



K2 BUSINESS RESCUE ☩

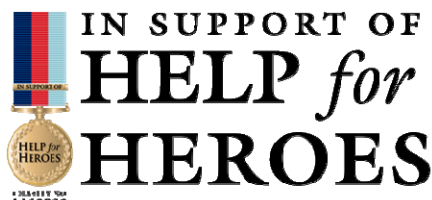
© K2 Partners (Rescue) Ltd 2010

A Handbook for Directors, Executives and Advisers

prepared by

*K2 Business Rescue
in collaboration with
Carter Clark*

Directors' Duties and Responsibilities with specific emphasis on Business Survival





Directors’ Duties and Responsibilities

with specific emphasis on Business Survival

CONTENTS

<u>SECTION</u>	<u>PAGE</u>
1. INTRODUCTION	3
2. RESPONSIBILITIES	4
3. WHO IS A DIRECTOR?	5
4. POWERS	7
5. DUTIES	7
6. LIABILITIES	9
7. INSOLVENCY	11
8. TRADING WHILE INSOLVENT	12
APPENDIX A	COMPANY SECRETARY’S ROLE

ACKNOWLEDGEMENTS

This handbook was prepared by Tony Groom, Chief Executive of K2 Business Rescue who would like to thank the contributors who included a number of licensed insolvency practitioners, insolvency and commercial solicitors and a company secretary. Specifically, he would like to thank Martin Pocock and Mark Barron of the Advisory Board of K2 Business Rescue, Douglas MacDonald and Neil Chesterton of The MacDonald Partnership plc, Professor Grant Jones and Tyrone Courtman of Cooper Parry LLP, Bryan Green of Gordon Brothers Europe, Justin Stephenson of Jeffrey Green Russell, David Archer and Ian Searle of Pitmans Solicitors, Sonia Jordan of Salans LLP, Adrian Seagers of Birketts LLP, Alan Clark of Carter Clark and Garry Mumford of Insight Associates.



1. INTRODUCTION

They say that “when the going gets tough, the tough get going” and this is especially true if you are a director trying to steer your businesses through difficult times. Sitting back and doing nothing is not an option if you are fighting for survival. Declining sales, increasing costs, bank repayments, HMRC arrears, lease and finance obligations, redundancy costs and a withdrawal of credit terms all contribute to a shortage of funds and the problem of having to juggle cash to meet creditor demands.

So, how can this handbook from Carter Clark and K2 Business Rescue help you?

Directors Responsibilities and Duties

Carter Clark and K2 Business Rescue believe that the key to saving a business is being realistic and implementing change but you need to know what you can and can't do. You need to know the rules and regulations and what your duties and responsibilities as a director are.

Our handbook therefore outlines these duties and responsibilities and also lists those statutory obligations that are normally carried out by company secretary on behalf of the directors. It includes notes on the relevant legislation that you need to be aware of and comply with. For example, did you realise that the law does not discriminate between directors and ‘non-executive’ directors who, contrary to popular myth, are just as accountable, should the company get into financial difficulty? Did you know that executives and advisers can also be held to be accountable when a company gets into financial difficulties?

You also need to be aware of the seven ‘codified duties’, as set out in the Companies Act 2006 that came into effect in 2008. Failure to comply with these broad duties can result in you as a director incurring civil and/ or criminal liability, leading to a fine, and/ or imprisonment and/ or disqualification for up to 15 years. The Insolvency Act 1986 goes further as it requires directors of insolvent companies to act in the best interests of creditors. However, directors who seek appropriate professional advice can avoid personal liability if they act upon that advice.

The Test for Insolvency

Our handbook also covers relevant aspects of the Directors Disqualification Act 1986 and the Insolvency Act 1986, and details the four primary tests to determine whether your company is insolvent, which can be the case even if you still have a strong balance sheet. The good news is that you can still trade while insolvent providing that in doing so it is in the best interests of your company's creditors. Our handbook also helps you establish your objectives and offers guidelines in the form of continuance principles if you do decide to trade while insolvent.

Help and Advice

As a director you can risk everything you have if you fail to seek advice when things get sticky. We hope this handbook will help, but if you would like to call us for advice about your company or your situation, Carter Clark and K2 Business Rescue will put you and your company's interests first and offer friendly, expert solutions based on years of experience.

Tony Groom
Chief Executive
K2 Business Rescue
64 Lower Sloane Street
London SW1W 8BP
tel 020 7720 8000
www.rescue.co.uk

Alan Clark
Partner
Carter Clark
Meridian House
62 Station Road
London E4 7BA
tel 020 8524 1447
www.carterclark.co.uk



2. RESPONSIBILITIES

Governing legislation

Directors' duties are defined by:

- ⊕ Common law
- ⊕ Specific legislation such as the codification contained within the Companies Act 2006
- ⊕ General Statutory compliance including but by no means limited to:
 - ◆ Companies Act 2006;
 - ◆ Health & Safety at Work etc Act 1974 and its subsequent Regulations;
 - ◆ Employment Act 2008 and its associated Regulations;
 - ◆ Competition Act 1998;
 - ◆ Supply and Sale of Goods Act 1994;
 - ◆ Data Protection Act 1998;
 - ◆ Discrimination legislation;
 - ◆ Industry specific legislation.

In addition directors also need to be aware of a vast amount of legislation where breaches could lead to disqualification and/ or personal liability, including but not limited to:

- ⊕ Insolvency Acts 1986 and 2000;
- ⊕ Enterprise Act 2002;
- ⊕ Company Directors' Disqualification Act 1986;
- ⊕ Corporate Manslaughter and Corporate Homicide Act 2007.

Responsibilities include

The board of directors of a company is primarily responsible for:

- ⊕ determining the company's strategic objectives and policies;
- ⊕ monitoring progress towards achieving the objectives and policies;
- ⊕ appointing senior management;
- ⊕ ensuring accounts are up to date and that they are aware of the financial position;
- ⊕ accounting for the company's activities to relevant parties, including shareholders and filing with Companies House;
- ⊕ compliance with relevant legislation;
- ⊕ statutory filings with Companies House.

The managing director/chief executive is responsible for the performance of the company, as dictated by the board's overall strategy. He/ she reports to the chairman or board of directors.



3. WHO IS A DIRECTOR?

A director, by whatever title, is one who is in practice responsible for the management of a company's affairs. There is no comprehensive definition of a director in statute, the only guidance given being that the term 'director' includes any person occupying the position of director, by whatever name called (Companies Act 2006, section 250). For example, in some companies management may be entrusted to 'Executives', 'Governors' or 'Council Members'. Under this definition, they will be held to be directors. Further, and separately, the word director in some statutory provisions includes someone who is a de facto director or shadow director, that is a person who acts as a director without having been formally appointed.

Subject to certain exemptions such as disqualification, bankruptcy or the company's auditor, anyone can be a director provided they are over 16.

Formal appointment

The first director(s) of a company will be appointed at the time of its registration. Subsequent appointments are governed by the company's articles of association (Articles). Typically the Articles will provide for the board of directors (Board) to fill any vacancies or to appoint additional directors and/or corporate directors up to the maximum number specified by the articles at an appropriate Board meeting. It should be noted that unless the Articles require more, a limited liability company only needs to appoint one director (subject to the proviso that that person is a natural person and not a corporate director).

On appointment a new director is required by law to complete a form AP01 (or AP02 for corporate directors) which requires certain information to be filed and held at Companies House along with his/ her signature on the form to signify consent to act as a director. Upon completion, the form should be filed with the Registrar of Companies at Companies House. There are also provisions for filing these forms electronically by those companies who have registered themselves for online filing. If there is a share qualification specified in the Articles, then the director will also be required to acquire the appropriate number of shares.

Upon appointment the new director's details should be entered in the Register of Directors.

The director is required to disclose any interests in shares or debentures with the company; these should be entered in the Register of Directors Interests. In addition the director should give notice of any interests in contracts or relationships with the company or with other directors or employees of the company; these are normally recorded in board minutes upon appointment and thereafter in subsequent minutes if there is a change.

On a practical note, it is recommended that the new director should make sure that he/ she familiarise themselves with the overall corporate makeup and situation of the company by seeking to obtain a copy of the company's memorandum and articles of association, details of recent business and financial affairs of the company including copies of recent board minutes and management accounts; as well as checking the statutory reports and accounts for the past two years.



Other types of director

Shadow director

Certain legislative provisions concerning directors extend to what are known as 'shadow directors'. A shadow director is a class of director distinct from actual appointed directors of the company. A 'shadow director' is defined as 'a person in accordance with whose directions or instructions the directors of a company are accustomed to act' (Companies Act 2006, section 251; CDDA86, section 22; and IA86, section 251) although the legislation provides that 'a person is not deemed a shadow director only by way of reason that the directors act on advice given by him/ her in a professional capacity'. It should be stressed, however, that what is necessary is that the whole board of directors acts under the direction of this shadow director. Depending on the facts, it is quite possible for a shareholder, bank, a lender or bond holder, an executive, an adviser or a 'company doctor' to be found to be a shadow director although it is more often where a particularly powerful individual controls the company without being formally on the board. Where a shadow director is itself a company, it does not necessarily follow that directors of the corporate shadow director are themselves shadow directors. Instead each such person's own actions are looked at separately. There is much analysis of the term shadow director and who constitutes a shadow director in case law as it is invariably decided on a case by case basis.

Non-executive director

It is important to appreciate that there is no difference in law between the duties of 'executive' and 'non-executive' directors. An 'executive director' is regarded as a director who has specific delegated responsibilities within the company, normally management or operational responsibilities. Directors are not required by law to give continuous attention to company affairs unless their executive position so requires either by contract and/ or by the terms of their appointment. However, all directors, including non-executive directors, should familiarise themselves with the company's affairs, including its financial position, and it is strongly recommended that they should attend meetings of the board, and of any committee of the board of which they are members, whenever they are reasonably able to do so and if not, to at least ensure that they have seen a copy of the minutes of the meeting. Crucially, legislation imposes a responsibility on all directors for discharging the duties of the board.

Alternate director

An alternate director is someone appointed by a director to represent him/ her at a meeting or to fulfil a specific responsibility on his/ her behalf. It is usually therefore only a limited and temporary appointment.

De facto director

A de facto director is someone who is accepted by others as a director and whose actions are deemed to be those of a director even though they are not formally appointed. When assessing whether or not someone acted as a de facto director, their authority and approval of transactions that are normally transactions that require board approval is a crucial test. Executives and advisers and specifically those with titles like chief executive, chief finance



officer, chief restructuring officer, turnaround adviser and other similar designations can be held to be de facto directors and their terms of engagement cannot contract them out of liability if their actions are deemed to be those of a director. While there is no difference in terms of personal liability, the distinction between a de facto director and a shadow director is based on the role as perceived by others where a de facto director holds himself/ herself out to others to be an executive officer of the company, such as chief executive, chief operating officer, chief finance officer or chief restructuring officer.

4. POWERS

The directors are generally responsible for the management of the company and they may exercise all the powers of the company. The extent of their authority will be defined in the Articles of Association of the Company and relevant Companies legislation particularly within the Companies Act. For example, the Articles often include provisions and restrictions on borrowing by the company. Further obligations and limitations on their authority can be imposed on directors in a shareholders agreement. For example, the shareholders agreement specify regular reports and accounts to be provided to shareholders and require directors to obtain shareholder consent before entering into certain types of transaction such as granting security, finance agreements or capital expenditure.

Generally, the directors must act collectively as a Board to bind the company. However, the Articles usually entitle the Board to delegate powers to individual directors as appropriate. In practice individual directors usually carry out many of the company's activities.

5. DUTIES

Many of the duties and obligations of a director are mandated by the Companies Act 2006. It enshrines some principles that codify directors' duties.

Codified duties

- ⊕ to act within powers as set out in the company's Articles and Memorandum of Association;
- ⊕ to promote the success of the company;
- ⊕ to exercise independent judgment;
- ⊕ to exercise reasonable care, skill and diligence;
- ⊕ to avoid conflicts of interest;
- ⊕ to not accept benefits from third parties;
- ⊕ to declare any interest in proposed arrangements with the company.

Directors are responsible for making sure that the company fulfils its statutory duties. As the company secretary is normally the person who will in practice be responsible for the performance of most of the compliance and regulatory duties required by the Companies Act, it is imperative that the directors ensure that the secretary is competent to discharge those duties properly. Although the majority of companies will have appointed a company secretary



specifically to carry out those duties, there is no longer an obligation for a company to appoint one. Whether or not a company secretary has been appointed, directors should make sure that someone is specifically appointed to carry out the equivalent duties on behalf of the company. This may be an individual within the company or someone else or indeed a professional firm that specialises in providing company secretarial services.

Statutory and other duties

- ⊕ a director must not put himself/ herself in a position where the interests of the company conflict with his/ her personal interest or his/ her duty to a third party;
- ⊕ a director must not make a personal profit out of his position as a director unless he/ she is expressly permitted to do so by the company;
- ⊕ a director must act bona fide in what he/ she considers is in the interests of the company as a whole, and not for any collateral purpose.

The primary duties and obligations of a director referred to as the “codified duties” are set out as seven general duties in sections 170 to 181 of the Companies Act 2006.

Other duties are governed by the Insolvency Act 1986 and the Company Directors’ Disqualification Act 1986.

Directors may become personally liable for any penalties incurred if the company fails to carry out its statutory duties. However, the legislation does provide a defence for a director if he/ she had reasonable grounds to believe that a competent person had been given the duty to ensure that the relevant statutory provisions were properly complied with.

The main statutory responsibility falling on directors is the preparation of the accounts and the report of the directors endorsing the preparation of the accounts. Failure to comply with this can lead to disqualification.

It is the responsibility of the directors to be aware of the financial position of the company at all times and to ensure that the company maintains full and accurate accounting records. This includes the preparation of a balance sheet and a profit and loss account for each financial period of the company, the presentation of these to shareholders and, subject to various exemptions, the filing of the accounts and report of the directors with the Registrar of Companies.

In addition to the above, on an individual level, directors have a responsibility to disclose to the board their interests in any dealings with the company, in particular in respect of the following:

- ⊕ an interest in a contract with the company;
- ⊕ interests in shares or debentures of the company;
- ⊕ dealings in options of the shares of the company.



Duty of skill and care

Directors are expected to display a certain amount of skill and exercise reasonable care in the performance of their work.

6. LIABILITIES

Directors may incur personal liability, both civil and criminal, for their acts or omissions in directing the company.

There are various other matters for which directors can be held to be liable. Specifically, directors should be aware of the provisions of the Company Directors' Disqualification Act 1986, which could lead to disqualification from acting as a director of a company for a period of between two and fifteen years, the Insolvency Act 1986 which gives rise to the possibility of directors being made personally liable for the company's debts, the Health and Safety at Work etc Act 1974, and the Corporate Manslaughter and Corporate Homicide Act 2007.

Company Directors' Disqualification Act 1986

The circumstances in which an application may be made for the disqualification of a director are as follows:

- ⊕ the director has been guilty of three or more defaults in complying with companies legislation regarding the filing of documents with the Registrar of Companies during the preceding five years;
- ⊕ he or she is, or was, a director of a company that has at any time become insolvent and that his/her conduct as a director of that company makes him/ her unfit to be concerned in the management of a company;
- ⊕ the director is found to be guilty of wrongful or fraudulent trading as defined in the Insolvency Act 1986 (see below).

A disqualified director cannot act as a director, nor can he/ she influence the running of a company or be involved in the formation of a new one.

Insolvency Act 1986 (IA 86)

Under the following headings the court may require a director to make a personal contribution to the company's assets if, in the course of the winding up of a company the director is found guilty of:

Wrongful trading – (s214 IA 86) where a director failed to take steps to minimising the potential loss to creditors where he/ she knew or ought to have known that there was no reasonable prospect of avoiding insolvent liquidation but continued to trade as a result of which the company is worse off. However, the director will not be made personally liable in circumstances where he/ she can establish that he/ she took every reasonable step prior to the liquidation to minimise the potential loss to the company's creditors.



Transactions at undervalue – (s238 IA 86) where a director executes a transaction at an undervalue such that it is not in the best interests of the company for example where the sale of an asset of the company is at less than its value or where payment is accepted of less than the recoverable value. This applies to transactions that take place during the period two years prior to formal insolvency or five years for transactions with a connected party. A connected party is as defined as:

- ⊕ A director or shadow director of the company;
- ⊕ An associate of such a director or shadow director i.e. a spouse or relative of a director;
- ⊕ An associate of the company i.e. another company with common director(s) or shareholder(s).

Preferential transactions – (s239 IA 86) where a transaction by the company was motivated by the desire to put a third party in a better position than they would otherwise have been on liquidation (had the transaction not taken place) e.g. writing off a debtor's liability to the company or paying one creditor in preference to another, particularly where the party is motivated by a desire to improve that creditor's position.

Transactions defrauding creditors – (s423 IA 86) applications under this section deal with transactions where the purpose was to put an asset out of reach of creditors. They are not subject to the 2 and 5 year limits that apply to transactions at an undervalue under s238 IA 86 above.

Fraudulent trading – this is similar to the definition of wrongful trading defined by s213 IA 86 and s993 CA 06 respectively but makes it a criminal offence where a director knowingly carried on the company's business with the intent to defraud the creditors or any other person. Fraudulent trading liability can arise regardless of whether or not the company is insolvent.

Misfeasance/ breach of duty – where a director breaches their fiduciary duty, by e.g. misapplying, retaining or becoming accountable for any money or property of the company.

Health and Safety at Work Act 1974 and subsequent Regulations

Health and safety law places various duties upon organisations and employers. Directors can become personally liable when these duties are breached: it is important to note that members of the board can have both collective and individual responsibility for health and safety. Larger public and private sector organisations need to have formal procedures for auditing and reporting on their health and safety guidelines and performance.

If a health and safety offence is committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the organisation, then that person (as well as the organisation) can be prosecuted under section 37 of the Health and Safety at Work etc Act 1974.

Those found guilty are liable to be fined and, in serious cases, imprisoned. In addition, the Company Directors Disqualification Act 1986, section 2(1), empowers the court to disqualify an individual convicted of an offence in connection with the management of a company which includes health and safety offences. This power is exercised at the discretion of the court and requires no additional investigation or evidence.



Individual directors are also potentially liable for other related offences, such as the common law offence of gross negligence manslaughter. Under the common law, gross negligence manslaughter is proved when individual officers of a company (directors or business owners) by their own grossly negligent behaviour cause death. This offence is punishable by a maximum of life imprisonment.

Corporate Manslaughter and Corporate Homicide Act 2007

Under this Act, an offence will be committed where failings by an organisation's senior management are a substantial element in any gross breach of the duty of care owed to the organisation's employees or members of the public, which results in death. The maximum penalty is an unlimited fine and the court can additionally make a publicity order requiring the organisation to publish details of its conviction and fine.

7. INSOLVENCY

Specifically, directors should ensure that they obtain regular updates as to of the company's general financial position to ensure that they are kept fully aware at all times of the solvency or potential insolvency of the company. When the company is made or becomes insolvent the directors must recognise their duty to the company's creditors, including current, future and contingent creditors.

There are four primary tests for insolvency:

- ⊕ Cash flow test – can the company pay its debts as and when they fall due? i.e. the company's cash resources are running out. Therefore, the company is not going to be able to pay its creditors on time;
- ⊕ Balance sheet test – negative net asset value, where the company's assets are less than its liabilities;
- ⊕ Unsatisfied judgement – where judgment obtained against the company has not been paid;
- ⊕ Statutory demand – where a statutory demand made on the company is either not paid or not disputed.

Notes on insolvency

It is important to be aware that it is quite possible for a company to have a strong balance sheet but still be unable to fund its cash flow – some refer to this as being “technically insolvent”.

An unsatisfied judgement or unresolved statutory demand are grounds for a creditor to petition to wind-up the company through the courts - again some refer to this as being “technically insolvent”.

There is no definition of “technical insolvency”: either a company is solvent or insolvent.



If any one director has any doubts about the solvency of his/ her company, he/ she should immediately seek professional advice whether on behalf of the company and/ or himself/ herself personally. Such advice if taken, should be expected to remove him/ her from further personal liability.

Directors' action on insolvency

In the event that a company is insolvent under one of the above tests, the directors should take professional advice. It should be noted that only licensed insolvency practitioners and solicitors are professionally qualified to give advice on insolvency.

Directors need to consider their objectives and take appropriate steps, where necessary with appropriate advice.

There are circumstances where it is acceptable to continue to trade while the company is insolvent but in view of the potential for directors to be held to be personally liable, they are advised to only trade on only after having received appropriate professional advice.

8. TRADING WHILE INSOLVENT

Continuing to trade is a decision that should be taken by the board of directors with a note made of any dissent. The decision to continue to trade and the reasons why the directors believe this is in the best interests of creditors (not the company) should be recorded in the minutes.

In view of the additional burden of responsibility placed on the directors of an insolvent company, it is advisable to employ the services of specialist turnaround or restructuring professionals to assist them while the company is returned to a solvent trading situation. Such professionals, whether or not they are formally appointed as directors, executives or advisers are aware that they are likely to be deemed de facto directors and accordingly are expected to act with the same duty of care to creditors as the directors.

Directors, executives and advisers involved with continuing to trade an insolvent company will then need to consider their objectives in order to take appropriate steps.

Objectives

In a potential or actual insolvency situation, directors should have the following common objectives foremost:

- ⊕ Maximise the interests of creditors;
- ⊕ Comply with the law;
- ⊕ Avoid personal liability;
- ⊕ Maximise the interests of employees.

Directors are also likely to have other objectives which may potentially conflict with their primary objectives such as:

- ⊕ Keeping the business alive;



- ⊕ Terminating onerous liabilities and contracts;
- ⊕ Minimising personal guarantees – this can be an issue as there is scope for conflict of interest by breaching duties defined by insolvency legislation, specifically the duty relating to Preferential transactions;
- ⊕ Other objectives which may apply depending on the type of business and financial circumstances.

Continuance principles

The following list is a useful guide for directors and professionals when trading while insolvent:

- ⊕ Don't continue to trade when the company is insolvent, unless you are certain that there is a strong prospect that the company will avoid insolvent liquidation;
- ⊕ Don't incur further credit or issue company cheques when you know there is little or no prospect of payment;
- ⊕ No further payments should be made to any outstanding creditors, where paying them could be regarded as preferring them to others;
- ⊕ No further credit should be taken and any goods or services required immediately must be paid for in strict accordance with the supplier's terms. (i.e. you must not put any creditor in a worse position);
- ⊕ No disposal of the company's money or the company's goods should be made to any creditor or customer who is owed money by the company, where the disposal could be claimed against set off;
- ⊕ Any disposal of the company's assets must comply with relevant sections of the Insolvency Act 1986;
- ⊕ Credit cards issued to directors and senior personnel should no longer be used;
- ⊕ All assets of the company should be properly insured;
- ⊕ An appointed director or adviser should deal with all press and media. It may be appropriate for the board to approve press statements before release;
- ⊕ No creditor claiming retention of title to goods previously supplied by him/ her should be permitted to remove any goods without professional advice. As a compromise, the goods concerned may be removed from sale or the sale proceeds can be paid into a trust account, escrow account or solicitor's client account pending resolution of the claim;
- ⊕ Sub-contract creditors should not be supplied goods (set-off may be applied by the creditor);
- ⊕ No goods of the company should be dispatched on carriers who are owed money by the company (the carrier may impose a lien);
- ⊕ No goods of the company should be stored in warehouse facilities that are owed money by the company (the storage company may impose a lien);
- ⊕ Dealings with any creditor should only be continued with caution. As advised above, attempts should be made to avoid a situation where a lien, set-off, etc. can be raised;
- ⊕ Don't take customer deposits when you know the company can't fulfil the order. Any deposits taken from clients should be paid into a separate bank account until the service has been rendered and invoice submitted;



- ⊕ Do continue to keep proper accounting records;
- ⊕ Do continue to submit returns and pay HMRC on time;
- ⊕ Do continue to submit returns and accounts to Companies House on time and pay any fees required;
- ⊕ Payments/ transactions with directors or connected persons must be made on a bona fide, arms length basis or they could be regarded as attempts to put assets out of the reach of creditors;
- ⊕ Debtors' payment terms should be reviewed with view to negotiating early payment, possibly offering a discount to justify the revised terms;
- ⊕ HMRC time to pay arrangements can help spread payments to assist cash flow when settling a large tax liability; however these arrangements must be agreed with HMRC and cannot be assumed.

The above list is not exhaustive but it should highlight the need for tight financial controls and additional administration procedures to be introduced when a company continues to trade whilst insolvent.

DISCLAIMER

This handbook is designed to provide a general overview of the law and is not designed or purport to provide a full or complete description of the law and accordingly should be used solely by way of information only. While every effort has been made to ensure that the information contained in this handbook is accurate and up-to-date as of the time of writing, you should not seek to apply or rely on any of the information contained within without first taking appropriate professional advice. Accordingly Carter Clark and K2 Partners (Rescue) Ltd trading as K2 Business Rescue do not accept any responsibility for negligence which arises from any action taken as a result of seeking to rely on the information contained in this document.



APPENDIX A

COMPANY SECRETARY'S ROLE

Whilst the directors remain responsible for ensuring the statutory duties are complied with, they are often delegated to someone else to carry out. Traditionally a number of these duties have been carried out by the Company Secretary who as an officer on the Board of Directors is often best placed to perform specific tasks on behalf of the directors outside Board meetings.

Whilst the Companies Act 2006 abolished the requirement for a company to have a Company Secretary, the directors must still ensure their traditional duties are carried out. In order to assist directors, the following list, while not complete, is intended to act as a check list when allocating responsibilities. It is split between those duties traditionally carried out by the Company Secretary and other compliance obligations that also need to be allocated.

Traditional Company Secretarial duties

Duty	Description
<i>Compliance with internal regulations and legislation</i>	Checking that the company complies with: <ul style="list-style-type: none">- Memorandum and Articles of Association (particularly that these are in force and up to date)- the Companies Act 2006- other legislation
<i>Maintenance of records and registers</i>	Keeping the company's statutory books and records, including registers of: <ul style="list-style-type: none">- directors and secretary- directors' interests (details of shares and debentures held, copies of directors' service contracts and other disclosed interests)- members- mortgages and charges- debentures and other charges
<i>Administration of board and general meetings</i>	Procedural compliance and administration: <ul style="list-style-type: none">- helping the chair to set agendas, preparing papers for the board and committees- preparing and sending out notices and board papers- taking minutes and keeping the minute books



Company secretary's role

Duty

Filing forms, notices and resolutions at Companies House

Description

Filing documents within the statutory time limits, including:

- company accounts
- annual returns (filed online or Form AR01)
- appointment of directors, corporate directors, secretaries and corporate secretaries (filed online or Forms AP01, AP02, AP03 & AP04)
- change of details for directors, corporate directors, secretaries and corporate secretaries (filed online or Forms CH01, CH02, CH03 & CH04)
- termination of directors and secretaries (filed online or Forms TM01 & TM02)
- allotment of shares and details of new classes of shares (filed online or Forms SH01 & SH09)
- change of registered office (filed online or Form AD01)
- change of accounting reference date (filed online or Form AA01)
- satisfaction of charge (filed online or Form MG02)
- notices & relevant resolutions

Shareholder communications

Issuing:

- circulars
- dividends
- documentation concerning shares e.g. transfers
- notices of meetings
- distribution of resolutions for approval by members

Access to records

Ensuring that:

- eligible persons can review company records
- company records are made available



Company secretary's role

Duty

Description

Legal and corporate governance regulatory advice

Ensuring that:

- the board considers employees and other stakeholders when decisions are made
- directors are aware of their legal responsibilities and updating them on developments in the law, corporate governance developments and corporate social responsibility concerning the running of companies
- board procedures are followed
- board has considered implementation, accounting, tax, resources and financial consequences when making decisions

Share administration

Managing and supervising:

- the register of members
- share transfer matters generally
- requests for information from shareholders
- the issue of share and debenture certificates
- the notice of allotments and restructuring to Companies House

Corporate communications

Maintaining communication links between:

- the chair, directors and non-executive directors
- shareholders and the board
- employees and the board
- auditors and the company
- media/press and the company



© K2 Partners (Rescue) Ltd 2010

Company secretary's role

Duty

Description

Running the registered office

Administering the registered office:

- dealing with correspondence
- receipt and care of official documents
- making documents required by law available for inspection by third parties
- ensuring the company's name is displayed at the registered offices

Security of documents

Managing the security of:

- company seal (if one exists)
- Certificate of Incorporation
- certificate(s) on change of name
- Memorandum and Articles of Association
- shareholder agreements
- deeds of adherence
- directors' service contracts
- share certificates and stock transfer forms
- debentures
- documents relating to fixed charges
- other documents of title

Other compliance obligations

Compliance

Ensuring that the company complies with legislation, including:

- Maintain accounts
- Health and Safety at Work etc Act
- Employment legislation
- Insurance
- Going concern
- Data Protection Act
- Licences



Company secretary's role

Duty

Description

Collation of accounts and compliance with accounting legislation

Ensuring that:

- the company's accounting records are maintained in accordance with company legislation
- there is a sound system of internal controls with at least an annual review of controls
- the company's accounting records are prepared in time
- the company's accounting records conform to company law and accounting standards
- copies of accounts are distributed to the appropriate persons within requisite time period

Health and safety

Where a business has more than five employees, ensuring that:

- a written health and safety policy is produced
- the health and safety policy is kept up to date
- there is a process for putting the policy into practice
- the policy is explained to employees
- employees are provided with relevant information about health and safety risks
- employees are trained on preventative measures
- work-related risks are regularly assessed

Employee legislation

Ensuring that:

- employees have written contracts of employment
- employee handbook and working instructions are kept up to date with distribution of memos and directives when they are changed
- employees are consulted when required by policy or statute
- disciplinary and grievance procedure is in place and followed
- Working Time Directive is observed
- requisite employee records are maintained



Company secretary's role

Duty	Description
<i>Insurance policies</i>	<p>Ensuring that adequate insurance is held, as appropriate to cover:</p> <ul style="list-style-type: none">- employees and third parties- property and assets- use of vehicles- operation of plant and machinery- other business risks- directors and officers
<i>Solvency and going concern</i>	<p>Ensuring that the board observes appropriate procedures and receives specialist advice in the event that:</p> <ul style="list-style-type: none">- the company is unable to meet its liabilities as and when they fall due- the balance sheet shows a negative net asset value- a statutory demand is received- a winding up petition is presented- the board is aware of any information that could put the company's survival as a going concern in jeopardy- it is necessary to produce a statement of affairs

DISCLAIMER

This Appendix is designed to provide a general overview of the law and is not designed or purport to provide a full or complete description of the law and accordingly should be used solely by way of information only. While every effort has been made to ensure that the information contained in this Appendix is accurate and up-to-date as of the time of writing, you should not seek to apply or rely on any of the information contained within without first taking appropriate professional advice. Accordingly Carter Clark and K2 Partners (Rescue) Ltd t/as K2 Business Rescue do not accept any responsibility for negligence which arises from any action taken as a result of seeking to rely on the information contained in this document.