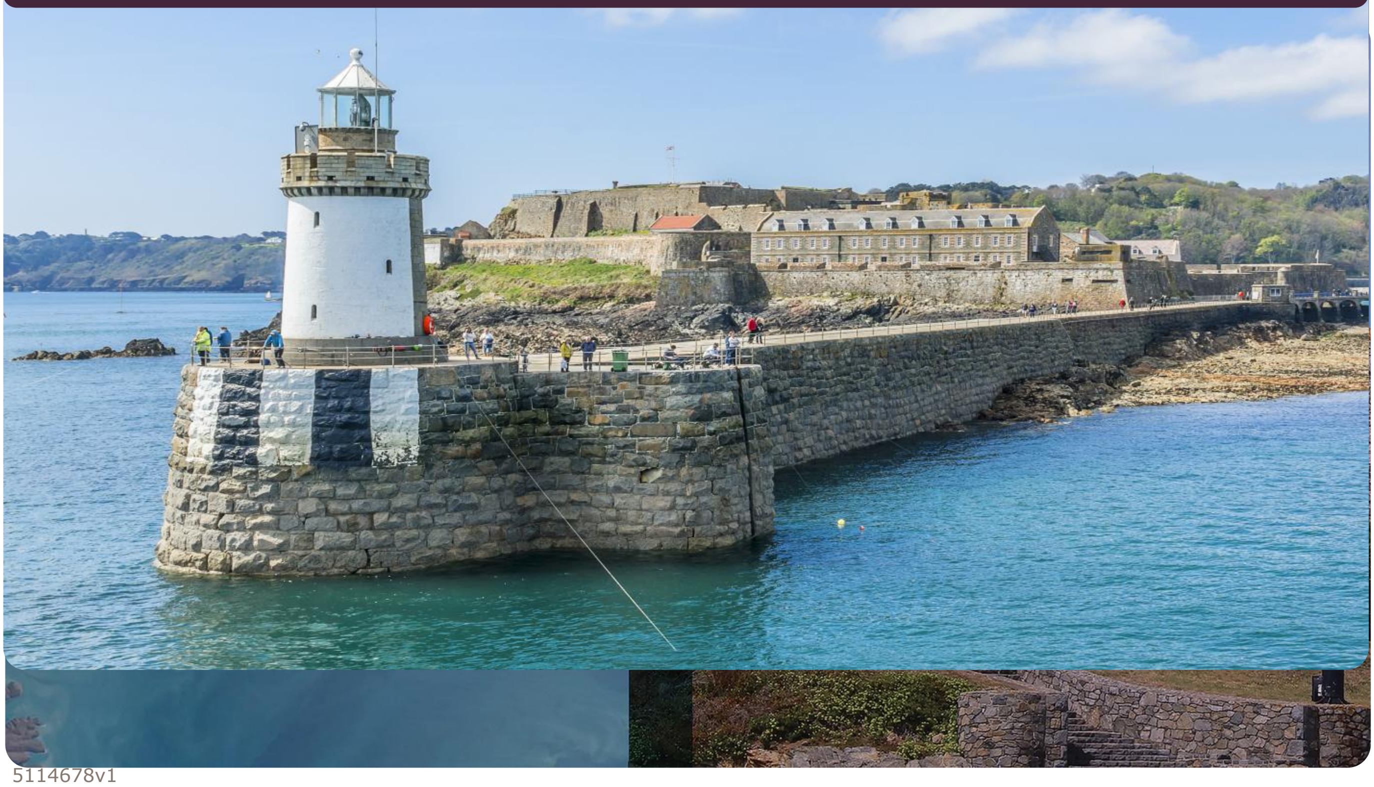
APPLEBY

GUIDE

DIRECTORS' DUTIES IN GUERNSEY



5114678v1

GUERNSEY

As a British Crown Dependency, Guernsey has a stable and reliable legal system. With a long history of political stability, a highly respected regulatory framework and its accessibility via an established infrastructure make it a desirable international offshore destination for businesses. Guernsey's agile and pro-business government, low tax regime and compliance with international standards of regulation and transparency provide a secure and competitive choice for companies.

INTRODUCTION

This Guide provides a summary of the principal duties and potential liabilities of directors of Guernsey companies. It is not exhaustive. Additional obligations may arise under a company's memorandum and articles of incorporation, a director's terms of appointment, regulatory legislation and applicable codes of corporate governance.

This Guide was last updated in August 2026. It is routinely reviewed by Appleby and updated when changes to the law require it. This Guide is for general guidance only and does not constitute definitive advice. Please contact one of our lawyers if you require more detailed information.

Further publications are available from applebyglobal.com

CONTACTS

RICHARD SHELDON
Managing Group Partner
Dispute Resolution
Guernsey

JON BARCLAY
Partner
Dispute Resolution
Guernsey

KATE OVENDEN
Partner
Corporate
Guernsey

Contact details are at the end of this guide (click here).

WHO IS A DIRECTOR?

The Companies (Guernsey) Law, 2008, as amended (**Companies Law**) defines a director as including an alternate director and any person occupying the position of director, by whatever name called. The Court will therefore look at substance rather than title. A person who acts as a director without having been validly appointed may be treated as a de facto director. A shadow director – a person in accordance with whose directions or instructions the directors are accustomed to act – may also be subject to duties and statutory liabilities in appropriate circumstances.

Executive and non-executive directors owe the same core duties. The application of those duties, particularly the duty of care, will depend on each director's functions, knowledge and experience.

GENERAL DUTIES AND RESPONSIBILITIES OF A DIRECTOR

The Companies Law does not codify directors' general duties. They arise principally under Guernsey customary law, informed by the English common law principles which applied before the duties of directors were codified in the UK Companies Act 2006. The Companies Law imposes additional statutory obligations.

Directors owe their duties individually to the company of which they are a director. They do not ordinarily owe those duties to directly to individual shareholders, to shareholders as a class or to other companies within the same group. In certain circumstances, however, the interests which directors must take into account include those of the company's creditors.

The principal duties are to:

- act honestly and in good faith in what the director considers to be the best interests of the company;
- exercise powers for the purpose for which they were conferred;
- exercise independent judgement;
- avoid or properly disclose conflicts of duty and interest;
- not make unauthorised profits from the director's position; and
- exercise reasonable care, skill and diligence.

  A director must also comply with the company's memorandum and articles, keep themselves sufficiently informed about its affairs and give proper consideration to material matters before making decisions.

DUTY TO ACT IN GOOD FAITH

A director must act honestly and in good faith in what they bona fide considers to be the best interests of the company as a whole. The test is principally subjective: the Court will not substitute its own commercial judgement for a decision which the director honestly believed to be in the company's best interests. The director's assertion of good faith is not conclusive. The Court may consider all the evidence, including whether the decision was one which a reasonable and competent director could have regarded as being in the company's interests. A failure to consider the company's interests at all may itself amount to a breach.

DUTY TO EXERCISE REASONABLE CARE, SKILL AND DILIGENCE

A director must exercise the care, skill and diligence of a reasonably diligent person having both:

- the general knowledge, skill and experience which may reasonably be expected of a person carrying out the same functions as that director in relation to the company; and
- the actual knowledge, skill and experience of that director.

  This is a combined objective and subjective standard. A director's particular expertise or experience may raise the standard expected of them, but a lack of experience cannot lower the objective minimum. Directors may delegate functions and rely appropriately on management, fellow directors and professional advisers. Delegation does not, however, amount to an abdication of responsibility. Every director must maintain an appropriate degree of oversight, understand the company's business and financial position, and obtain sufficient information to make an informed decision. The standard is applied to each director individually and in the context of their particular functions.

DUTY TO EXERCISE INDEPENDENT JUDGEMENT

A director must exercise their own judgement and must not simply follow the wishes of a shareholder, appointing party, parent company or another director. The company is entitled to an actual decision by each director.
This does not prevent a director from taking account of the views of colleagues or relying on advice and expertise. The director must, however, consider the matter for themselves and remain responsible for the decision they make.

DUTY TO EXERCISE POWERS FOR A PROPER PURPOSE

A director must use each power for the purpose for which it was conferred. This duty applies even where the director acts honestly and believes the decision to be in the company's best interests.
For example, the articles may confer a power to issue shares. An issue made principally to raise capital or otherwise advance the company's interests may be proper. An issue made principally to create or preserve a particular shareholder's control may be an improper exercise of the power and may be set aside.

CONFLICT OF DUTY AND INTEREST

A director must not place themselves in a position where their duties to the company conflict, or may conflict, with their personal interests or duties owed to another person. The common law duty is strict. Authorisation may be available under the company's articles or from the company, but the relevant procedures must be followed.

Section 162 of the Companies Law requires a director, immediately after becoming aware that they are interested in a transaction or proposed transaction with the company, to disclose the nature and extent of that interest to the board. There is an exception for a transaction between the director and the company entered into in the ordinary course of the company's business and on usual terms and conditions. Failure to make a required disclosure is a criminal offence.

An interested transaction may be voidable by the company unless the interest was properly disclosed before the transaction, the transaction is ratified in accordance with section 160 of the Companies Law, or the company received fair value. Subject to the company's memorandum and articles, an interested director may vote on the transaction once the interest has been disclosed.

DUTY TO CREDITORS

While the company is solvent, its interests are generally identified with those of its members as a whole. When the company is on the brink of insolvency, however, the duty to act in its best interests extends to the interests of creditors. Those interests must be given precedence where that is necessary to recognise that creditors will have priority over members in the company's assets if a winding up follows.

The leading Guernsey analysis is in *Carlyle Capital Corporation (in Liquidation) v Conway and others* (Guernsey Judgment 38/2017). The Royal Court described the threshold as requiring significant proximity to insolvency: being "on the brink of insolvency" or "bordering on insolvency".

The UK Supreme Court's later decision in *BTI 2014 LLC v Sequana SA* [2022] UKSC 25 is likely to be persuasive in Guernsey, but does not displace the Guernsey authority. The majority held that the duty is engaged when the directors know, or ought to know, that the company is insolvent or bordering on insolvency, or that an insolvent liquidation or administration is probable. A merely real and not remote risk of insolvency is insufficient. In that case, the trigger points were held to be: when the company is insolvent or bordering on insolvency; where an insolvent liquidation or administration is probable; or where the transaction in question would place the company in either of the foregoing two situations.

The precise content of the duty is fact-sensitive. Trading on may be proper where the directors, acting honestly and on reasonable grounds, consider that it offers the best prospect of protecting creditors. The creditor-duty threshold is distinct from the statutory test for wrongful trading.

DUTY TO ACCOUNT FOR PROFITS

A director must not use the company's property, information or opportunities to obtain an unauthorised or secret profit. The duty does not depend on whether the company itself could have taken the opportunity or suffered a loss. Unless properly authorised, any profit arising from the director's position must be accounted for to the company.

ENFORCEMENT AND RATIFICATION

The company is ordinarily the proper claimant in respect of a breach of duty, and any recovery belongs to the company. In limited circumstances a shareholder may bring a derivative action on the company's behalf. A shareholder may also seek relief under the unfair prejudice provisions in sections 349 and 350 of the Companies Law where the statutory requirements are met.

Under section 160, members may ratify conduct by a director which exceeds their powers or amounts to negligence, default, breach of duty or breach of trust. Ratification is normally by ordinary resolution, subject to any higher threshold in the memorandum or articles. Votes of members with a personal interest in the ratification are generally disregarded, except where the conduct merely exceeded the director's powers. Some acts are incapable of ratification.

OTHER DUTIES UNDER THE COMPANIES LAW

The Companies Law imposes numerous obligations concerning company records, registers, accounts, meetings, annual validations and filings. Liability does not attach to a director automatically whenever the company is in default, but many provisions create offences or liabilities for directors or other officers who authorise, permit or fail to prevent a breach.

Directors should ensure that appropriate systems are in place for the company to comply with its statutory obligations. Directors of regulated or listed companies may also be subject to additional legislation, regulatory rules and corporate governance codes.

DISTRIBUTIONS, DIVIDENDS AND REPURCHASES

The board may authorise a distribution, or the payment of a dividend, only if it is satisfied on reasonable grounds that the company will satisfy the solvency test immediately afterwards and any requirements in the company's memorandum and articles are met. The board must approve a certificate stating that opinion and the grounds for it, signed on its behalf by at least one director.
The solvency test requires that:

- the company is able to pay its debts as they become due;
- the value of the assets is greater than its liabilities; and
- if it is a supervised company, it satisfies any additional solvency requirements imposed by the legislation under which it is supervised.

The directors must have regard to the company's most recent accounts and all other circumstances which they know, or ought to know, may affect the value of its assets and liabilities. They may rely on valuations and estimates which are reasonable in the circumstances.

A redemption or acquisition by a company of its own shares is a distribution and must comply with the solvency requirements. It must also be authorised by the company's memorandum or articles and comply with the statutory approval procedure. A director may be personally liable to the company where the statutory procedure was not followed or there were no reasonable grounds for the solvency opinion, to the extent that an unlawful distribution cannot be recovered from members.

WRONGFUL TRADING

Wrongful trading gives rise to civil, not criminal, liability. If a company enters insolvent liquidation, the Court may order a person who was then a director, including a shadow director, to contribute to the company's assets if, before the winding up, they knew or ought to have concluded that there was no reasonable prospect of the company avoiding insolvent liquidation.

The Court will not make an order if, after that point was reached, the director took every step which they ought reasonably to have taken to minimise the potential loss to creditors. The standard combines the knowledge, skill and experience reasonably expected of a person performing the director's functions with the director's actual knowledge, skill and experience.

Directors of a company in financial difficulty should obtain reliable and current financial information, ensure that decisions and their reasons are properly recorded, review the position frequently and take appropriate professional advice. Resignation will not erase liability for conduct while in office and may leave the company without the benefit of the director's efforts to protect creditors.

FRAUDULENT TRADING

It is a criminal offence for any person to knowingly be a party to carrying on a company's business with intent to defraud creditors or for any fraudulent purpose.

In a winding up or administration, the Court may also order any person who was knowingly a party to fraudulent trading to contribute such amount to the company's assets as it thinks proper. Liability is not confined to formally appointed directors.

PREFERENCES AND TRANSACTIONS AT AN UNDERVALUE

Under section 424 of the Companies Law, a liquidator may apply to set aside a preference given during the six months before the relevant insolvency date, extended to two years where the recipient was connected with the company. A preference involves improving the position of a creditor, surety or guarantor in the company's liquidation. The company must have been unable to pay its debts, or become unable to do so because of the preference, and must have been influenced by a desire to improve that person's position. A connected person is presumed to have received a preference influenced by that desire unless the contrary is shown.

Preferences are distinct from transactions at an undervalue. Before 2023, an undervalue transaction might be challenged through other routes, depending on the facts, including breach of duty or misfeasance claims and the customary law Pauline action. Section 426D of the Companies Law, which came into force on 1 January 2023, introduced a separate express office-holder remedy for transactions at an undervalue.

Under section 426D, a liquidator or administrator may seek an order where, during the relevant six-month period, the company made a gift or received no consideration, or received consideration significantly less valuable than that which it provided, while unable to satisfy the solvency test or becoming unable to do so as a result. The period is extended to two years for connected persons. The Court may restore the position, subject to statutory protections and a defence for transactions entered into in good faith for the purpose of carrying on the company's business where there were reasonable grounds for believing the transaction would benefit the company. The statutory remedy is expressly without prejudice to any other remedy.

REMEDIES IN A WINDING-UP

Under section 422 of the Companies Law, where in the course of a winding up a past or present officer or another person involved in the company's promotion, formation or management has misapplied company assets, become personally liable for company debts or liabilities, or committed misfeasance or a breach of fiduciary duty, the liquidator or any creditor or member may apply to the Court. The Court may order the person to repay, restore or account for money or property, contribute to the company's assets and pay interest, as it considers appropriate by way of indemnity, compensation or otherwise.

DISQUALIFICATION

The Court may disqualify a person from acting as a director, shadow director or other officer, or from participating in the management, formation or promotion of a company, where their conduct shows that they are unfit to be concerned in company management. The Court considers matters including probity, competence, experience, judgement, diligence, breaches of duty, conduct in an insolvent liquidation and compliance with legal and regulatory standards. A disqualification may last for up to 15 years.

INDEMNITY OF DIRECTORS

Section 157 of the Companies Law renders void any provision which purports to exempt a director from liability for negligence, default, breach of duty or breach of trust in relation to the company. A company also cannot indemnify a director against such liability except as permitted by sections 158 and 159.
Section 159 permits a qualifying indemnity against certain liabilities to third parties. It cannot cover criminal fines, regulatory penalties, an unsuccessful defence of criminal proceedings, an unsuccessful defence of proceedings brought by the company or an unsuccessful application for relief under section 522.

ECONOMIC SUBSTANCE

Guernsey's economic substance regime is contained principally in the Income Tax (Substance Requirements) (Implementation) Regulations, 2021. It applies to Guernsey-resident companies, and to certain partnerships, which derive income from specified relevant activities, intellectual property or pure equity holding activities, subject to the detailed scope and exceptions in the Regulations.

An in-scope body carrying on a relevant activity must satisfy each applicable requirement, including that the activity is directed and managed in Guernsey, that its core income-generating activity is carried on in Guernsey and that it has adequate people, expenditure and physical presence in Guernsey proportionate to the activity. For a company, the directed-and-managed test includes requirements concerning the frequency and location of board meetings, the physical presence of a quorum in Guernsey, strategic decision-making, board knowledge and expertise, and the keeping of relevant records in Guernsey. Directors of an in-scope company should ensure that the board's actual decision-making and the company's records support its reported position. Non-compliance can result in financial penalties, exchange of information with overseas tax authorities and, ultimately, strike-off.

INSURANCE

Section 158 of the Companies Law permits a company to purchase and maintain insurance for a director against liability arising from negligence, default, breach of duty or breach of trust.
Broadly, there are three categories:

- directors' and officers' liability insurance, taken out by the company to protect its directors from third party claims against them;

- professional indemnity insurance, which may be available to, for example, a non-executive director to cover liability incurred in the course of providing professional services to the company; and
- directors' liability insurance, which may protect a director against liability to the company in his capacity as a director.

The scope and exclusions of any policy should be reviewed carefully. Insurance commonly excludes fraud, dishonesty, wilful default, criminal conduct and liabilities which cannot lawfully be insured. However, the company can take out separate fidelity insurance for its own risks on the individuals it employs.

RELIEF FOR DIRECTORS

Section 522 of the Companies Law permits the Court to relieve an officer, wholly or partly, from liability for negligence, default, breach of duty or breach of trust where the officer acted honestly and reasonably and, having regard to all the circumstances, ought fairly to be excused. An officer who reasonably anticipates a claim may apply for relief before proceedings are brought.

For more specific advice on directors' duties in Guernsey, we invite you to contact one of the following:

VIEW PROFILE

GUERNSEY

RICHARD SHELDON

Managing Group Partner*

Dispute Resolution

Phone +44 (0)1481 755 904

Email rsheldon@applebyglobal.com

VIEW PROFILE

GUERNSEY

JON BARCLAY

Partner

Dispute Resolution

Phone +44 (0)1481 755 607

Email jbarclay@applebyglobal.com

VIEW PROFILE

GUERNSEY

KATE OVENDEN

Partner

Corporate

Phone +44 (0)1481 755 626

Email kovenden@applebyglobal.com

* admitted in England and Wales

For the convenience of clients in other time zones, a list of contacts available in each of our jurisdictions may be found here.

ABOUT APPLEBY

Appleby is one of the world's leading international law firms. Our global teams of legal specialists advise public and private companies, financial institutions and private individuals. We are a full service law firm providing comprehensive, expert advice and services across corporate, dispute resolution, property, regulatory and private client and trusts practice areas. We work with our clients to achieve practical solutions whether from a single location or across multiple jurisdictions. We have offices in ten highly regarded, well-regulated global locations, operating in nine and practising the laws of eight jurisdictions. Our office locations include the key international jurisdictions of Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey, Isle of Man, Jersey, Mauritius, and the Seychelles, as well as the international financial centres of Hong Kong and Shanghai. Our global presence enables us to provide comprehensive, multi-jurisdictional legal advice at the times most beneficial to our clients. We are regularly recognised for our professionalism, integrity and excellent client service, and these are the values we pride ourselves on and are at the core of our business.

Hirzel Court
St Peter Port
Guernsey
GY1 3BN

T: + 44 (0) 1481 755 600

E: guernsey@applebyglobal.com