

THE FOOTBALL ASSOCIATION

A GUIDE TO DIRECTORS' DUTIES AND OBLIGATIONS



This guide is believed to reflect the law and practice in the area as it applied at March 2012. It is not intended to be a statement of law. It has been written in general terms and therefore cannot be relied upon to cover specific situations. It also cannot be relied upon to cover (1) all obligations owed by a director to a company and (2) all eventualities should a director breach any of the obligations outlined in this document.

Application of the principles set out will depend upon the particular circumstances involved and we recommend that you obtain independent legal advice before acting or refraining from action on any of the contents of this guide.

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A INTRODUCTION

When an individual is appointed as a director of a football club, it is often his / her first experience of being a Company director. The duties associated with being a director of a football club are the same as those for any other Company director. This guide aims to provide an overview of what these duties and responsibilities are.

Whilst companies are owned by their members (the shareholders or guarantors), they are, for the large part, managed by a board of directors. Outside a limited number of decisions reserved for members' approval, the board is usually free (subject to the Company's constitution¹) to make decisions for the Company on all other matters.

Therefore the power delegated to directors is extremely wide. In order to regulate this, certain duties and responsibilities are bestowed upon directors in order to ensure their actions are primarily for the benefit of the Company.

Please note that the definition of 'Director' under the Owners & Directors Test ('OADT', formerly the 'Fit and Proper Person Test') is wider than that under Company Law.

Therefore this guidance is limited to the three types of director recognised by law and described in Section B below. It may be possible, for example, for an individual to be require to complete an OADT form under football regulations who does not fall under any of the categories of director listed in Section B.

B TYPES OF DIRECTOR

The three types of Company director are:

Executive Director: this is a director who carries out executive functions within the Company (for example as the Chief Executive Officer or Chief Financial Officer) and is usually a full or part-time employee. An executive director will usually perform operational and strategic business functions, will manage people, look after assets and enter into contracts on behalf of the Company.

Non- Executive Director: this is a director who is not an employee of the Company or a holder of an executive office. Such a director would usually devote part of their time to the affairs of the Company as an independent advisor or supervisor. A non-executive director will use their skills, experience and expertise to provide independent advice and provide a role in monitoring the Company's executive management.

¹ A company's constitution includes company's articles of association, decisions of the members of the company and any resolutions or agreements otherwise affecting the company's constitution.

Shadow Director: this is any person in accordance with whose directions or instructions the directors of the Company are accustomed to act. Although such individuals may not be a registered director at Companies House, they are still subject to the duties set out below.

It is important to note there is no distinction in principle between the duties owed by executive and non-executive directors. However, a shadow director does not necessarily owe the company the full range of duties set out below. The duties of a shadow director can depend on their position and function within the Company.

C DURATION OF DUTIES

The duties a director owes to the Company begin on his or her appointment. After resignation, directors are generally released from their obligations.

However, certain duties, such as the duty to avoid conflicts of interests and responsibilities, the duty not to make unauthorised profits and in some circumstances the duty not to accept benefits from third parties continue to apply after the directorship ceases.

D DIRECTORS' STATUTORY DUTIES

Directors generally have the authority to exercise all the powers of a Company in order to manage its business on a day-to day basis. However, these powers must be exercised in accordance with their statutory duties.

The seven principal fiduciary duties owed by directors to the Company are now set out in the Companies Act 2006 and are as follows:

- i) To act within powers:** A director must act in accordance with the Company's constitution and must only exercise his powers for their proper purpose. The Company's constitution includes the Company's articles, decisions of the members of the Company and any resolutions or agreements otherwise affecting the Company's constitution.
- ii) To promote the success of the company:** A director must act in a way he considers, in good faith, would be most likely to promote the success of the Company for the benefit of the members as a whole. There are factors that a director should take into account. These include, but are not limited to:
 - the likely consequences of the decision in the long term;
 - the interests of the company's employees;
 - the impact of the decision on the Company's reputation; and

- the need to act fairly as between the members.
- iii) **To exercise independent judgement:** A director must be independent in the exercise of his judgement on the matters considered by the Board. This does not prevent the director from acting in accordance with the terms of any agreement of the Company that might restrict the exercise of his judgement, nor does it prevent the director from delegating decisions to, for example, a committee if allowed by the Company's constitution.
- iv) **To exercise reasonable care, skill and diligence:** A director must exercise the same skill, care and diligence as would be expected of (1) a reasonably diligent person with the level of general knowledge, skill and experience that may reasonably be expected of the person carrying out the functions of that director in relation to the Company and (2) the actual knowledge, skill and experience of that director. If a director has, for example, specialist knowledge of a subject, then he will be expected to exercise the skills commensurate with that knowledge (having regard to his functions and specific responsibilities).
- v) **To avoid conflicts of interest:** A director must avoid situations where he might have a direct or indirect interest that would conflict with the interests of the Company. This is not the same as the duty to declare an interest in a proposed transaction or arrangement with the Company. Conflicts that do arise may be authorised by the other independent directors, the members or the Company's constitution.
- vi) **Not to accept benefits from a third party:** A director cannot accept any personal benefit from a third party which is conferred because of his being a director or his doing or not doing anything as a director. In some circumstances this may be authorised by the members.
- vii) **Declare an interest in a proposed transaction or arrangement with the company:** A director must declare the nature and extent of any interest he has in any proposed transaction or arrangement with the Company. Such declarations should be made before the proposed transaction or arrangement is entered into by the Company. Directors must also declare any previously undisclosed interest in an existing transaction or arrangement with the Company.

Any director failing to exercise the duties shown in i) to vii) runs the risk of committing an offence under the Companies Act. A new director should therefore take the time to ensure that he or she understands these duties.

E COMMON LAW DUTIES

The 2006 Companies Act codified the duties that were previously established through common law and equity. However, these will continue to apply to the extent duties are not expressly provided for in the 2006 Act.

It is therefore important for directors to be aware of the following:

- i) The common law duty of skill and care; and
- ii) Fiduciary duties such as:
 - the duty to act bona fide in the interests of the Company;
 - the duty to act for proper purposes/ not for any collateral purpose (e.g. not for personal gain, or with a conflicting interest);
 - the duty not to misapply Company property (e.g. making a prohibited loan to a director); and
 - the duty to account for a secret profit (i.e. a profit made by virtue of one's office, perhaps involving a contract between the director and a third party, which is not approved by the Company).

F BREACH AND LIABILITY

The duties listed above are owed by a director to the Company directly. They are also cumulative so that, if more than one duty applies, all relevant duties must be complied with. You cannot breach one duty in order to satisfy another.

A Company is a separate legal entity from its directors. Therefore, should a director breach any of the duties outlined above, the Company may have a claim against that director in law.

Any action taken against a director for breach of duty would usually be taken by the Board on behalf of the Company. However, in certain circumstances, the members can also bring an action against the director regardless of whether or not a director has personally benefited from a breach of duty.

G REMEDIES

Remedies for a breach of the above duties can include:

- the setting aside of a relevant transaction;
- the requiring of the return of property or acquired profits;
- the termination of the director's service contract; and
- damages payable to the Company.

As an example, the remedy awarded for a breach of the duty to exercise reasonable care, skill and diligence is generally damages (i.e. paying a sum of money to put the Company back in the position they were before the breach occurred).

H DIRECTORS' AND OFFICERS' LIABILITY INSURANCE

A Company cannot indemnify a director for any liability they may have incurred as a result of their negligence, default, breach of duty or trust in relation to the Company. However, a Company may indemnify its directors against any liability incurred to a third party, but there are a number of restrictions on the extent of this indemnity.

Additionally, the Company can purchase insurance for its directors against any liability attaching to them in connection with any negligence, default, breach of duty or breach of trust by them in relation to the Company.

I OTHER STATUTORY OBLIGATIONS

Criminal and civil liability can also be imposed on directors in the following circumstances (note: this list is not exhaustive):

- i) if a director continues to trade when he knew or ought to have known that there was no reasonable prospect of the company avoiding insolvent liquidation (known as wrongful trading) or if he knowingly continues to carry on business with the intention of defrauding creditors in the knowledge that there was no reasonable prospect of the creditors being paid by the company (known as fraudulent trading);
- ii) if a director fails to comply with health and safety regulations (for example failing to ensure the health and safety of their employees and those that are affected by their activities so far as reasonably practicable);

- iii) if a director fails to comply with environmental legislation (for example if it is shown that the director contributed to a breach through consent, connivance or neglect);
- iv) if a director acts while disqualified; and
- v) if a director fails to comply with other legislative requirements such as employment, data protection, competition and securities law.

Other statutory obligations of directors include administrative duties such as the duty to keep the statutory books up to date and the duty to file annual returns.

However, the liability for the breach of these duties usually attaches to the Company and to all defaulting officers of the Company.

J PRACTICAL ADVICE TO FOOTBALL CLUB DIRECTORS TO MITIGATE RISK

In order to mitigate the risk of any liability arising from any of the obligations detailed above, it would be prudent for an individual acting as a director of a football club to take the following steps and/or measures:

- to be aware of any limitations on the powers of the Company or its directors;
- to ensure that the Company has regular board meetings with prepared agendas (sent out in advance of the meeting) so **all** the directors can be kept properly informed of the affairs of the Club;
- to ensure that the Club's accounting records provide appropriate and necessary information including up to date management information or accounts. These should be presented at the board meetings to help provide directors with timely information. For example, if there has been a deterioration in the financial position of a Company which may lead to potential insolvency issues.
- the annual budget should be agreed by the board, including specific reference to key budgeted expenditure, such as the playing budget (given that this is likely to be the main expenditure of any Football Club) and any major capital commitments.
- to ensure that accurate and complete minutes are taken of all board meetings that evidence the basis on which directors have taken decisions;
- that the Company has in place written agreed levels of authorisation on expenditure;

- to ensure that the Club has the appropriate insurance in place to cover both on and off field liability. Professional advice should be sought wherever possible as to the required level of cover for the Club;
- to ensure that all loans to the Club should be documented in line with FA Rule I 1 (g); and
- ensure that the Club's bank mandate (and internet banking procedures) are up to date and only include relevant signatories with agreed level of authorisation limits.

The above is not an exhaustive list and the circumstances may change from Club to Club, depending on its particular circumstances.

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