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news

## Newsletter

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### **DIRECTORS' DUTIES**

#### **TO KEEP CONFIDENTIAL, PERTINENT AND PROPRIETARY INFORMATION OF THE COMPANY**

A director or officer of a company has a fiduciary duty not to use for his own purposes, or to disclose, confidential or proprietary information entrusted to him

concerning the company's affairs, and he or she can be prevented and restrained from doing so even after the termination of his office.

In this circumstance and context, confidential or proprietary information can include, and is not necessarily restricted to, information of direct commercial value for example trade secrets, know how or customer lists. A Company is entitled to regard the confidential oral or written communications of its directors and

employees as revered and untouchable, and can in the relevant situation, enforce the confidentiality of such communications against whosoever is in possession of them and who seeks to use them.

Similarly, the afore-going can apply to the confidential discussions of the board of directors. Directors' fiduciary duties are extended to ensure the company's rights to regard and hold as confidential the proceedings of its board. A director must not allow himself to be compromised by

looking to the interests of the group which appointed him rather than to the interests of his company; a director cannot merely act as a channel of communication for, or puppet for a group that has appointed him. Directors must respect, out of necessity of the board's interests, the confidential nature of the board affairs. To this end, in determining what information is confidential, one does not merely look at an item which has been marked as "confidential".

The Director is obliged to hold secret any matter or communication that if discussed, may detrimentally affect the company, including but not limited to, disclosing information about who voted in a particular way on a particular resolution. Where it may be difficult to ascertain what is and is not confidential in respect of proceedings of the board, and as a precaution, it can be recommended to obtain approval from the board (by way of resolution) of the communication of any information outside of the board.

A director who threatens to act in breach of his duty not to disclose confidential information, can be restrained and interdicted from doing so. A director who has acted in breach of this duty may be

held liable for any profits he has made thereby or, alternatively, for damages in respect of any damage the company has suffered, and may be entitled to rely upon two distinct causes of action – a breach of a fiduciary duty or - a delictual claim for unlawful competition or infringement of the company's right to privacy.

## 2. DIRECTORS

### DUTIES, IN SO FAR AS IT MAY RELATE TO COMPETITION WITH THE COMPANY

A fundamental duty of directors individually and collectively, is to exercise their powers bona fide in the best interest of the company. In addition, at common law, there is a fiduciary duty upon a director not to place him or herself in a position where his interests with his duties to the company. A director will act in breach of his fiduciary duties, not only if

he actually competes with his company, but also if he becomes a director of or holds another office in a rival concern and, in so doing, places himself in a position in which his duties to that rival concern conflict, or may possibly conflict, with his duties to his company.



In the absence of any agreement to the contrary, a managing director (including a de facto managing director) or other executive director is precluded to either on his own account or through another company, carry on a business which falls within the scope of his company's business, and he is not permitted to solicit, use or canvass his company's employees on behalf of another.

A court, in considering the extent and nature of company's business and the limits of its directors' duties in this regard, will not only look at the company's powers under its memorandum, but also with the business that the Company carries on or it intends to carry on at the time of the alleged or threatened breach of duty. In circumstances where the company is in essentially a partnership, the court will also consider the underlying

agreement or understanding between the members.

However, where there is no special circumstance (for example a prohibition in a service contract) a director does not commit a breach of his fiduciary duty, merely because he takes steps to ensure that, on ceasing to be a director he can immediately set up in business in competition with the company or join a competitor. A director is also not obliged to disclose to that company that he is taking those steps.

The Courts have held that the mere creation by a managing director, whose services had been terminated and who was serving the period of his notice, of a future alternative means of employment – albeit in competition with his company – did not necessarily create a conflict of interests greater than that of an ordinary director serving on the boards of two competing companies.

Where a director acts in breach of this duty, the company may claim profits he may have acquired, or make a claim for damages in respect of any damage it has suffered, as a result of the director's breach of duty. Similarly, and where appropriate, the court can grant an interdict restraining a director from so acting. If the director acted on behalf of another, that other will be liable together with the director for any damage the company may have suffered.



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