoint and remove directors of a company. If section 176 is considered as mandatory, then how will such parties remove the directors they have appointed since they may not be members of the company?

Section 176 and Class Rights etc

Under sections 29, 172(4) and 49 a company may grant a particular class of shareholders the right to appoint a certain number of directors. The question is whether these directors appointed by a class, which may be a minority, can be removed by the majority without prejudicing the rights of the appointing class.

In ***Okudjeto v Irani Bros***, the court expressed the view that Section 176 vest in the general meeting of the shareholders the absolute right of determining who should manage the affairs of the company despite any agreement to the contrary. This view seems to be supported by section 176(1) which gives shareholders to power to remove a director notwithstanding any provision in its Regulations.

In ***Okudjeto v Irani Bros***, the court considered whether the removal of a director appointed by a

class by the other shareholders under the terms of section 185(now section 176) can amount to oppressive conduct. The held that:

"*It seems therefore that a resolution to remove a director can fall within the provisions of section 218 if it is found to be oppressive, or prejudicial, or discriminatory, or in disregard of the interests of a member. In this case, however, there is no evidence that the members at the general meeting do not want the class "B" shareholders to be represented. The members do not want a particular director appointed, and I think the provisions of section 185 that the general*

meeting can remove any director "notwithstanding anything in its Regulations" would be rendered meaningless if such a decision of the shareholders in circumstances such as appear in this case were held to be oppressive or discriminatory, etc. The class "B" shareholders are free to nominate another person as director. It is [p.386] only when every person nominated by them is rejected that the court may legitimately draw the inference that the shareholders at general meeting are trying to deprive the class of representation on the board, and therefore stamp their conduct or acts as discriminatory or oppressive" @385-6

In the court's view therefore, even though a particular director has been appointed by a class, such appointment does not affect the fundamental rights of the members in general meeting to determine who manages their business. Therefore, a director appointed by a class can be removed by the members in general meeting under section 176.

The exercise of the right of removal by the members in general meeting does not amount to a variation of rights of the class because the class will still have the right to appoint a replacement director. It is only when directors appointed by the class are consistently removed that an issue can be raised about an unlawful attempt to vary the rights of the class or possible oppressive conduct under section 219.

Disqualification of Directors (Section 177)

The following persons may be disqualified from being directors of a Company in Ghana:

(a) where a person is convicted of.

i) an offence involving fraud or dishonesty

ii) an offence in connection with the promotion, formation or management of a body corporate,

iii) An offence involving insider dealing, or

iv) Any other criminal offence which is not a misdemeanour

(b) a person adjudged bankrupt whether in the Republic or elsewhere,

(c) a person appears to be a appears to have been guilty of a criminal offence, whether convicted or not, in relation to a body corporate or of a fraud or breach of duty in relation to a body corporate.

(d) it appears that a person is disbarred by the competent authority from being a member of a recognised professional body as the result of a disciplinary inquiry, or

(e) there is an ongoing investigation by a criminal investigation body or by the Registrar or the equivalent in a foreign jurisdiction regarding the matters in (a) to (d).

The disqualification proceedings may be commenced by the High Court on its own motion or by

(i) Registrar;

(ii) the Official Trustee;

(iii) by the trustee in bankruptcy of the person concerned; or (iv) by the liquidator of a body corporate.

Where the court is of the opinion that the case for disqualification has been established it may order that the director shall not, without the leave of the Court, be a director of or in any way, whether directly or indirectly, be concerned or take part in the management of a company or act as auditor, receiver or liquidator of a company for the period that may be specified in the order.

In ***Mahama v Soli,*** the court held that the MD of the company had made himself unfit for the post of a fiduciary of the company and found that he had committed a breach of "duty in relation to a body corporate" within the meaning of section 186 (1) of the Companies Act 1963 and ordered that he should not take part in the management of the company for at least a period of five years.

See also *Adams v. Tandoh*

The following will be automatically disqualified for a period of five years:

(a) Persons who have been convicted of an offence involving fraud or dishonesty or relating to the promotion, formation or running of a company within the last 5 years,

(b) Persons who have been directors or senior executives of companies that have become insolvent due solely or partly to the activities of that person, or

(c) Persons who have been disqualified to act as Company Secretary, receiver, manager or liquidator of a company.

The disqualification may be for a period of 10 years where the person is subsequently subject to a second conviction of an offence involving fraud or dishonesty or relating to the promotion, formation or running of a company.

The disqualification is permanent where the person is subsequently subject to a third conviction.

Duty of Director to Report Disqualification (Section 178)

A disqualified director on becoming aware of his disqualification, must immediately report it to the Board of Directors and the Company Secretary in writing. Failure to do so within 21 days of the disqualification makes the director liable to a fine not less than 500 penalty units and not more than 1,000 penalty units or a term of imprisonment of not less than 2 years and not more than 5 years or both the fine and the imprisonment.

Types of Directors

Substitute directors: Section 180

These are directors appointed by the Company to act as deputies to named directors and as substitute in the absence of the named director. Other than in relation to quorum, a substitute is not counted as a director for the purpose of any provision in the Act requiring a certain number of directors.

Further, a substitute director cannot vote at any meeting at which the main director is present.

Apart from the above, a substitute director is deemed to be a full director for all purposes and shall be appointed and removed in the same manner as an ordinary director. A substitute director does not cease to be a director merely because the director for whom he is a substitute ceases to be a director.

In Professor Gower's comments on section 187 (now Section 180), he indicates that:

"*The permanent substitute director under section 187 is a full-fledged director and must be appointed by the members. He differs from the normal director only in that he is counted as one with his "principal" for the purpose of minimum and maximum numbers and in that he cannot vote at a board meeting if this "principal" is present. Hence one director and his substitute will not suffice as compliance with section 180.*"

Alternate Directors: Section 181

In the absence of contrary provisions in the Constitution of a company, a director may appoint another director or any other person to be his alternate on the board for a period not exceeding 6 months, if he is out of the country or he unable to act as a director for some other reason.

If the proposed alternate is a director then no board approval is required. However, if he is a not a director then the approval of the board is required11. See *Okudjeto v Irani Bros*.

The appointment is required to be in writing and should be signed by both the director and his alternate and lodged with the company.

An alternate director is deemed for all purposes to be a director of the company and officer of the company and not an agent of his appointer.

If the Regulations require a share qualification, it shall not apply to him and he shall not be counted for the purpose of any provision of the Act requiring a maximum or minimum number of directors, except in relation to quorum requirements.

The company does not incur any additional cost for the appointment of an alternate director. The appointing director bears the costs of his appointment. See 181(4) and (5).

Where the alternate director is himself a director, he shall have an additional vote for each director for whom he is alternate, at every director's meeting. Provided however that an alternate cannot attend any director's meeting at which his appointor is present.

The appointment of an alternate director will cease:

(i) at the expiration of the period for which he was appointed;

(ii) if his appointor gives written notice to that effect to the company;

(iii) if his appointor ceases for any reason to be a director; or

(iv) if the alternate resigns by notice in writing to the company.

Until the cessation of the appointment of an alternate director both the appointor and appointee shall be and may act as directors of the company.

NB: Act 992 proscribes attendance and voting by proxy at directors meeting-§188(2) (i).

	Substitute	Alternate
Mode of appointment	By company through its members	By a named director (approval by board may be required)

	Substitute	Alternate
Tenure of office	Fixed until removed from office in accordance with § 172	Can be removed from office by expiration of time of appointment, termination or resignation
Counting at meetings	Present at meetings where his named director is present with no right of vote. Entitled to vote of his named director.	Cannot be present where his named director is present. Entitled to vote of his appointor and when an already director, additional vote.
Delegatus non protest delegare	Cannot delegate	Cannot delegate
Powers	Full power of director	Full power of director

Executive Directors

An executive director is a director who exercises additional responsibilities of in the day-today management of the company. In that executive capacity, the director becomes an employee of the company[6].

The Managing Director

Section 146 and 183 of the Companies Act allows the directors to appoint one or more of their members to the office of managing director and to delegate all or any of their powers to such a director.

[6] Section 183

Unless any express limitations on the powers of a Managing Director are published, in relation to third parties, the extent of his powers will be determined by sections 147 and 150(b) of the Companies Act.

The directors may entrust to and confer on a managing director any of the powers, exercisable by them upon such terms and with such restrictions as they think fit.

An MD's position is automatically determined when he ceases to be a director. Section 184(b).

Whether the termination of his appointment as a director will amount to a breach of his service contract will be determined by the terms of the contract. Sections 184(b).

Remuneration

In determining the remuneration of executive directors, the directors are required to take into account their fiduciary duties and to ensure that the remuneration is commensurate with the services to be rendered by the holder of the office. See section 183(d).

All fees and other remuneration payable to a director in whatever capacity should be approved by ordinary resolution of members, Section 185. Further under section 214, a director cannot be paid tax free remuneration by the company.

Professor Gower's comments on section 194(now section 185):

"I am hopeful that this section will do much to prevent one of the most common abuses, namely, running companies, for the sole benefit of the directors who take everything by way of' remuneration leaving nothing for the shareholders. I can see no reason why it should prove unduly, restrictive; it merely forces directors to come clean and to justify themselves to the shareholders instead of being sole judges in their own cause."

In practice however most companies avoid this scrutiny by getting the shareholder to pass resolutions authorizing the directors to determine the remuneration and other emoluments of executive directors.

<u>Residence of Directors in Ghana: Section 182</u>

At least one director should be resident in Ghana at all times. In the view of Professor Gower, this requirement is important because it is undesirable that companies should be left without any director in the jurisdiction, considering the fact that the Companies Act makes provision of alternate and substitute directors.

Meetings of Directors: Section 188

The purpose of section 188 is to provide a liberal regime within which directors can meet to deliberate on the company's business. It allows them to make their own procedure as may suit the particular circumstances. Some key points are as follows:

a. Any director can call a meeting;

b. No statutory notice period required for directors meetings. They can determine this themselves;

c. A director outside the jurisdiction need not be given notice of a meeting;

d. The directors may decide their own quorum for meetings. The default quorum requirement is 2;

e. Proxy voting is not permitted at director's meetings;

f. Directors can take decisions by written resolution.

g. Quorum is generally fixed at 2. However, a company may fix its own quorum. The exception, however, to this rule is where the number of directors fall below quorum; the director(s) may act for at most 4 weeks and after which they may act to only to fill the vacancy-section188(2) (f): see Politis v Plastico Ltd and Montero v Redco. [1984-86].

h. A board meeting that transacts business inquorate may seek ratification from the board: see Food Specialty v Technicas [1987-88]

i. Generally, resolutions at meetings are to be by majority votes, unless the company's constitution provides otherwise: Voting may be by way of; consensus for non-controversial issues and show-of-hands for controversial issues and casting vote.

Minutes of Meetings: section 188

A company is required to keep a minute book of all meetings of directors and committees of the board. Minutes signed by the chairman of the meeting or chairman of the next meeting shall be deemed to be prima facie evidence of what took place at the meeting.

Unlike minute books of general meetings, the members are not entitled to inspect the minutes of directors' meetings. Minutes of directors' meetings may become available to shareholders in the context of litigation pursuant an order for discovery.

POWERS & LIMITATIONS ON THE POWERS OF DIRECTORS: § 189:

Directors' powers are conferred by the company's constitution: see section 144(2).

The law therefore enjoins them to operate within the limit prescribed by the constitution and exercise those powers for the purposes for which they are conferred- section 190(3) and section 191. However, the default provided for by the Act are as follows:

1. Issuance of shares: The directors of a company, particularly those with shares, may issue treasury shares without any restraint or right or pre-emption [section 189(1)(a)(i)] or shares to employees as part of a scheme in force- section 189(3). However, they can only issue new or unissued shares by an ordinary resolution and upon exhaustion of pre-emptive right issue - section 189(1)(a)(i)

2. Charity and voluntary contribution: Directors may make contributions to; Pensions fund for the benefit of their employees or associated company, charity and other funds. However, contributions to charity and other funds requires an ordinary resolution where it exceeds 2% of company's retained earnings (i.e former income surplus) from the just ending financial year- section 189(1)(a)(ii)

3. Borrowing: Directors of a company may borrow money for running the business of the company. However, where the borrowings (i.e the amount to be borrowed together with other monies borrowed and charges created) of the company exceeds it's stated capital, an ordinary resolution is required-§ 189(9).

4. Acquisition/Realization of assets and acquisition rights (described as major transactions): A company can acquire or realize its assets. However, where the realization or acquisition is more than 75% of the company's asset, a special resolution is required: see § 189(1)(b) and 145.

5. Delegation of duties: Directors by the principles of *delegatus non protest delagare* may delegate their functions (see § 181-184). Yet, cannot assign their officer to third parties as any such assignment is void.

FUNCTIONS OF DIRECTORS

The directors of a company essentially have these main functions to perform namely:

1. Overall management and running of the company. They are not bound to comply with the directions or instructions of members: see § 144 and Hayfron-Benjamin in Okudjeto v Iran v Bros.

2. Recruit executive directors and appoint directors during vacancies: see Politis v Plastico Ltd where the appointment of a new director by a surviving director was held (per Amissah JA) invalid only by his failure the serve notice of meeting on the administrator of the deceased director.

3. Recommend dividends: See Asare v Dupaul woods.

4. Protect and preserve assets.

Duties of Directors

Directors owe a fiduciary duty to the Company and are required to observe the utmost good faith in any transaction with the company or on its behalf. As fiduciaries, certain key principles are applicable to the role directors' play in corporate governance. These are:

(i) The directors must act in good faith in what they believe to be the best interest of the Company.

(ii) They cannot exercise the powers conferred on them for a collateral purpose or for their personal benefit;

(iii) They must not fetter their discretion; and

(iv) They should not place themselves in a position in which their personal interest or their duties to others conflict with their duties to the company.

The duty to act in Good faith

The duty to act in good faith involves a requirement that the directors should act as honest men of commerce would act in the affairs of the company. The duty is to act in what they bona fide believe to be in the best interest of the Company not what the court or a third party believes to be in the best interest of the company. To this extent, the duty of good faith involves a subject test. That is, it is for the director to personally consider, in good faith, whether his conduct is in the best interest of the company.

In ***Smith & Fawcett*, [1942] 1 All ER 542** the company's directors had unfettered power under the Regulations to refuse to register a transfer of shares. On the issue of whether the directors have exercise that power in the best interest of the company, the court held that the directors must exercise their discretion in what they consider, not what a court may consider, to be in the best interest of the company.

Though the duty to act bona fides has a subjective element, the courts will also take object considerations into account. In determining the standard of this subjective test, the court will take into account what degree of skill will be required from a person of the director's knowledge and experience.

Re City Fire Equitable Insurance

Even where the directors act in good faith for a purpose which is ostensibly within their powers, the court may intervene in exceptional circumstances. As Bowen LJ put it in ***Hutton v West Cork Rly** Co* (1883) 23 Ch. D. 654, at 671:

"*Bona fides cannot be the sole test, otherwise you might have a lunatic conducting the affairs of the company and paying away its money with both hands in a manner perfectly bona fide yet perfectly irrational.*"

In deciding whether a director has acted bona fide, the court also considers whether he has acted in such a manner as a reasonably skillful director would have acted in the matter. In ***Charterbridge v. Lloyds Bank* [1969] 2 All ER, 1185**, the court considered a whether the directors of a subsidiary company had considered only the interest of the group in granting a

guarantee as opposed to the interest of the company. The court held that the proper test must be:

"Whether an intelligent and honest man in the position of a director of the company concerned could in the whole of the existing circumstances have reasonably believed that the transaction was for the benefit of the company."

This objective test is reflected in section 190(2), which requires a director to perform his duties in such manner as a faithful, diligent, careful and ordinarily skilful director would act in the circumstances and to have regard to

(a) the likely consequence of any decision in the long term,

(b) the impact of the operations of the company on the community and the environment, and

(c) the desirability of the company maintaining a reputation for high standards of business conduct.

Do directors have to be constantly engaged in the business of the Company?

Though all directors owe fiduciary duties to the company, most often it is only executive directors who are constantly engaged in the business of the company. The question, what is the duty of the non-executive directors regarding the day to day running of the business?

In ***Re City Fire Equitable Insurance***, the court held that, a director is not bound to give continuous attention to the affairs of his company. His duties are of an intermittent nature to be performed at periodical board meetings and at meetings of any committee of the board which he may serve on. He is not however bound to attend all such meetings, though he ought to attend a majority of whenever in the circumstances he is reasonably able to do so.

In some cases however, the courts have held that where the inactivity of a dormant director has led to losses to the company, it can amount to breach of their fiduciary duties. In *Dorchester Finance v Stebbing*, [1989] BCLC 498, two director who were chartered accountants and another with considerable experience in management had left the affairs of the company in the hands of another director and often signed blank cheques for the director. Action was later brought against them for negligence in the management of the company. The court held that considering the expertise and experience of the defendant, they had acted in breach of their fiduciary duties.

Duty to not Fetter Discretion

As part of their fiduciary obligation, directors are required to act at all times in what they believe to be in the best interest of the company. Further, under section 170, directors are prohibited from acting on the directions or instructions of another person. These duties imply that, directors should not restrict the exercise of their future discretion or relegate their discretion in place of the views of another person.

According to Prof Gower's the use of the words "always"[7] in Section 190 (2) is intended to emphasise that directors cannot validly fetter their discretion by contracting to vote in a particular way. They must always free to act as they think best in the company's interests and cannot enter into a binding agreement today on how they will vote next year.

This restriction however does not prevent directors entering into arrangements regarding their future conduct if at the time they entered into the arrangement, they genuinely believed that there acting in the best interest of the company.

[7] Gower commented on the old section which used the words "at all times". The point remains valid because the word "always" is synonymous to the phrase "at all times".

Fulham v Crabra Estates [1994] BCLC 363; Dawson International v Coats Paton

In the Australian case of **Thorby v. Goldberg (1964) 112 CLR 567 @605-6**, the court held that:

"There are many kinds of transactions in which the proper times for the exercise of the directors' discretion is the time of the negotiation of a contract and not the time at which the contract is to be performed … If at the former times they are bona fide of opinion

that it is in the best interest of the company that the transaction should be entered into and carried into effect, I can see no reason in law why they should not bind themselves to do whatever under the transaction is to be done by the board.

Who do the directors owe their duty to?

Section 190 provides that a director stands in a fiduciary duty to the Company and should act in what he believes to be the best interest of the company as a whole. The question is how to define the interest of the company as a whole. The company is said to be a nexus of contracts, connecting various actors including shareholders, directors, employees, the state, the community, customers inter alia. Does this mean that the interest of these parties should be taken into account by the directors?

Gower's comments on section 203(2) (now section 190) dictates that wider consideration of stakeholder interest, no matter how meritorious they may be would not form part of a true legal definition of the interests of the companies. Therefore, "the company as a whole" means the long-term interest of members and members alone. In ***Greenhalgh v Arderne****,* the court held that the company as a whole does not mean the company as a commercial entity as distinct from its shareholders. It means the general body of the shareholders.

According to Gower it would be unrealistic to expect that a director appointed by a sectional interest, like employees, a class of shareholders or creditors will completely ignore the sectional interest because of the duty to the company. Subsection 4, therefore allows a director appointed by a sectional interest to give consideration to the group he is representing in deciding whether a particular transaction or course of action is in the interest of the company as a whole.

(i) *Duty to shareholders*

Directors do not owe fiduciary duties to shareholders. The authorities indicate that though the directors may take the interest of shareholders into account, they do not owe fiduciary obligations to the shareholders.

See *Dawson International v Coats Paton*

In both ***Boohene v GUA and Dan Ofori v GCB***, the High Court held that the directors have a duty to provide adequate information to shareholders on certain resolutions to be presented to shareholders to allow them to make an informed decision. The key point in these cases is that this duty is not a separate fiduciary obligation but part of the general fiduciary duties to the company.

(ii) *Duty to Creditors*

When a company is in financial difficulties, to the extent that its creditors are at risk, the duties which the directors owe to the company are extended so as to encompass the interest of the company's creditors as a whole as well as those of the shareholders

In ***Kinsela v Russel Kinsela*** the court held that:

"In a solvent company, the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise. If as a general body they authorize or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done. But where the company is insolvent, the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholders' assets that through the medium of the company, are under management of the directors pending their liquidation, return to solvency or the imposition of some alternative administration."

Also, in ***West Mercia Safetywear v Dodd***, the court held when the company is insolvent the interest of creditors should take precedence over the interest of shareholders.

Sometimes near insolvency or financial crisis will oblige the directors to consider the interest of the creditors in their management of the company's finances. In ***Nicholson v Permakraft***, the court held that:

The duties of the directors are owed to the company. On the facts of particular cases, this may require the directors to consider inter alia the interest of creditors. For instance creditors are entitled to consideration, in my opinion, if the company is insolvent, or near insolvent, or doubtful solvency, or in a contemplated payment or other course of action would jeopardize it solvency." @ 279

Duty to employees

In considering the interest of the company in a particular matter, section 190 (4) allows directors to have regard for the interest of employees. This however does not mean that directors owe a

duty to seek the welfare of employees above that of the company and its shareholders. In *Parke v the Daily*

News, the court held that there was no legal basis for the proposition that directors of a company which was ceasing its business should pay substantial part of its assets to employees to the detriment of the company and its shareholders, on the basis that were duty bound to give consideration to the interest of employees.

Conflict of duty and Interest

Under section 192, without the consent of the company, a director is prohibited from placing himself in a position in which his duty to the company conflicts or may conflict with his personal interests or his duties to other persons. that the duty of a director to avoid conflict is not infringed if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or the matter has been authorised by the directors.

This reflects a well-established equitable principle that persons owing fiduciary obligations should not place themselves in a position in which their personal interest or duties to other may conflict or may possibly conflict with their fiduciary obligations. The leading authority on this principle is case of ***Aberdeen Railway v Blaikie***, where the court held that the company was entitled to set aside a contract for the purchase of equipment entered into between it and a partnership on the basis that the managing partner of the partnership firm was also the chairman of the board of directors of the company. The court held that:

"*A corporate body can only act by agents, and it is of course, the duty of these agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect*" — per Cranworth L.C. at 471

In the case of ***Bhullar v Bhullar***, the court held that the phrase "*possibly may conflict*" means that:

"*…the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict.*"

192(a): The No Profits Rule

Under this leg of the rule, a director, without the consent of the company, is prohibited from using for his own advantage any money or property of the company, otherwise than in accordance with the provisions of the Act on how to use company information (Section 198) or any confidential information or special knowledge obtained by him in his capacity of director.

In ***Regal (Hastings) Ltd. v. Gulliver [1942]1 All E.R. 378, H.L***, the directors of company A themselves subscribed for £l shares at par in another company B which company A had decided to form. This they did in perfect good faith and only because it was necessary for the shares to be subscribed in cash and company A could not do so. Later all the shares in both companies were sold and the part of the price allocated to the shares in company B was £3 l6s. per share. It was held that the directors must restore to company A the profit of £2 16s. which they had made. Lord Macmillan (at pp. 391-2) expressed the principle to be as follows: "The plaintiff company has to establish two things:

(i) that what the directors did was so related to the affairs of the company that it can properly be said to have been done in the course of their management and in utilisation of their opportunity and special knowledge as directors, and (ii) that what they did resulted in a profit to themselves."

Section 192 (a) envisages circumstances where there has been no misappropriation of corporate property or a corporate opportunity but merely some use of corporate property or special information, which has enabled the directors to make a personal profit.

The key issue in this rule is that person owing fiduciary must not use property belonging to the beneficiary of the duty or information they come across in the course of their duties for personal profit without disclosing all material facts and obtaining the consent of the beneficiary of the duty.

Maturing Business Opportunity

This principle applies to situations where directors seek to take advantage of business opportunities, they have become aware of in the course of their duties as directors. In ***Canadian Aero Services v. O'Malley***, the president and vice president were held to be in breach of their fiduciaries duties after they actively pursued a business opportunity for the company and later resigned to take advantage of the opportunity.

In ***Industrial Devpt v Cooley***, a commercial opportunity was offered to the defendant, who was at the time the managing director of the plaintiff company, in his private capacity. The defendant

subsequently obtained his release by the company in order to exploit that opportunity for his own benefit. There was no possibility of the company obtaining the contract from the counterparty. Had the company known that he had been offered that opportunity, it would not have agreed to release him. He was held accountable for the benefits he had received by exploiting the opportunity. It did not matter that the opportunity could not have been exploited by the company itself. Roskill J held as follows:

"*The defendant had one capacity and one capacity only in which he was carrying on business at that time. That capacity was as managing director of the plaintiffs. Information which came to him while he was managing director and which was of concern to the plaintiffs and was relevant for the plaintiffs to know, was information which it was his duty to pass on to the plaintiffs because between himself and the plaintiffs a fiduciary relationship existed…." @ p 451*

However in ***Island Export Finance Ltd v Umunna****,* where the plaintiff resigned his position from the company and later obtained contracts from a party with whom the company did business, the court held that he was not in breach of his fiduciary duties because at the time he resigned he was not actively pursuing any opportunity with the counterparty for the company and it could not be said on the facts that the dominant reason for his resignation was to exploit a maturing opportunity. The court suggested that resignation alone (without being prompted or influenced by a wish to acquire the business) might found liability if his position with the company led the ex-director to the opportunity. The court held that:

"*It would…be surprising to find that directors alone, because of the fiduciary nature of their relationship with the company, were restrained from exploiting after they had ceased to be such any opportunity of which they had acquired knowledge while directors. Directors, no less than employees, acquire a general fund of knowledge and expertise in the course of their work, and it is plainly in the public interest that they should be free to exploit it in a new position*." @p 482

Ummuna, therefore establishes that a director after he resigns or otherwise leaves office is not precluded from using his general skill and knowledge or his personal connections to compete. See also ***CMS Dolphin v Simonet****.*

In some cases, it has been held that when the company considers an opportunity and rejects it, the directors can take advantage of the opportunity. The danger of this approach is that it provides an incentive for the directors to consider and reject the opportunity so that they can later take it for themselves. This can however be addressed through legal action, if shareholders later find that the directors had failed to act in the best interest of the company in deciding to reject the opportunity.

See also ***Peso Silver Mines Ltd v Cropper***.

192(1) (b) Competing with the Company.

A director is not allowed to be interested directly or indirectly, otherwise than as a shareholder or debentureholder in a public company, in any business which competes with that of the company.

Asafu Adjaye v Agyekum

192(1)(c) Personal Interest

A director cannot be personally interested, directly or indirectly, in any contract to be entered into by the company without first complying with section 207.

Section 193: Avoiding conflict (except personal interest under section 193(1)(c))

Section 193 can be used to cure a potential conflict in all cases other than cases falling under section 192(1) (c). Under this section, the consent of the company should be by ordinary resolution after the disclosure of all material facts, including the nature and extent of the interest of the relevant director. The resolution should either have been agreed to by all members entitled to attend and vote or passed at a meeting at which the relevant director nor any holders of any shares in which he is beneficially interested should not have voted.

The consent may be given before or after the transaction. Where the approval is given after the transaction it shall be not be effective unless it was given not later than 15 months after the transaction.

Section 194: Avoiding conflict under section 192(1)(c)

According to Professor Gower, the objective of section 194 is to have a relaxed approach to dealing with directors contracting with the company. This is made subject to disclosure of material facts by the directors. This does not however absolve the director from any breaches of his fiduciary duties under section 190.

The rules under section 194 can be summarized as follows:

(i) A director with a material interest in a contract is required to disclose the extent and nature of his interest at a meeting of the board of directors;

(ii) Holding of shares of not more than 2% in a public company does not amount to material interest;

(iii) Declarations in respect of the proposed contracts should be made at the first meeting at which the contract was considered or at the earliest opportunity;

(iv) Other directors of the company are prohibited from entering into a transaction on behalf of the company if they are aware that another director of the company is materially interested in the transaction and the board has not approved the transaction;

(v) The interested director is not allowed to vote in the resolution approving the contract;

(vi) The Company is required maintain a directors disclosure register and a copy of every declaration made and of a notice given in pursuant to section 194 is required to be entered into the register;

(vii) The register is open for inspection without charge by any director, secretary, auditor or member of the company at the registered office of the company and is required to be produced at every general meeting of the company, and at a meeting of the directors if requested by a director.

In the case of ***Neptune v Fitzgerald***, the court held that even in the case of a sole director, the requirement for disclosure of interest and the recording of that disclosure should be complied with.

Cases like *Bhullar v Bhullar* and *Items Software v Fassihi*, indicates that apart from the particularized parts of section 192 dealing with conflict of interest, the general duty of a director as a fiduciary is very broad and the courts are willing to extend the duty to cases falling outside the particularized parts of section 192.

In ***Items Software v Fassihi***, the court held that:

"This duty of loyalty is the "time-honoured" rule: per Goulding J in Mutual Life Insurance Co of New York v Rank Organisation Ltd [1985] BCLC 11, 21. The duty is expressed in these very general terms, but that is one of its strengths: it focuses on principle not on the particular words which judges or the legislature have used in any particular case or context. It is dynamic and capable of application in cases where it has not previously been applied but the principle or rationale of the rule applies. It reflects the flexible quality of the doctrines of equity. As Lord Templeman once put it "Equity is not a computer. Equity operates on conscience …" @103

CIVIL LIABILITY

Breach of Duty

Where a director commits a breach of duty under sections 190 to 192:

(a) the director and any other person who knowingly participated in the breach is liable to compensate the company for the loss it suffers as a result of the breach;

(b) the director shall account to the company for any profit made by the director as a result of the breach;

In *CMS Dolphin v Simonet,* the court held that:

"*In my judgment the underlying basis of the liability of a director who exploits after his resignation a maturing business opportunity of the company is that the opportunity is to be treated as if it were property of the company in relation to which the director had fiduciary duties. By seeking to exploit the opportunity after resignation he is appropriating for himself that property. He is just as accountable as a trustee who retires without properly accounting for trust property. In the case of the director he becomes a constructive trustee of the fruits of his abuse of the company's property, which he has acquired in circumstances where he knowingly had a conflict of interest and exploited it by resigning from the company.* @733

(c) a contract or any other transaction entered into between the director and the company in breach of that duty may be rescinded by the company.

Proceedings to enforce a breach can be brought under section 200.