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## Company Directors: Duties and Liability in Cayman Islands Law

Duties and liabilities of directors of companies in the Cayman Islands are determined by legislation in the Companies Law (Revised) and by the Common Law from which precedents are established. Some of the Common Law principles are incorporated in statute and legal precedents evolve over time as new cases are tried before the Grand Court, Court of Appeal and the Privy Council.

### Statutory Duties of Company Directors

The Companies Law (2011 Revision) lists the duties and requirements of company directors:

- To maintain a register of company members with their names and addresses and in the case of a company having its capital divided into shares, a statement of the shares held by each member, at the registered office of the company in the Cayman Islands. (This provision does not apply to the register of exempted companies which can be kept at any location).
- To maintain a register of directors. The Registrar of Companies shall be notified of any change in directors or officers within 30 days. Failure to comply with the notification gives rise to a penalty of CI\$10 for every day during which the default continues. The penalty applies to every director and manager who knowingly and willfully authorises or permits such default.
- A register of mortgages and charges over company assets must be kept at the registered office of the company. A director or manager who knowingly and willfully authorises or permits a mortgage or charge on company property without entry on the company register is liable to a penalty of CI\$100.

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- Special resolutions adopted by the company must be notified to the Registrar of Companies within 15 days and annexed to or incorporated into every copy of the Articles of Association.
- The directors of a company are responsible for filing annual returns and the appropriate fee with the Registrar of Companies annually.
- The shareholders of a company, other than exempted companies, must hold at least one AGM annually.
- The directors are responsible for ensuring that the company keeps proper books of account and that it complies with accounting requirements.
- Changes of directors and any change of registered office must be notified to the Registrar within 30 days.
- Section 34 (2). No distribution or dividend may be paid to members out of the share premium account unless immediately following the date on which it is paid the company shall be able to pay its debts as they fall due. A company and any director or manager who knowingly and willfully authorises or permits any distribution or dividend which contravenes this provision is liable on summary conviction to a fine of CI\$15,000 and to imprisonment for 5 years.
- Section 37 (6). A payment out of capital by a company for the redemption or purchase of its own shares is not lawful unless immediately following the date on which payment out of capital is proposed to be made the company shall be able to pay its debts as they fall due in the ordinary course of business. The company and any director or manager thereof who willfully and knowingly authorises or permits any payment out of capital to effect any redemption or purchase of any share in contravention of this provision commits an offence and is liable on summary conviction to a fine of CI\$15,000 and to imprisonment for 5 years.

#### *Fraudulent Trading*

Section 147 of the Law provides that a liquidator may apply to the Court for a declaration where it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose. The Court may declare that any persons who were knowingly parties to the carrying on of the business in the manner mentioned are liable to make contributions to the company's assets.

#### *Fraud in Anticipation of Winding Up*

Section 134 of the Law provides that where any person, being an officer (including a shadow director), professional service provider, voluntary liquidator or controller of the company, within 12 months preceding the commencement of winding up has, with the intent to defraud creditors or contributories:

- (a) concealed any part of the company's property to the value of CI\$10,000 dollars or more or concealed any debt due to or from the company;
- (b) removed any part of the company's property to the value of ten thousand dollars or more;
- (c) concealed, destroyed, mutilated or falsified any documents affecting or relating to the company's property or affairs;
- (d) made any false entry in any documents affecting or relating to the company's property or affairs;
- (e) parted with, altered or made any omission in any document affecting or relating to the company's property or affairs; or
- (f) pawned, pledged or disposed of any property of the company which has been obtained on credit and has not been paid for unless it was done in the ordinary course of the company's business,

then such person is guilty of an offence and is liable on conviction to a fine and to imprisonment for five years.

#### *Transactions in fraud of creditors*

Section 135 of the Law introduced a criminal offence, similarly punishable by fine or imprisonment, where in the case of a company being wound up by the Court or voluntarily, an officer of the company, a professional service provider to the company has either (a) made a gift or transfer of, or has charged the company's property, or has caused or connived in levying execution against it or (b) has concealed or removed the company's property, in each case with the intent to defraud the company's creditors or contributories.

#### *Misconduct in winding up*

Section 136 of the Law states inter alia that where a company is being wound up by the court or voluntarily, any person who is or was a director, officer or professional service provider of the company who does not make full disclosure to the liquidator of all company documents or property within his control (except where disposed of in the ordinary course of business) or who permits a false debt to be proved in the liquidation is punishable by a fine and to imprisonment for five years.

#### *Material omission in statement of affairs*

Section 137 provides that where a company is being wound up, a director, officer or manager or a professional service provider of the company commits an offence if he makes any material omission in any statement relating to the company's affairs with intent to defraud the company's creditors or

contributories. A person who commits an offence under the section is liable to a fine and/or imprisonment for up to five years.

#### *Penal Code of the Cayman Islands*

The Penal Code of the Cayman Islands provides for offences of theft and fraud and includes offences such as publishing false or misleading statements with intent to deceive members or creditors and false accounting. The penalty for wrongdoing is up to seven years imprisonment.

#### *Shadow Directors*

Shadow directors are potentially criminally liable under the Companies Law pursuant to section 134 (fraud in anticipation of winding up) and section 136 (misconduct in the course of winding up) and section 137 (material omission from statement of company affairs). The penalty is a fine and imprisonment for 5 years.

A shadow director, as the name suggests, is an individual who has a role in instructing the directors of the company in their capacity as directors. It amounts to a pattern of behavior rather than a single event. The shadow director's name does not appear on the register as a named director. The role is defined in terms of the relationship with the named directors. A manager giving instruction to company directors in decision making could be construed as a shadow director although it depends on all the facts surrounding the engagement. The liquidator of a company may take action against any director, manager or officer of the company if in the course of a winding up that there is evidence of a criminal offence.

#### **Duties of Company Directors at Common Law**

The Companies Law (Revised) in the Cayman Islands does not specify the fiduciary or other duties imposed on company directors. Duties of directors, such as they are derive from English common law.

Duties are categorised at common law as fiduciary, skill, care and diligence. A company director must act in good faith. He must act in the best interests of the company in all his company dealings and exercise his powers in the company's interests. The duty is owed specifically to the company and not to associate companies, subsidiaries or holding companies. The fiduciary duty extends to a director's trusteeship of company assets; a duty to declare personal interest in company contracts; a duty not to make secret profits from his position as director; a duty of honesty and loyalty to the company. See *Renova Resources Private Equity Ltd v Gilbertson* 2009 CILR 268.

In considering the common law duty of care the Grand Court applies an objective test in assessing the stewardship of a company director – the skill and knowledge and experience that is reasonably expected of a person in that position in conjunction with the general knowledge, skill and experience that the director actually has. In *Re Barings PLC 2000 BCLC* the Court of Appeal approved a summary of a director's role which was subsequently adopted into Cayman law by

Justice Andrew Jones of the Grand Court in the case of *Weaving Macro Fixed Income Fund Limited ( In Liquidation ) v Petereson and Ekstrom* 26 August 2011. See below.

### **Liability of Company Directors**

Generally speaking, directors are not personally liable for the debts, obligations or liabilities of a company except for those which arise out of negligence, fraud or breach of fiduciary duty by an individual director, or due to an action not within his authority and not ratified by the company.

#### *Statutory liability*

Statutory liability may arise by order of the Court on the winding up of the company or under the fraudulent trading provisions.

#### *Tortious liability*

Where a director acts outside the scope of his authority and a third party suffers a loss, he may be held liable in compensation. Whether a director has authorised an act by the company outside the scope of his authority will depend on the facts of the case.

An Individual dealing with a company director about company business in the normal course of events would assume correctly that the director has authority to speak on behalf of his company unless it is subsequently proven otherwise. A director may become personally liable where he exceeds the authority given to him under the memorandum and articles of association of the company.

Under section 147 of the Companies Law, discussed above, the Court may order a director who was knowingly party to fraudulent trading by the company to make contribution to the company's assets.

### **Weaving Macro Fixed Income Fund Limited (in Liquidation) v Peterson and Ekstrom Judgment FSD 26 August 2011.**

The Financial Services Division of the Grand Court ("FSD") delivered a significant judgment on directors' duties in the context of offshore hedge funds.

In the Cayman Islands case of *Weaving Macro Fixed Income Fund Limited (In Liquidation) v Peterson and Ekstrom* 26 August 2011 FSD, judgment of Justice Jones, the role of a non-executive director to a Cayman Islands investment fund was considered. The judgment gives useful guidance on director's duties as a Cayman fund director and follows English case law precedent in this regard.

Mr. Justice Jones stated:

*“A director must exercise his powers independently, without subordinating those powers to the will of others, except to the extent that they have properly delegated their powers. The Cayman Islands investment fund industry works on the basis that investment management, administration and accounting functions will be delegated to professional service providers and a company's independent non-executive directors will exercise a high level supervisory role. The nature and scope of this duty can only be determined by reference to the actual circumstances of this case.”*

Mr. Justice Jones cited two English cases which were considered in relation to the director's duty to supervise delegated functions:

*Re Barings PLC, Secretary of States for Trade and Industry v. Baker(No.5) [1999] 1 BCLC 433* which provided that:

- i) *“Directors have, both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors;*
- ii) *whilst directors are entitled (subject to the articles of association of the company) to delegate particular functions to those below them in the management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation does not absolve a director from the duty to supervise the discharge of the delegated functions; and*
- iii) *No rule of universal application can be formulated as to the duty referred to in (ii). The extent of the duty, and the question whether it has been discharged, must depend on the facts of each particular case, including the director's role in the management of the company”.*

*Re Westmid Packing Services Ltd [1998] 2 BCLC 646* which provided that *“Each individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them. A proper degree of delegation and division of responsibility is permissible, and often necessary, but total abrogation of responsibility is not.”*

Mr. Justice Jones concluded in the Weaving judgment that the directors:

*“must do more than react to whatever problems may be brought to their attention by the other professional service providers. They must apply their minds and exercise an independent judgment, in the ordinary course of business, in respect of all the matters falling within the scope of their supervisory responsibilities. For example, when asked to sign the financial*

*statements and accompanying management representation letter addressed to the auditors, the directors must exercise an independent judgment by conducting a review in an inquisitorial manner and making appropriate enquiries of those involved, in particular the administrator and auditor.”*

#### *Director’s Guidelines*

The Grand Court in *Weaving Macro Fixed Income Fund Limited (In Liquidation) v Peterson 2011* set out useful guidance for directors of Cayman Islands funds to follow in the launch stage of their fund, during the normal operation of their fund and where the markets in which the funds are disrupted. This is a useful reminder to nominated directors of what is expected of them taking up an appointment as a company director. A summary of these points is set out below.

#### *Launch*

At the fund formation stage, directors must satisfy themselves that the offering document complies with Cayman Islands law, that the terms of the service providers' contracts are reasonable and consistent with industry standards and that the overall structure of the fund will ensure a proper division of responsibility amongst the service providers. Directors must act in the best interests of the fund at this stage which, in this context, means its potential investors.

In the *Weaving* case, it was determined that the Directors had a duty to satisfy themselves that the Macro Fund's offering document complied with the requirements of section 4(6) of the Mutual Funds Law (Revised). The fund's offering document should describe the rights attaching to the participating shares which will be issued to the investors and contain all such other information as is necessary to enable a prospective investor to make an informed decision as to whether or not to subscribe. Every offering document should be subjected to a verification exercise, the purpose of which is to establish that it is both accurate and complete. The promoter's lawyers are engaged in this process. The directors should make appropriate enquiries of the lawyers as to what has been done in the preparation of the fund's offering documents.

#### *Operation*

It was commented in the *Weaving* case that whilst independent non-executive directors of Cayman funds will rarely have the technical expertise and experience to be able to monitor sophisticated investment strategies and trading techniques in a direct hands-on manner, they are expected to satisfy themselves, on a continuing basis, that the investment manager's strategy is fairly described in the offering document and that the investment manager is complying with whatever investment criteria and restrictions have been adopted by the fund. Directors are also expected to acquire a proper understanding of the financial results of the investment and trading activity of the fund, without which they would not be in a position to perform an overall supervisory role.

The directors of a Cayman fund have a duty to satisfy themselves that there is an appropriate division of function and responsibility between the investment manager and administrator. They

need to satisfy themselves, on a continuing basis, that the various service providers are performing their functions in accordance with the terms of their respective contracts and that no managerial and/or administrative functions which ought to be performed are left undone. The directors also have a duty to satisfy themselves that the scope of their own supervisory role is clearly understood by all concerned. Directors could not seek to define or understand the scope of their own role without first obtaining a clear understanding of the roles of the other service providers.

It was commented in *Weaving* that agendas for board meetings should specify matters for discussion, reports to be presented and the names of the officers at each service provider who will attend the meeting. Each service provider should be guided as to what they should report to board meetings which might include any breaches of investment restrictions, pricing errors, mis-statements of NAV, dramatic changes of NAV, compliance issues and any issues which arose during the audit process and the way those issues were resolved. Attendance by an officer of the administrator to review management accounts with the directors is expected to take place occasionally.

Management accounts should be tabled to each meeting to allow directors to inform themselves about the fund's investment activities and have a proper understanding of its financial condition. The agenda should be circulated to all service providers for their input before being finalised. Minutes of meetings should accurately record the matters considered and decisions made with a summary of the basis on which those decisions were made.

Reviews of financial accounts of a fund must be conducted by the directors in an inquisitorial manner of the administrator and auditor. The directors are not entitled to assume that the other service providers have all performed their respective roles and therefore do not need to be supervised in any way whatsoever. The independent directors of investment funds are expected to be able to read a balance sheet and have a basic understanding of the audit process. It is the duty of the directors of an investment fund to inform themselves about its investment activities and have a proper understanding of its financial condition.

#### *Market Disruption*

Frequency of meetings will depend on the activity of the fund and in the event of a market crisis the board should meet as a matter of urgency and then as regularly as necessary to manage that crisis. The need for oversight also increases in times of market crisis where service providers should be asked to report on the fund's ability to meet redemptions, counterparty risk, cash flow projections and the fund's liquidity position.

#### *Summary of Findings in Weaving Case*

The *Weaving Judgment* is a reminder to directors of various funds based in the Cayman Islands and elsewhere that their duties do not conclude with signing documents and allowing matters to proceed regardless for the duration of their directorship. They must be more vigilant and seen to take an active role in complying with director's duties identified in the judgment and referenced in this article.

The court found that the directors had signed documents that were put before them by the investment manager “without applying their minds to their content”. Although the directors acknowledged that they had a high level supervisory duty, Justice Andrew Jones wrote in his judgment, “They never once, in six years, asked any of those they were supposedly supervising to give them a written report or attend a board meeting to provide them with an oral report. Their behaviour was wrong”

In addition the court found that the directors Stefan Peterson and Hans Ekstrom, who are the brother and stepfather of the investment manager, “consistently signed financial statements, management representation letters, side letters and other documents without making any enquiry whatsoever”. The fact that the directors had signed the minutes of two board meetings that never took place “leads unequivocally to the conclusion that they knew perfectly well that their behaviour was wrong”, Justice Jones wrote in his judgment.

The plaintiff claimed that if the directors had not acted wilfully negligent or in default of their duties, they would have discovered that the fund’s transactions involving interest rate swaps violated the fund’s investment guidelines and this would have led much earlier to the discovery that those transactions were in fact fictitious. The Court concluded that the directors’ conduct fell well below what was required of them, and that they were guilty of wilful neglect or default “because they consciously chose not to perform their duties to the fund, or at least not in a meaningful way”.

The legal issue in the Weaving Judgment arose from a failure by directors to comply with duties as directors of the fund. The court’s finding was of wilful neglect by the directors concerned. They knew what they were obliged to do but failed to comply.

“Those who have an appreciation of their duty , but make no attempt, or at least no serious attempt, to perform the duty are not relieved from liability”.

Therefore the directors would not get the benefit of the standard indemnity clause in the Articles of Association.

#### *Appointment of Directors*

The Weaving judgment is also critical of the appointment of the directors:

*“On paper both Mr. Ekstrom and Mr. Stefan Peterson had appropriate professional credentials and met the Irish Stock Exchange’s independence requirement. With the benefit of hindsight, I find it difficult to avoid the conclusion that Mr. Magnus Peterson chose to appoint his relatives as a means of meeting the minimum legal requirements without burdening himself with a real board of directors who could be expected to perform their supervisory role in an ordinary businesslike manner“.*

This quotation from the judgment has implications for those in the business of appointing directors in the financial services industry. The appointment of a director to a fund concerned in the [www.dilloneustace.ie](http://www.dilloneustace.ie)

investment of millions of dollars is clearly not a role to be taken lightly. Appointing individuals to meet minimum legal requirements such as family relations might not be appropriate in such circumstances. That scenario could be extended to non-familial appointments made to meet minimum legal requirements. The appointment of a board of directors especially in off-shore funds is not a matter of convenience. The persons appointed ought to be competent in the areas of expertise involved in overseeing the operation of the company in line with Directors Guidelines from the Weaving judgment summarised above.

Individuals with multiple directorships of various funds would at least meet minimum legal requirements, one assumes. It should be noted that this is a typical occurrence in off-shore funds whereby individuals are frequently directors of several funds simultaneously. Common sense dictates that it is more difficult to comply with directors duties for several funds where multiple directorships are involved. The flip side of the argument is that a professional director ought to have the skills necessary to comply with a director's legal duties from practice alone if for no other reason. The question remains will the director have adequate time and attention span to do so considering his several other commitments as a director of other companies/funds.

An article in the Financial Times of 21 November 2011 addressed the issue. Fiduciary services firms provide the boards of hedge funds with professional independent directors. According to the article, it is estimated that there are 8000 hedge funds, nearly three quarters of the whole industry , domiciled in the Cayman Islands and that some individuals have directorships in the hundreds.

The Supreme Court of New York State dealt with independent directors in *Bullmore and Stenger as Joint Official Liquidators of Beacon Hill Master Ltd (In Official Liquidation) v Ernst & Young Cayman Islands and Ors.*, 19 June 2008.

There is judicial commentary in the Beacon Hill case on the independent director's of the fund. The two directors "did not hold a single meeting from the day that the fund was created" to the day it blew up, said the court; they never reviewed any financial statements for the fund, and, in their own words taken from depositions to the court, devoted "not a lot of time" to it – "probably a few hours at best". "The directors did not participate in any meaningful aspect of the management or decision-making of the Fund, but delegated all management responsibilities and duties to the investment Managers, had minimal communication with the Fund's investors, and performed largely minor administrative tasks".

In the Weaving case the directors, who had appropriate professional credentials were appointed by Magnus Peterson as a matter of convenience for minimum legal requirements "without burdening himself with a real board of directors who could be expected to perform their supervisory role in an ordinary businesslike manner".

It could be implied that the Weaving judgment is supportive of the appointment of independent directors as opposed to family connections, who at least ought to know their director's duties and to comply with them in accordance with the guidelines set down by Mr. Justice Andrew Jones in this significant judgment. On the other hand, the judgment raises the matter in obiter concerning appointment of directors as a convenience to comply with minimum legal requirements. The

Supreme Court of New York made observations on the minimalist approach of independent directors in the Beacon Hill case, above, although the judicial comments were factual and did not address the role and duties of the independent directors of the Cayman domiciled fund.

### *Indemnification*

Cayman law does not prohibit a company from indemnifying its directors and officers against personal liability in the articles of association of the company. In the words of Justice Jones in the *Weaving* case:

“Those who attempt to perform their duty, but fail as a result of their carelessness, no matter how gross, are relieved from liability”.

This applies to a director’s own negligence and breach of duty on company business and not where there is fraudulent or dishonest activity or willful neglect or breach of fiduciary duty. Accordingly it is standard practice in Cayman Islands to include a director’s and officers indemnity in the articles of association.

Where there is willful neglect in carrying out director’s duties, personal liability will be imposed by the court (*Weaving judgment ibid*). The duty to act in honesty and good faith of a fiduciary’s obligations remains despite the terms of any indemnity (*In re Bristol Fund Ltd. (4.) 2008 CILR 317*).

### **Exempted Limited Partnerships**

Statutory duties for directors of companies who act as a general partner of an exempted limited partnership also arise under the Exempted Limited Partnership Law (Revised).

- Under the Exempted Limited Partnership Law the directors of the General Partner have a duty to keep registers of limited partnership interests and to keep proper books of account as are necessary to give a true and fair account of the state of the partnership’s affairs and to explain its transactions.
- The directors of the General Partner have a duty to file annual returns for the partnership, maintain a registered office for the partnership and file notice of any changes of the partnership’s name, the general nature of its business, its registered office, its term (if any) and its general partner with the Registrar of Exempted Limited Partnerships in the Cayman Islands.

The General Partner under the Exempted Limited Partnership Law has a duty to act at all times in good faith and in the interests of the partnership and shall in the event that the assets of the partnership are inadequate, be liable for all debts and obligations of the partnership. Any legal proceedings brought by or against the Partnership will be instituted by or against the General Partner. A limited partner of the Partnership may bring an action on behalf of the Partnership if the

General Partner, with authority to do so has, without good cause, refused to institute such proceedings.

### **Segregated Portfolio Companies**

Directors of a Segregated Portfolio Company (“SPC”) have additional duties and liabilities pursuant to Part XIV of the Companies Law.

#### *Segregation of Assets*

In addition to director’s duties imposed by statute and common law the directors of an SPC are also under a statutory duty (section 219(6) of the Companies Law) to establish and maintain, or cause to be established and maintained, procedures to keep segregated portfolio assets segregated and identifiable from both the general assets of the SPC and the assets of other segregated portfolios, and to ensure that assets and liabilities are not transferred between segregated portfolios otherwise than at full value.

Segregation of assets will be reflected in company records.

#### *Contracts with Third Parties*

Section 218 (1) of Part XIV of the Companies Law provides that any act, matter, deed, agreement, contract, instrument under seal or other instrument or arrangement which is to be binding on a segregated portfolio must be executed by the relevant segregated portfolio(s) which shall be identified or specified. In addition, any such document must indicate that its execution is in the name of, or by, or on account for the relevant segregated portfolio.

Section 218 (2). If a SPC is in breach of subsection (1) above, the directors shall upon becoming aware of the breach, make any necessary enquiries to determine the correct segregated portfolio to which the relevant act, matter, deed, agreement, contract, instrument under seal or other instrument or arrangement should be attributed; make the correct attribution and notify in writing all persons which are party to the act, matter, deed, agreement, contract, instrument under seal or other instrument or arrangement that was executed or which may be adversely affected by any such attribution, of that attribution and the parties rights under subsection (3).

Section 214(3) imposes criminal sanctions where a director knowingly makes a false declaration or makes a declaration without reasonable grounds for the purpose of converting a pre-existing exempted company into an SPC.

### **Conclusion**

Directors of companies must be fully aware of their powers, duties and liabilities to fulfill the terms of appointment and to avoid personal liability to the company and third parties. In addition to their duties under common law and the statutory regime in the Cayman Islands, directors must have regard to the company’s memorandum and articles, shareholder resolutions and board minutes.

The judgment in the Weaving case is a useful benchmark for Guidance on Directors Duties and Liabilities particularly for hedge funds domiciled in the Cayman Islands.

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