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Sent: Mon 22/07/2013 1:01:43 PM (UTC)
To: Rodric Williams [REDACTED] **GRO**
Cc: Matthews, Gavin [REDACTED] **GRO**
Subject: Director's Duties

Rodric

Please find below a short note on directors' duties. Does this cover the points you were considering?

In summary:

- The risk of a POL director being personally liable to anyone outside of POL is very low.
- POL's directors are subject to various personal duties (see below). As long as they make fair and reasoned decisions in good faith, they are unlikely to breach these duties.
- Each director owes their duties to POL (as a company). Only POL (as a company) can enforce a director's duties. Employees, contractors and SPMRs cannot sue POL's directors directly for a breach of their duties.
- A shareholder (ie. BIS) can step into POL's shoes and sue a director on behalf of POL (a derivative action) – though this is difficult and quite rare.
- Outside of a director's general duties, directors should be careful when externally commenting on specific SPMRs / cases (either publicly or in private but still external settings ie. speaking to JFSA, MPs or Second Sight). Directors, like anyone else, can be held personally liable for any defamatory comments they make regardless of whether those comments are made in a personal or a business context.

Key directors' duties

Duty to act within powers (section 171 Companies Act 2006)

A director must act in accordance with the company's constitution and must only exercise his/her powers for their proper purpose.

Duty to promote the success of the company (section 172)

A director must act in the way he/she considers, in good faith, would be most likely to promote the success of the company for the benefit of its shareholders as a whole.

Duty to exercise independent judgment (section 173)

A director must exercise independent judgment. The duty will not be infringed by a director acting in accordance with an agreement entered into by the company that restricts the future exercise of the directors' discretion or in a way authorised by the company's constitution. This duty will not prevent directors relying on advice, as long as the directors exercise their own judgment in deciding whether or not to follow the advice.

Duty to exercise reasonable care, skill and diligence (section 174)

A director must exercise the care, skill and diligence which would be exercised by a reasonably diligent person with both:

- The general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company.
- The general knowledge, skill and experience that the director actually has.

Bad faith

Please note that should a director take a decision in bad faith or maliciously (highly unlikely) this may give rise to a number of personal liabilities for that director ie.

- Liability for triggering a malicious prosecution against an SPMR.
- Liability for breach of the Data Protection Act in misusing personal / Horizon data.
- Inducing a breach of contract between POL and an SPMR.

I don't believe that we are anywhere near this territory but include this concept for the sake of completeness.

Criminal

I'm just checking with one of our criminal lawyers to see if there is any way a director could be liable for POL's failure to disclose something in a prosecution case. I suspect not but will double check and then confirm.

Kind regards
Andy

Andrew Parsons

Senior Associate

for and on behalf of Bond Dickinson LLP

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