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BEING A DIRECTOR IS NOT FOR THE FAINT HEARTED

There is often a false assumption that off-shore companies have less regulatory requirements than their onshore counterparts but whilst they may be different they may also in fact be more onerous.

Many off-shore jurisdictions used for company incorporation are or were British colonies or related territories (eg The Bahamas, BVI, Cayman Islands, Jersey and the Isle of Man) and are thus common law jurisdictions largely following the English legal system. These common law jurisdictions will be considered here.

The role of director should not be taken on lightly and anyone who holds this office or acts in the capacity of a director faces personal liability for the company's failure to fulfil its obligations. Courts have demonstrated that they do not distinguish between active or passive directors, nominee or named directors, appointed, de facto or shadow directors. Even when not involved in the day-to-day running of the company and not attending board meetings or signing resolutions, a director can be held liable for decisions of which he or she was unaware. Liability can be both civil and criminal (ultimately including corporate manslaughter) and involve the payment of damages, restitution or a custodial sentence.

Obligations arise in a vast array of fields, such as company accounts, tax, health and safety, data protection, environmental and insolvency laws. The main and best known duty is to act in the best interests of the company for the benefit of its members. A director has to act at all times in good faith and with care, skill and diligence. On a very basic level to meet this requirement a director must take an interest in the day to day running of the company and the decisions being made.

If breaches occur and directors have not made a reasonable effort to oversee the management of the company, they can

be personally responsible which could mean liability for damages, the cost of a courtroom defence and the impact of the publicity on their reputation.

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Before accepting to take on the role of a director a person should at least:

- read the relevant law for the jurisdiction of the company;
- understand the regulatory and tax position of the company;
- check if you are qualified to be a director;
- check who else has the right to sign on behalf of and bind the company;
- check what indemnities and insurance provisions are in place; and
- agree on the activity parameters of the company.

Indemnities which offer some comfort may not stand up in court if the company or one of its directors has committed a criminal offence and insurance is unlikely to cover negligence, breach of duty or default and will do nothing to repair reputational damage. Becoming a director is a serious undertaking and should only be done with a full understanding of all of the issues.

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